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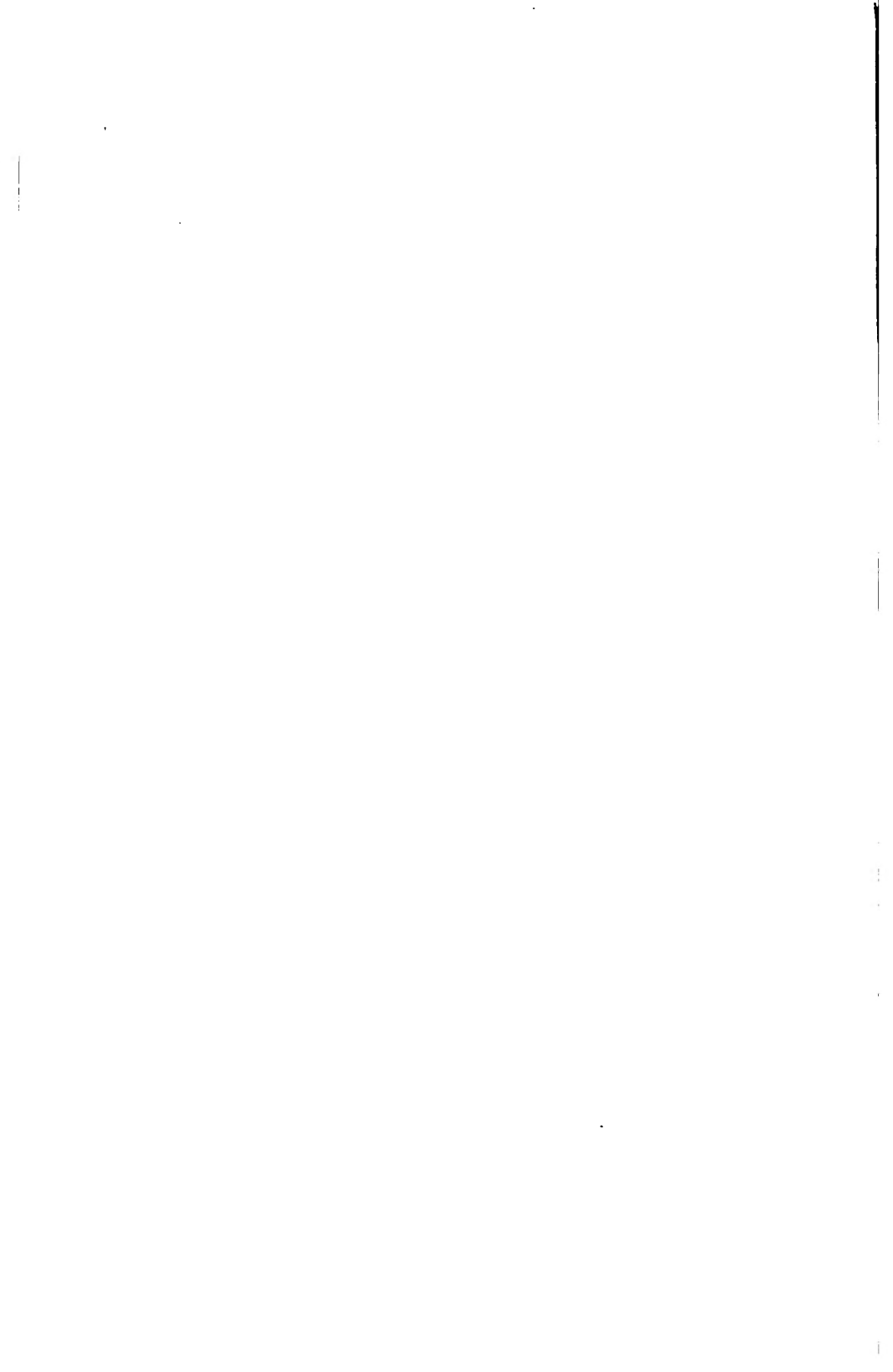
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No. 15

KENTUCKY COURT OF APPEALS.

THRUSTON'S ADM'R, &c. v. PRATHER, &c.

(Filed December 3, 1903—Not to be reported.)

1. Wills—Probate of—Codicil—The mere statement of an illiterate person, who could neither read nor write, that a testator a short time before his death had sent for three persons unknown to the witness, who came to his room, and had dictated a codicil to his will to one of them, who wrote it down, and that the testator signed the writing and the two other persons and the witness signed it as witnesses is not sufficient, in the absence of the paper itself, to authorize the submission to a jury of the question whether or not the will offered for probate was modified or revoked by the alleged codicil.

2. Precatory trust—The provision of a will that "all the rest and residue of my estate, real, personal or mixed, legal or equitable, I devise absolutely and in fee simple to my dear wife," can not be considered as modified or revoked by an undated letter addressed by the testator to his wife, containing merely expressions of advice and recommendation, and closing with "all I ask when you go, you will not leave all to yours; but that you will share some with Ellen."

Bodley, Baskin & Morancy, A. T. Burgwin and Matt O'Doherty for appellants.

W. S. Hogan for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

Hamilton Pope died at his residence in Jefferson county, Kentucky, in 1893. He left two holographic wills, the first of which is as follows:

"In the name of God, Amen: I, Hamilton Pope, of the city of Louisville, and State of Kentucky, do make this will, knowing as I do my dear wife will make at her death such disposition of my property as would be acceptable to me were I alive, I give and devise to her, my said wife, Henrietta, all the real and personal estate I may die seized of or possessed in fee simple and absolutely and as fully as words can express it, and I appoint her executrix of this will, and request no security be required of her.

"In witness whereof I hereto set my hand this 9th of June, 1868.

(Signed) "HAMILTON POPE."

The will of 1868 was probated by order of the county court on the 6th day of December, 1893. Subsequently a later will having been discovered, the order probating that of 1868 was set aside, and the latter instrument was admitted to probate on the 27th day of March, 1894. It is as follows:

"In the name of God, Amen: I, Hamilton Pope, of the city of Louisville and State of Kentucky, make this my last will:

"1st. I give and devise to Hamilton Pope Prather my watch (which his father presented to me) with its accompaniments, to be handed to him when my wife, his grandmother, shall deem it advisable.

"2d. All the rest and residue of my estate, real, personal or mixed, legal or equitable, I devise absolutely and in fee simple to my dear wife, Henrietta, and I appoint her my executrix, and request the county court not to require security of her, and also request that she will not return any inventory or appraisement of my personal estate.

"In witness whereof I hereto set my hand this 8th day of September, 1891.

(Signed) "HAMILTON POPE."

Among the papers of the decedent was found the following letter, wholly written by himself, and addressed to his wife:

"To my dear wife—I am now old, in bad health, and feeble, and have been hard run and despondent. I have maintained you in some style, and have tried to gratify your desire for travel. I have helped your family, and more so than I have done mine. I recommend when I am gone, which shall not now be long, you sell your home, my twenty acres, and my office, and, indeed, all I have, if necessary to maintain you. I am under no obligations to your family or mine. All I ask when you go, you will not leave all to yours; but that you will share some of it with Ellen Thruston. * * *

(Signed) "HAMILTON POPE."

Contending that the decedent, who died childless, had executed a will subsequent to that of 1891, which revoked that instrument, and that the latter will had been suppressed or destroyed, Mary T. Pope, Curran Pope, Pendleton Pope and A. T. Pope, who were heirs at law of the decedent, together with Ellen Thruston, appealed from the order of the Jefferson County Court, admitting to probate the will of 1891, to the Jefferson Circuit Court, and upon a trial there had Ellen Thruston's administrator (she having in the meantime died), sought to establish the letter left by the decedent, addressed to his wife, as a part of his will. The contestants, Mary T. Pope, &c., undertook to establish, by evidence, that the decedent had executed a will subsequent to that of 1891, which in effect, at least, revoked that instrument, they claiming that the will, the execution of which they sought to establish, had been destroyed or suppressed.

The trial of the questions thus raised resulted in the court peremptorily instructing the jury that there was no evidence which would warrant them in finding that Hamilton Pope had executed a will subsequent to 1891, as claimed by the contestants. The question as to whether or not the letter addressed by the decedent to his wife constituted a part of his will was submitted to the jury, who found adversely to that paper. Of the ruling of the

court, and the verdict of the jury. Ellen Thruston's administrator, and the contestants, Mary T. Pope and others, are now complaining.

The execution of the will sought to be established by Mary T. Pope and others depends upon the evidence of Annie Wilson, a colored woman who was in the employ of the decedent, who states that some time before his death Hamilton Pope sent her with a note to his office; that in response to this note three gentlemen came to the house of the decedent, and were ushered into his presence in his sick room; that, with his consent, she remained in the room and heard all that transpired; she did not know who the three gentlemen were, but describes one of them as being tall and dark complexioned, who addressed the decedent as "Uncle Hamilton;" that she heard the decedent tell this gentleman that he desired to write a "codicil" (codicil), and wished him to write down what he (the decedent) should dictate; that thereupon the decedent directed him to write that Hamilton Pope Prather was to have \$12,000; that the balance of his estate should go to his wife for life, with remainder to his heirs at law; that she saw the tall, dark gentleman apparently write on a piece of paper in response to this dictation; that after it was finished the emanuensis handed the paper to Hamilton Pope, who thereupon took a pen and wrote something on the paper; that the other two gentlemen, who came with the emanuensis, also wrote something on the paper, and that she was then called on to attest the instrument thus written.

The witness describes herself as being wholly illiterate. She could not, of course, have read what was written on the paper which she claims to have attested; she did not hear it read, as it was merely handed by the emanuensis to the decedent, who read it himself; she does not, therefore, know what was written upon the paper; she does not know whether or not the decedent signed it; she saw him take a pen and go through the motion of writing, but, being unable to read, she did not, and could not, know what he had written. For the same reason she did not know whether either of the other witnesses to the instrument signed their names; she saw them do as the decedent had done, but could not state whether their names were subscribed to the paper or not. She does not even know that her own name was written as a witness; she saw something written, and she was called on to touch the pen; and this is all that she knows as to the formal execution of the will.

Section 4838 of the Kentucky Statutes provides: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence, and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made, or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

Section 4833: "No will or codicil, or any part thereof, shall be revoked unless * * * by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the same manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto, with intent to revoke."

The testimony of Annie Wilson fails to show the execution of a will within the provisions of the statute. Giving everything that she said upon the subject its utmost force and effect, there is no evidence that the amanuensis wrote down what the decedent dictated to him, or that Hamilton Pope, or any of the supposed witnesses, signed the paper in question. If the paper had been produced, and the witness had identified it as the paper which she saw before her when she touched the pen, then the instrument would have spoken for itself, and been worthy to be submitted to the jury; but in the absence of the paper we think the evidence falls short of the requirements of the statute, and that the trial judge properly excluded this issue from the consideration of the jury. This conclusion is fully sustained by the reasoning of the court in the cases of *Chisholm v. Ben*, 7 B. Mon., 408, and *Mackin v. Mercer*, 14 Bush, 434.

The ruling of the trial judge, as to the letter sought to be established by the administrator of Ellen Thurston, was more favorable to him than he was entitled. The paper bears no date, and there was no evidence as to when it was written.

The will of Hamilton Pope, executed in 1891, was fully established by the evidence; indeed there was no attempt to dispute its validity as a testamentary instrument at the time of its execution; all that was contended by the contestants was that it had been revoked, or modified, by a subsequent will. In order to establish the letter as a testamentary instrument, which would modify or supplant the will of 1891, it was necessary to be shown, by some evidence, that it was written subsequently to the 8th day of September, 1891; this the evidence bearing upon this issue wholly failed to do.

Moreover, we think the letter was not testamentary in character. In the first place, it was a letter written by the decedent to his wife, and does not purport, upon its face, to be anything more than an expression of advice and recommendation, leaving to her the question of compliance. The very fact that the testator, who was a learned lawyer, based his wish with regard to his property after the death of his wife, in a confidential letter directed to her alone, which she was under no obligation or duty to exhibit or show to any one, strongly tends to show that the decedent did not intend it to operate as a testament. The expressions contained in the letter are more usually found in instruments about whose testamentary character there exists no doubt, and when so found, they are, perhaps, entitled to more weight, as establishing precatory trusts, than when written in private letters. But had the words in question been written by Hamilton Pope in the will of 1891 they would not, in our opinion, have established a precatory trust. In the case of *Bryan v. Milby*, 24 Atl., 333 (Court of Chancery of Delaware), the will of the testator contained the following: "I give and devise to my wife, Mary Bryan, all of my estate, both real and personal; and I do hereby authorize and direct my executrix hereinafter named to sell my real estate as soon as it can be sold to advantage, and to invest the money in good stocks and bonds. And I do request my wife, if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother, Charles A. Bryan, of Cecil county, Maryland." This was held not to create a precatory trust.

In the case of *Marti's Estate* (Supreme Court of California), 61 Pac., 964,

the precatory words of the will were: "Upon the death of my wife I desire one-half of the property bequeathed to her shall be devised by her to my relatives." These words were held not to constitute a trust. The court said: "The words, themselves, fall far short of a command, or direction, and are rather in the nature of an expression of the testator's feelings, and a suggestion or recommendation to be considered by her in making a testamentary disposition of her estate, or as a reason to influence her therein."

In the case of *Hopkins v. Glunt*, 111 Penn., 287, the language of the will was:

"I give, devise and bequeath to my beloved wife, Margaret Hopkins, her heirs and assigns forever, all my property, real, personal and mixed, of whatever nature and quantity soever, and wherever the same shall be at the time of my death. * * *

"My further request is that at the death of my wife, Margaret aforesaid, that she will so devise what she may have among our daughters, Martha's and Eliza's, children, share and share alike."

This was held not to constitute a precatory trust.

In the case of *Igo v. Irvine*, 24 Ky. Law Rep., 1165, the precatory words were: "I make it as a request of my children, that if any of them should die without issue, that in so far as they may have received any estate from me, that at their death they will the same to my surviving children, other issue of those who may be dead. I think this is but a reasonable request, and I have confidence that it will be complied with by my children."

The court held that the language in question did not constitute a trust. In its opinion the court cited with approval the following language from *Hess v. Singleton*, 114 Mass., 567: "It is a settled doctrine of courts of chancery that a devise of bequest to one person, accompanied by words expressing the assurance, entreaty or recommendation that he will apply to the benefit of others, may be held to create a trust, if the subject and obligation are sufficiently certain. Some early English cases had a tendency to give this doctrine the weight of an arbitrary rule of construction; but the latter cases in this, and in all other questions of interpretation of wills, the intention of the testator as gathered from the whole will controls the court. In order to create a trust it must appear that the words were intended by the testator to be imperative. And when the property is given absolutely, and without restriction, a trust is not to be lightly imposed by mere words of recommendation."

In the case of *White, &c. v. Irwin*, 24 Ky. Law Rep., 2458, the words were: "I make it as an earnest request of my said son, I, Shelby Irwin, that if he should die without having issue, he give said 805 acres of land, or its value, to my daughter, Sarah I. White, if living; if not, then to her children; if any of her children should be dead, having issue, in that event, said issue is to receive one equal share."

This language was held not to create a trust. The principle established by the cases cited makes it clear that the letter written by Hamilton Pope to his wife was not intended as a will, or a codicil to a will; its language merely indicates his wishes, without any intention on his part to hamper the devise to his wife by any absolute conditions. His will is: "All the rest and residue of my estate, real, personal and mixed, legal or equi-

table, I devise absolutely and in fee simple to my dear wife, Henrietta." This strong language is not to be modified or revoked by words which, on their face, are simply advisory, or recommendatory. The propounder of the will of 1891 was entitled to a peremptory instruction as against the administrator of Ellen Thruston, on the issues raised by the letter; and this being true, he was not prejudiced by the ruling which submitted the paper in question to the jury.

Perceiving no error in the record, the judgment is affirmed.

WHITNEY v. WHITNEY.

(Filed December 4, 1903—Not to be reported.)

Settlement of partnership—Sale of property—Where it is admitted by the adverse party that a sale of the real and personal property belonging to a partnership will be necessary to a settlement of the affairs of the partnership and nothing appears to show that a sale, as directed, will result in injury or loss to the firm, the judgment can not be successfully attacked as premature.

B. F. Graziani for appellant.

W. A. Byrne for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

This action was brought by appellee in the court below to settle a partnership that had long existed between the appellant and himself in the insurance business.

The petition sets forth the dissolution of the partnership, the inability of the parties to agree upon a basis of settlement, and further, that there are partnership assets, consisting of \$5,000 on deposit in two of the banks of Covington, some real estate, an office lease yet unexpired, and personal property consisting of office furniture and certain stocks of value, and also that the firm owed some debts which should be paid out of its assets, and that there are due it certain debts from others.

A settlement of the partnership is asked as between the partners and as between them and all others, and to that end that a commissioner be appointed to take charge of the property and assets, and that he be ordered to collect what is due the firm and pay its indebtedness and make final settlement of its affairs as prayed.

It further appears from the averments of the petition as well as from the evidence that the property, real and personal, belonging to the partnership is of such a character as to require its sale in order to make a settlement of the affairs of the partnership, and in this view of the case the lower court, on appellee's motion, entered the judgment appealed from, which directed the sale of the real and personal estate described therein. Appellant complains that the judgment was premature. It is not denied, however, that such a sale of the real and personal property of the partnership will be necessary to a settlement of its affairs. We are of opinion that the judgment of sale was proper. No reason is shown why the sale of the partnership property

should be postponed, and it is admitted that no settlement of the partnership can be made without such a sale. The judgment makes no disposition of the proceeds of sale. So the proceeds will be held by the commissioner subject to the order of the court and may be applied as hereafter adjudged, either in paying the indebtedness of the partnership or by dividing it between the partners themselves. It is not shown that any injury or loss will result to the firm, its members or creditors, by such a sale of its property as is contemplated by the judgment, but, upon the contrary, it would seem that such a sale will serve to hasten the settlement of the affairs of the partnership, which is apparently desired by each of the partners.

Wherefore, the judgment is affirmed.

SHINKLE v. McCULLOUGH.

(Filed December 3, 1903.)

1. Personal injuries—Damages—Instructions—In an action to recover damages for personal injuries resulting, as alleged, from the running of an automobile at a high rate of speed whereby the horse driven by plaintiff was frightened and overturned the vehicle, an instruction which told the jury to find for the plaintiff if they believed from the evidence that the act of the defendant in running his automobile at a high rate of speed was negligence, and that because of such rate of speed, "or because of said rate of speed, together with the noise emanating from said automobile," the horse became frightened and caused the injury, was not erroneous to the prejudice of the defendant in authorizing the jury, to find for the plaintiff if they believed that the horse became frightened at the noise emanating from the automobile, the noise being an incident to the running of the machine.

2. Evidence—Admission—A statement made by the defendant on the trial of an action in a justice's court for injuries to plaintiff's buggy received in the accident, to the effect that he considered himself responsible for the accident, is admissible in an action to recover for personal injuries to plaintiff as an admission on the part of the defendant to contradict his testimony that he had not been guilty of any negligence which caused the accident.

3. Automobiles—Care in management—While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of care and prudence in management and consideration for the rights of others as is consistent with their safety.

4. Excessive damages—A verdict for \$1,000 for injuries resulting, not only in superficial bruises, but also in a permanent and serious impairment of the vision of one eye, is not excessive.

W. A. Price for appellant.

John W. Henver and M. H. McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

Whilst the appellee, W. T. McCullough, was driving along a public highway leading from the city of Covington on the 29th of August, 1901, with two companions, he met the appellant, Clifford Shinkle, riding in an automobile. Appellee's horse became frightened at the automobile and upset his

vehicle, throwing him upon the turnpike road, inflicting injuries to his clothing and person, and permanently impairing the vision in one eye. For these alleged injuries he instituted this action for damages, and alleged that the defendant, while in sight and approaching him, had recklessly and negligently propelled his automobile at a rapid and dangerous rate of speed up to and within twenty-five feet of his horse, notwithstanding the fact that he saw, or could have seen, that plaintiff's horse had become frightened, and in disregard of repeated warnings to slacken his speed; and that by reason of defendant's refusal to heed these warnings his horse became frightened, and in his efforts to escape turned over his buggy, inflicting the injuries complained of. The defendant in his answer denied all the allegations of negligence recited in the petition, and plead contributory negligence. Upon the trial of the case before a jury the testimony introduced by the plaintiff was to the effect that the defendant was traveling at a very high rate of speed (some of the witnesses put it at as high as twenty miles an hour); that the motive power was gasoline mixed with air, which made a noise when the machine was in operation, which could be heard at a distance of about two hundred feet; that as soon as the plaintiff's horse heard this noise it began to take fright, and plaintiff and those with him at once began to shout and signal to the defendant to slacken his speed; but that he failed and refused to do so until he had driven the automobile to within thirty or forty feet of plaintiff, by which time his horse became so unmanageable as to upset the buggy; that the defendant saw that the horse was frightened, and the plaintiff's peril. The testimony, on the other hand, was that the defendant saw the plaintiff for about two hundred feet driving along apparently paying no attention to the approach of the automobile, the horse being apparently perfectly quiet; that when he got within about one hundred feet of the plaintiff the horse suddenly shied, upsetting the buggy in the middle of the road, and that the defendant immediately slowed down his automobile, alighted therefrom, and went to assist the plaintiff. He also testified that the customary signal to slacken speed was by holding up the hand, was not given, and that as soon as he discovered the peril of plaintiff he stopped his machine, and that he was not going at exceeding six or seven miles an hour. The trial resulted in a verdict and judgment for the plaintiff for \$1,020, and the plaintiff has appealed.

He asks a reversal, first, for alleged errors in the second instruction, and also in the instruction defining the measure of damages. Instruction No. 2 is as follows: "If the jury believe from all the evidence that at the time and place of injury to plaintiff the defendant was operating said automobile at a high rate of speed, and that because of said rate of speed, or because of said rate of speed together with the noise emanating from said automobile, the horse of plaintiff became frightened and caused the injury to plaintiff, and if the jury further believe that the act of defendant in operating said automobile at a high rate of speed, if he did so operate it, was an act of negligence on the part of the defendant, the jury should find a verdict for the plaintiff."

The complaint of this instruction is that it authorized the jury to find for the plaintiff if they believed that his horse became frightened either at the speed of the automobile or at the speed and noise emanating therefrom, it

being nowhere alleged in the pleadings that the horse was frightened by any noise. This instruction only authorized a recovery in the event the jury found from the evidence that the automobile had been operated at a high rate of speed, although the horse may have been alarmed not only by the high rate of speed at which the machine approached, but also at the noise emanating therefrom. Besides, appellant himself testified that the operation of the machine was always accompanied by noise; and upon cross-examination the witness, Hanauer, testified to the same effect, and the only noise spoken of in the instruction was that which was incident to the running of the automobile. The error in the instruction, if it was in fact an error, was not, in our opinion, prejudicial to the defendant.

The instruction defining the measure of damage is not objectionable. In fact it has been approved by this court in substantially the form in which it was given in this case in numerous cases. Appellant also complains that the trial court erred in permitting appellee to prove a statement alleged to have been made by him upon the trial in a justice's court in an action on account for repairs to the buggy injured in this accident, to the effect that he considered himself responsible for the accident. To support this contention we are referred to the note to section 44 of 1 Greenleaf on Evidence, in which the editor says that "opinion evidence of this character is only allowed when, from the nature of the case, the facts can not be stated or described to the jury in such manner as to enable them to form an accurate judgment thereof, and no better evidence than such opinion is attainable."

The author in the section referred to was discussing the competency of expert testimony. We think this testimony was competent as an admission of defendant because it tended to contradict the testimony of the defendant given upon the trial of the case, to the effect that he had not been guilty of any negligence which superinduced the accident complained of.

While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horse and carriage, their use should be accompanied with that degree of prudence in management, and consideration for the right of others, which is consistent with their safety. If, as the jury found by their verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile, and taken such other steps for appellee's safety as ordinary prudence might suggest.

Appellant also complains that the verdict is excessive. The testimony shows that in addition to the mere superficial bruises received by appellant there has been a permanent and serious loss in the vision of one of his eyes as the result of a severe cut and bruise immediately over it received at the time of the accident. It is impossible for us to determine the extent of pecuniary loss which may accrue to appellee from the injury of this character, not to speak of the pain and suffering and inconvenience resulting therefrom. This was a question for the jury, and there was abundant testimony on this point to support their finding.

For reasons indicated the judgment is affirmed.

MALONE'S COMMITTEE v. LEBUS.

(Filed December 4, 1903.)

1. Gifts—Essentials of.—The reservation in a deed to real estate of the interest on a purchase-money note for the use of an imbecile during her life, the principal being payable to the donor at her death, was unequivocal and sufficiently explicit to create a valid gift without a delivery of the note to the donee.

2. Power of revocation.—The reservation having been made, it was not within the power of the donor to revoke it without the consent of the donee by the subsequent surrender of the note and the acceptance of other notes without such reservation.

3. Acceptance of gift.—The donee being an imbecile, no acceptance of the gift on her part was necessary, the law presuming an acceptance.

4. Recorded deed.—Notice to purchaser.—A purchaser of the real estate on which the original note was a lien took the property subject to the lien and the trust in favor of the donee, being charged with notice by reason of the deed being recorded.

5. Limitation.—The claim of one who was appointed committee of the imbecile many years after the gift was made for the annually accruing interest reserved for her use is not stale in so far as it is not within the statute of limitation.

D. Bradley Shawhan for appellant.

Lafferty & King for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 30th day of April, 1872, Caleb Jones and wife conveyed by general warranty deed to Munroe D. Whitaker a small tract of land in the town of Cynthia, La. The consideration therefor recited in the deed is as follows:

"The said party of the first part, for and in consideration of the sum of \$350, of which \$50 is in hand paid, and a promissory note for \$300, with interest at 6 per cent. per annum, payable annually from the first day of June, 1872, for the use of Nora Malone during her life, and at her death to Caleb Jones, but should she die within four years from this date the principal is not to be paid until the end of that time."

And a lien was reserved on the lot as security for the payment of the \$300 note. On the first day of July, 1873, Munroe D. Whitaker and wife sold and conveyed this tract of land to James R. Curry, by general warranty deed, for the recited consideration of \$50 cash, and the surrender of Whitaker's note to Caleb Jones for \$300, dated June 1, 1872. On the same day Curry and wife sold and conveyed the land by general warranty deed to J. A. Fennell for the recited consideration of \$350, \$50 of which was paid in cash, and three notes of \$100 each, payable to Caleb Jones in one, two and five years respectively, with interest from date, executed for the remainder, a lien being reserved to secure the payment of the unpaid purchase money. On the 9th of March, 1887, N. B. Wilson, as executor of A. Fennell and Mrs. Mary Fennell, sold and conveyed this tract of land to L. F. Struve for the recited consideration of \$2,300, of which \$1,150 was paid in cash, and for the balance of the purchase money a note was executed, due one day after date, and a lien retained to secure its payment. This deed contains no reference to the

lien for \$300 recited in the deed from Caleb Jones and wife to Munroe D. Whitaker. By a series of subsequent conveyances the appellee, Lewis Lebus, became the purchaser of this tract of land. On the 12th of July, 1902, the appellant, P. P. Wyles, as committee for Nora Malone, brought this action in the Harrison Circuit Court, in which he alleged that Nora Malone had been from her birth a deaf mute, wholly without mind, dependent upon the charity of her uncle, Caleb Jones, for her support and maintenance; that on the 17th day of August, 1898, she had been adjudged by the Harrison County Court, on the verdict of a jury, to be an imbecile, and of unsound mind; and that he had been duly appointed her committee, and accepted the trust. He also set out the various conveyances of the lot conveyed by Caleb Jones and wife to Whitaker in April, 1872, and alleged that none of the installments of interest on the \$300 note, for which a lien was reserved in the conveyance of Jones and wife to Whitaker, had been paid to Nora, or to any one for her use and benefit, and prayed that the deed to the appellee, Lewis Lebus, the last vendee of the tract of land, should be corrected so as to set out the reservation in her favor contained in the deed from Jones to Whitaker, and for a judgment for \$18, the interest as of the first day of June of each year from 1873 to 1902, inclusive, with interest from their respective dates until paid.

The defendant, Lebus, filed a general demurrer to the original and amended petitions, which was sustained, and plaintiff's petition dismissed, and he has appealed.

It is contended for appellee that as plaintiff failed to allege that the \$300 note was delivered to Nora Malone, or to any one for her use and benefit, or that Caleb Jones himself held it for her benefit, that it was not a valid or enforceable gift; and that when the donor, Jones, surrendered this note and accepted in lieu thereof three notes of \$100 each, in which no interest was reserved for Nora Malone, that all claim for interest on the \$300 note which she might have had terminated. It is also contended that the plaintiff's claim, if it ever existed, is barred by the lapse of time and the statute of limitation.

To constitute a valid gift inter vivos of personal property the gift must be voluntary, gratuitous and absolute, and take effect at once, and ordinarily must be accompanied by a delivery of the thing to the donee, or to some one for her use and benefit. But this is not always required. As said by this court in *Williamson v. Yeager*, 91 Ky. 286: "If one delivers possession of personal property to a trustee to hold as a gift for the donee it is a valid gift, and if he expressly says or does acts amounting to the same thing, that he constitutes himself a trustee to hold the property for the donee. We perceive no reason why this should not be as valid and binding as a delivery of the property to a third person to be held for the donee."

And in *Krankel's Ex'tx v. Krankel's Ex'or, &c.*, 104 Ky. 745, it was said: "The general doctrine is well settled that a completed parol voluntary trust is enforceable, and in order to render such a trust valid and enforceable the donor need not use any technical words or language in express terms creating or declaring the trust, but must employ language which shows an unequivocal intention on his part to create or declare a trust in himself for the donor."

The reservation in the deed from Jones to Whitaker of the interest on the \$300 note for the use of Nora Malone during her life is unequivocal, and sufficiently explicit to create a valid gift thereof to the beneficiary, Nora Malone, and having been once made, it was beyond the power of Jones to thereafter revoke it without the consent of the donee. The note was not by its express terms to mature during the life of Nora Malone, and at her death it provided that the principal was to be paid to the donor. It was, therefore, natural and proper that he should have retained its possession. Besides, if as alleged, Nora Malone was an imbecile or a person of unsound mind at the date of the gift, no acceptance thereof by her was essential to render it valid, as the law will presume an acceptance on her part. (Pennington v. Lawson, 23 Ky. Law Rep., 184; Bunnell v. Bunnell, 23 Ky. Law Rep., 800.) A purchaser of real property must look to the records for evidence of title, and when it is there shown to be incumbered with liens in favor of a third person, he is presumed to have purchased with such knowledge and subject to such conditions, and himself becomes a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased. (Jones on Liens, sections 1083 and 1084; 2 Pomeroy's Eq. Jur., sections 581 and 638; Johnson v. Gwathmey, 14 Ky., 419.) Nor is appellee's contention that appellant's claim is stale and barred by the statute of limitation maintainable. At least in so far as her claim to the annually accruing interest is not within the statute.

For reasons indicated the judgment is reversed and cause remanded, with instructions to overrule the demurrer and for further proceedings consistent with this opinion.

FIDELITY MUTUAL LIFE INS. CO. v. PRICE.

(Filed December 9, 1903.)

1. Life insurance—Waiver of forfeiture—Where a life insurance policy provided that upon the failure of the insured to pay premiums when due the policy should be forfeited and become null and void, and the insurance company, through its proper officer, extended the time for the payment of a premium upon the execution by the insured of a note, which provided that the policy should be null and void if it was not paid at maturity, there was not a waiver of the right of forfeiture for the ensuing premium year by the acceptance of the note, but merely a postponement of the exercise of the right of forfeiture during the period covered by the note, which in no way prejudiced the right of the company to consider the policy void for the nonpayment of the note at maturity.

2. Same—Demand of payment—A demand by an agent of the insurance company for the payment of the note when due, accompanied by a certificate of health to be signed by the insured and approved by the officers of the company at the home office for the purpose of reviving the policy, was a sufficient notice to the insured that the company considered the policy forfeited, and was not an unconditional demand for the payment of the note which would amount to a waiver of the forfeiture.

3. Contract to be expressed in policy—A note executed for a premium on a life insurance policy which provides for the forfeiture of the policy if the note is not paid at maturity is not a contract as to insurance within the meaning of the statute, which requires the contract of insurance "or agree-

ment as to such contract" to be expressed in the policy, and it is not necessary that such note should be attached to the policy to be valid.

4. Delay of company in rejecting application—It being a matter for the company alone to determine whether or not it would accept and approve the certificate of health submitted by the insured and waive the forfeiture, the insured has no ground to complain of the delay of the company in rejecting the application for a restoration of the policy.

F. H. Calkins, Sims & Grider and Fairleigh, Straus & Fairleigh for appellant.

Lewis McQuown for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

On the 12d of April, 1896, in consideration of \$217.80, and the payment of a like sum annually thereafter on the 22d of April of each year, the appellant issued a policy on the life of George T. Price for \$10,000, payable at his death to Sue E. Price, wife of the insured. Before the annual premium became due, April 22, 1900, the insured asked the company to grant an extension of four months in which to pay the premium. The manager of the appellant's Louisville office notified Price that he had no authority to grant the extension without the approval of the home office, and enclosed a note for his signature, stating that the matter would be submitted to the home office, and that he would be advised of the result. The note was dated April 22, 1900, payable four months after date, and it was accepted by the company. It matured on August 22, 1900. Before this note matured Price requested the Louisville office to extend the time for its payment. He was again advised that the home office alone had the authority to grant the extension. The home office declined to waive the payment of the note, but agreed to accept \$60 and a new note for \$174.74, payable three months after date. This note matured November 20, 1900. He failed to pay that note, and died on the 10th day of December, 1900.

Among other provisions the policy contained the following:

"Provided any moneys required to be paid under this policy during the continuance of the contract must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment to him; otherwise, this policy shall be ipso facto null and void, and all moneys paid hereon shall be forfeited to the said association. * * *

"With the written approval of the president or vice-president the beneficiary herein named may be changed upon the written request of the member by the surrender of this policy. * * *

"In case of lapse or forfeiture of this policy it may be revived upon the approval of the president or vice-president and medical director, subject to the rules of the association. * * *

"No agent of the association has any power or authority to make, alter or discharge contracts, waive forfeitures, or grant credit; and no alteration of the terms of this contract shall be valid, and no forfeiture hereunder shall

be waived unless such alteration or waiver be in writing and signed by the president of the association."

This action was instituted by the beneficiary, Sue E. Price, to recover the amount of the policy, to wit, \$10,000. Questions raised by counsel will be made to appear in this opinion, hence it is unnecessary to summarize them.

The failure to pay the note executed for the balance of the premium which matured November 20, 1900, is admitted. Counsel for the appellee urge that the appellant waived the forfeiture, and when once waived it could not be exercised during the ensuing year; that this right of forfeiture existed on the 23d day of April, 1900; and the acceptance of the four months note for the annual premium due that day was an election to waive the forfeiture for the entire year. By the terms of the policy it becomes ipso facto null and void unless the moneys required to be paid by it are actually paid when due. At the request of the insured the company extended the time for the payment of the premium for four months, which matured April 22, 1900. This was done as an accommodation to the insured. Except for that act he would either have been forced to pay the premium or have allowed his policy to lapse. The company did not agree to waive its right of forfeiture, or relieve the insured from his obligation to pay the premium. It simply agreed to postpone the payment of the premium for four months; and that it would not exercise its right of forfeiture for that period. It did not agree that it would not exercise its right of forfeiture upon the failure of the insured to pay the note at its maturity. On the contrary, the company and Price agreed that the execution of the note was simply setting forward the time of forfeiture, and that the right to forfeit was to be exercised at the maturity of the note unless it was then paid, for it is recited in the note: "If this note is not paid at maturity, policy D67,852, issued by the Fidelity Mutual Life Insurance Co., of Philadelphia, for which it is given, shall be null and void, without notice to the maker thereof, and without any act on the part of the company, and shall remain so until restored by its terms."

It was said in *St. Louis Mutual Life Insurance Co. v. Grigsby*, 10 Bush, 310: "Where, as a matter of favor to the insured, credit is extended him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy will be forfeited."

The same doctrine is announced in *Manhattan Life Insurance Co. v. Myers*, 109 Ky., 372; *Manhattan Life Insurance Co. v. Pentecost*, 105 Ky., 642. The same doctrine is recognized in *Noeland v. Union Central Life Insurance Co.*, 104 Ky., 129, and *Union Central Life Insurance Co. v. Duvall*, 20 Ky. Law Rep., 443. The parties had the same right to agree to the extension of the time for the payment of the premium and the setting forward of the time of forfeiture as they had to enter into the original contract of insurance. The beneficiary named in the policy had no vested rights in it, because it is expressly provided therein that the insured may change the beneficiary by the surrender of the policy. Besides, under the express terms of the policy, if the beneficiary was not changed, she did not have any rights under it unless the premiums were actually paid. She could not complain because the company, as a matter of grace, extended the time of payment of the premium and the time for the exercise of the right of for-

feiture. It is contended by counsel for the appellee that the case of *Johnson v. Southern Mutual Life Insurance Co.*, 79 Ky., 408, supports his position. That case expressly recognizes the doctrine which we here enunciate, for the court said in that case: "The execution of the note for \$107 and the extension of time for its payment beyond the day on which the annual premium was agreed to be paid for the year ending October 21, 1875, did not constitute a waiver of the forfeiture of the policy upon the part of the company, but it was an agreement not to enforce the consequences of the forfeiture for ninety days after the period at which it was originally agreed the forfeiture should take place. (10 Bush, 314.)"

The court, however, seems to hold in that case that an unconditional demand for the payment of the note and the retention of it by the company amounted to a waiver of forfeiture for the premium year. It is urged that the forfeiture was waived by an unconditional demand for the payment of the note of \$174.74 after maturity. The question presented is not one of preventing the lapse of a life policy, but of the revival of one which has already been forfeited. Both the appellant and Price understood that the failure to pay the note operated as a forfeiture of the policy. Under the doctrine which this court has repeatedly announced, if there had been an unconditional demand for the payment of the note after its maturity, unaccompanied by an explanation showing a different intent, it would be evidence in itself of an intention to waive the forfeiture. (*Moreland v. Union Central Life Insurance Co.*, 104 Ky., 129.)

In that case the court said: "We can see how, without a waiver of the forfeiture being manifested, the note might not be returned to the assured through oversight or negligence, or even be retained for the purpose of allowing the assured to reinstate the policy by its payment; but a demand of payment, unaccompanied by an explanation showing a different intent, is evidence in itself of an intention to waive the forfeiture. It seems to us that to send the note to its attorneys for collection, and to demand its payment, are evidence of an intention to waive the right to insist on a forfeiture." (*Union Central Life Insurance Co. v. Duvall*, 20 Ky. Law Rep., 441.)

In passing upon the question of waiver of the right of forfeiture in *Phoenix Insurance Co. v. Stevenson*, 78 Ky., 158, the court said: "The act or conduct of the company, in order to operate as a waiver of its right to rely upon the breach as a release from liability, must be such that the insured might reasonably infer therefrom that the company did not mean to insist upon the forfeiture. The insured must have been misled to his prejudice."

Price well knew from the terms of his policy and previous transactions under it that when the policy lapsed for the nonpayment of premiums the forfeiture could only be waived at the home office in the prescribed way. It is true the Louisville office demanded the payment of the note, but that demand was accompanied by a request that he sign a certificate of health, which was to be approved by certain officers of the company at its home office. When the manager of the Louisville office demanded the payment of the note he enclosed a certificate of health, which showed that the company claimed the policy was forfeited. So the demand was not unconditional, but was accompanied by the claim that a forfeiture of the policy was claimed. In addition to that Price was advised that the certificate of health

would have to be sent to the home office for approval. Price, on December 1, 1900, signed a certificate of health, containing the following language: "Policy No. D67,852 on my life, issued by the Fidelity Mutual Life Insurance Co., being void by reason of the nonpayment of the note, 6419, due and payable thereon the 20th day of November, 1900, now, therefore, for the purpose of obtaining a revival of said policy, and as a basis of such a revival."

* * *

This shows that Price understood that the company claimed that the policy was forfeited, and he applied to it to have the forfeiture waived. We are of the opinion that there was no unconditional demand for the payment of the note. It is claimed for the appellee that the note for the premium containing the forfeiture clause for failure to pay is a contract as to insurance, and void under the statutes unless attached to the policy. In support of that contention Provident Savings Life Assurance Society v. Puryear's Adm'r, 22 Ky. Law Rep., 980, is cited. The statute referred to, among other things, provides that no insurance company "shall make any contract of insurance, or agreement as to such contract, other than is plainly expressed in the policy issued thereon." This clause evidently is not applicable to the facts of this case. It relates to the time the policy was issued. If it had the effect, as contended by counsel, that the note was void and likewise its provisions because it was not attached to the policy, the appellee could not get any benefit from the execution of the note. If it was void because it was not attached to the policy, its terms would not be binding on either party. The logic of counsel's position would be that as there was no valid agreement between the parties as to the extension of time for the payment of the premium, the policy was forfeited on the 20th of November, 1900, and the insured was never relieved from the forfeiture. If the contract was void, then the court would not uphold the part that was beneficial to the insured, to wit, the extension of time for the exercise of the right of forfeiture, and deny the company the right to insist upon the forfeiture upon the failure to perform that part of the contract which induced the company to extend the time for declaring the forfeiture.

The certificate of health was signed December 1, 1900, mailed to the home office in Philadelphia, where it was received and retained for about six days before it was returned not approved. It was a matter for the company alone to determine whether it would approve the certificate of health and waive the forfeiture, and the insured could not complain of the delay of the company in rejecting the application for the restoration of the policy. There is no conflict in the evidence. The material part of it was in letters and writings, therefore, we are of the opinion that the court should have given a peremptory instruction to find for the defendant.

The judgment is reversed for proceedings consistent with this opinion.

HART COUNTY, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

LOUISVILLE & NASHVILLE R. R. CO. v. HART COUNTY.

(Filed December 9, 1903.)

Original opinion ante, 895.

McCandless & James for appellant county.

Helm, Bruce & Helm and H. W. Bruce for appellee, L. & N. R. R. Co.

Appeal from Jefferson Circuit Court, Chancery Division.

Judge Paynter delivered the following response to petition for rehearing:

It is not a difficult matter for zealous counsel to conclude that a court has not fully understood the record when its conclusions on the facts and the law do not accord with their views. This is unfortunate, but it has always been so, and will continue to be so long as courts exist and lawyers are unsuccessful in the prosecution of cases before them. The alleged inaccuracy of the court in summarizing the purpose of the action had not the slightest effect on the conclusion of the court. On the contrary, the court accurately states the claim of the county as to its alleged right to dividends on stock issued to taxpayers, or their assignees, before such certificates of stock were so issued. Notwithstanding the criticism which counsel saw proper to make of the opinion of the court, wherein the purpose of the action was stated with reference to the claim to which we have just referred, counsel who filed the petition for a rehearing was so impressed with the opinion of the court on that question they were moved to say in the petition for rehearing: "We have regarded the right of the county in this particular as doubtful, and will not further insist upon the same."

In the opinion of the court it is stated that in *Hardin County v. Louisville & Nashville R. R. Co.*, 92 Ky., 412, "the interest did not cease to run on the subscription until the cash dividend was declared in June, 1864," and "the conclusion of the court is now adhered to." Counsel criticises the opinion because they seem to conclude that the court did not follow the *Hardin county case*. The court did adhere to it in holding that the stock dividend of one-quarter of one per cent. did not stop the running of interest, and that the interest was not stopped until the payment of a cash dividend. However, on the question of estoppel the court said the facts of this case are essentially different from those of the *Hardin county case*. The court in the *Hardin county case* refused to apply the doctrine of estoppel; in this case the court did apply it to an essentially different state of facts. The criticism of counsel could only be justified upon the theory that because the court refused to apply the doctrine of estoppel against one county it can not do it against another county on a different state of facts.

The court admits an error in saying that Hart county was represented at a certain meeting of stockholders, but the correction of this error does not render it improper to apply the doctrine of estoppel to the facts of this case.

It might be conceded that the court reached an erroneous conclusion in all the questions adjudged, save the one wherein the court held that the assignment of the principal stock carried with it the claim for interest stock, still Hart county was not entitled to recover. The court adheres to the conclusion reached on that question.

The whole court (except Judge Hobson, who did not sit in the case) considered the petition for a rehearing and overruled it.

CHAPLIN AND BLOOMFIELD TURNPIKE ROAD CO. v. NELSON COUNTY.

(Filed December 9, 1903—Not to be reported.)

1. Free turnpikes—Action to recover value of—Verdict of jury—Where it appeared from the testimony that the turnpike, the value of which was sought to be recovered from the county to which it had been delivered, had cost many thousands of dollars in its construction; that it had been maintained in a splendid state of preservation for many years; that it was very extensively used by the public, and that the tolls collected thereon had paid dividends over and above the expense of maintaining it, a verdict of a jury that it was without value at the time it was turned over to the county could have been the result only of passion or prejudice, or of the admission of improper testimony.

2. Same—Evidence—Testimony to the effect that the turnpike was without value because the county had voted free turnpikes and the owners were not getting any income from it on account of tollgate raiders was incompetent to show want of value and was prejudicial to the rights of the turnpike company.

3. Same—The mere fact that the stock of the turnpike company was not selling on the market at the time free turnpikes were voted in the county, and when the contract for the purchase of the road was made with the county, did not furnish evidence that the road had no actual value, as no one would want to invest in the stock in view of the contemplation of the county to acquire the road, and the introduction of evidence to that effect was erroneous.

4. Criterion of value—Considering the fact that the county had voted to free the turnpikes and that the tollgate raiders had put an end to the collection of tolls, the value of the turnpike road can not be measured by the price it would bring "at a fair, voluntary sale," but its actual or real value, including its franchise, should be ascertained by considering the cost of construction, its condition when turned over to the county, the income from its previous use, and the probable profits which might be derived from its continued use, as private property.

5. Burden of proof—The county having denied that the turnpike was of any value, the burden of proof was thereby placed upon the plaintiff, the turnpike company, and a subsequent plea of want of consideration for the contract for the purchase of the turnpike did not shift the burden to the defendant.

Geo. S. & John A. Fulton, J. S. Kelley and J. A. Barlow for appellant.

Nat W. Halstead, Eli H. Brown, W. S. Pryor and C. C. McChord for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

While the court has not overlooked any of the points or questions raised, which were so ably and elaborately discussed by counsel, it will consider in this opinion only such as it regards as controlling in the case.

The question as to the effect of the contract between the Nelson Fiscal Court and the appellant, which is the basis of this action, was determined in *Bardstown and Louisville Turnpike Co. v. Nelson County*, 22 Ky. Law Rep., 1457. The answer does not contradict the fact that the proceeding in the Nelson County Court to condemn the road was dismissed by the county.

Thereupon the right accrued to the appellant to have the value of its road ascertained in a court of competent jurisdiction. The principal question in the case was the ascertainment of the actual value of the appellant's turnpike at the time it was turned over to the county. This court, in *Richmond and Lancaster Turnpike Road Co. v. Madison County Fiscal Court*, 24 Ky. Law Rep., 1263, said: "It proposed to take appellant's pike, and when it did so it must pay appellant the real value of the property at the time of the taking." The record shows that the tollgate raiders had destroyed the tollgates on the road, and that the company was not collecting tolls at the time the turnpike was turned over to the county. The purpose of this action was to recover the value of the turnpike at the time it was placed in the possession of the county. The chief defense of the county is that the turnpike was not of any value at the time. The evidence introduced shows that it was a valuable turnpike; that it had been kept in a fine state of preservation for twenty years; that it was very much used because of its favorable location and the feeders constructed to it. Some witnesses gave opinions that the foundation of the pike was not as good as it should have been, but it is difficult to understand how it could have been kept in such a fine condition for travel if it did not have a suitable foundation. It cost \$11,500 to build it. The travel on it had been increased by the construction of new roads to it. It had been paying dividends for some years before the county took possession of it. Notwithstanding this evidence the jury found that it was without value when it was turned over to the county. The verdict can only be accounted for upon the theory that it was superinduced by prejudice or passion, or by the admission of testimony which was prejudicial to the rights of the appellant. There was evidence tending to show that the turnpike was of no value because the county voted for free turnpikes, and that the company was not getting any income from it on account of tollgate raiders.

This testimony was clearly erroneous and prejudicial to the rights of the appellant. The action of tollgate raiders and the voting of free turnpikes did not damage the roadbed, or diminish the use of it by the traveling public. The voting of free turnpikes would rather add to the market value of the road, if it had any, as it gave the county authorities the right to purchase it, thus placing a purchaser in the field, where perhaps there were none before who desired to purchase it. The testimony which tended to show that the pike was without value for either of the reasons stated should have been excluded from the jury. If any witness testified that the road was without value for the reasons given, and gave other reasons for the opinion which were proper to be considered by the jury, the court should have instructed the jury that they could not consider as affecting the value of the pike, or in fixing its value, the action of the county in voting free turnpikes, or the action of lawless persons in destroying tollgates on it. No evidence should be admitted tending to show that the stock in the road had no market value after the November election, 1897, and on the 26th of February, 1898, when the contract on which this action was brought was made. With the knowledge that the county contemplated acquiring the turnpikes and making them free, no one would probably want to invest in turnpike stock, because the investment would not be permanent. The mere fact that the stock was not then selling in the market did not furnish evidence that it did have an actual value.

The court instructed the jury that by actual value is meant such a price as the property would have sold for "at a fair, voluntary sale." By the first instruction the court told the jury to find for the plaintiff the actual value of the property on the 26th of February, 1898, unless the jury believed from the evidence that the property was of no value at that date. We will consider the two instructions together in determining whether the court erred in giving them. The jury evidently understood from these instructions that if the property was offered at a voluntary sale, and that if no one bid on it that it had no actual value. Ordinarily the value of property may be determined by what it would bring at fair, voluntary sale. It is made perfectly manifest that it would work a great injustice to allow the value of appellant's property to be determined by that rule. From the nature of the property and the circumstances surrounding it the rule stated by the court was wholly inapplicable.

It was said in the case of *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S., 403: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that perhaps it is impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general thing we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or want of the community or such as may be reasonably expected in the immediate future."

The court is of the opinion that the inquiry should be confined to the ascertainment of the actual or real value of the property which includes its franchise. The value of property depends largely upon the profitable uses to which it may be put. The owners enjoyed the right to charge those who used it tolls, which enabled it to reap a profit in its use. To ascertain the real value of the property the court should allow evidence to be introduced with reference to the original cost of the construction of the pike; its condition when turned over to the county; and the income from its previous use; and as to the probable profits which might be derived from the continued use of the pike; and also as to the cost of constructing it at the time the contract was made.

When two-thirds of those voting on free turnpikes voted therefor it was a vote in favor of incurring the necessary indebtedness for that purpose and authorized the county to incur an indebtedness in excess of the revenue provided for the year in purchasing turnpikes in the county. (*Whaley, &c. v. Commonwealth*, 23 Ky. Law Rep., 1292.)

Defendant denied that the turnpike was of any value. The burthen of proof was on the plaintiff to show its value, and unless it did so judgment would have gone against it. Section 526, Civil Code, provides that the "burthen of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." When the defendant denied that the turnpike was of any value it presented a negative defense. The character of defense is not changed by the supplementary averment which was to the effect that as the turnpike was of no value, the writing on which the action was based was without consideration. If from the state of the

pleadings the averment of want of consideration was an affirmative defense, it did not change the burthen of proof. When a defendant pleads both an affirmative and a negative defense, though the burthen is on him as to the former, the burthen of proof in the whole action is on the plaintiff. The averment as to the want of consideration under the statement of the pleadings did not change the issue that had been made by the denial that the turnpike was of any value.

The instructions of the court do not conform to the conclusions reached herein, but should be made to do so at the next trial.

If the court sustained the verdict it would be allowing private property to be taken for public uses without any compensation. The Constitution forbids the taking of private property for public uses without just compensation, and courts should preserve the rights thus guaranteed.

The judgment is reversed for proceedings consistent with this opinion.

DOVEY v. LAM, &c.

(Filed December 9, 1908.)

1. Witnesses—Competency of wife—Inasmuch as separate judgments may be rendered as to each defendant in an action to recover for an assault and battery, the wife of one of the defendants is a competent witness for the others, although she is not, under section 606 of the Civil Code, a competent witness for her husband, and although the jury might unconsciously give her testimony effect as to her husband.

2. Burden of proof—In an action to recover for an assault and battery in which the allegations of the petition were not denied, but matter in avoidance was plead, the burden of proof was on the defendants.

Jonson & Wickliffe and W. H. Yost for appellant.

W. L. Reeves for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Hobson.

George B. Dovey, appellant, instituted this action against James W. Lam, W. N. Eads, G. W. Roark, Flint McDowell and John G. Love, appellees, to recover for an assault and battery. They pleaded self-defense, and the jury found for them. The court entered judgment on the verdict, and the plaintiff appeals. The difficulty occurred over the possession of a coal shaft and engine, the defendants claiming that Mrs. Rachel McNeil was in possession, and that the plaintiff undertook to interfere with her possession, the defendants being her agents and servants. The court held the burden of proof to be on the defendants, and each of them was thereupon sworn in his own behalf. After the difficulty and before the trial Mrs. McNeil intermarried with the defendant, John G. Love. The other four defendants offered her as a witness in their behalf. The court ruled that she could not testify for her husband, but that she could testify for the other four defendants. He, therefore, allowed her to testify, instructing the jury that her testimony could only be considered as to the defendants other than her husband. Of this action of the court the plaintiff complains. It is insisted for the plaintiff that the jury could not disabuse their minds of the effect produced by

her evidence, and would necessarily consider it as to her husband. If this is true, it would be no reason for reversing the judgment except as to John Love, her husband, for if the other defendants only had been sued, she would undoubtedly have been a competent witness, and these defendants were in fact more or less affected by her testimony being given when her husband was a party to the action, and it might be supposed that this would warp her judgment. But aside from this, by section 605 of the Code of Practice, every person is competent to testify unless incapable of understanding the facts concerning which his testimony is offered, subject to the exceptions contained in section 606. By section 606 neither husband nor wife shall testify for or against the other, except in certain cases not material here. There is no other provision of the statute affecting the competency of the witness. As by section 605 every witness may testify who has sufficient capacity to understand the facts concerning which his testimony is offered, Mrs. Love was a competent witness, unless she was cut out by section 606. The only thing in section 606 affecting her is that she shall not testify for or against her husband. Under our statute, in cases of this character, the jury may find in favor of one of the defendants and against the others, or may find a larger amount against one than the other. (Kentucky Statutes, section 12; Railroad Co. v. Kuhn, 86 Ky., 593.) If five separate actions had been brought against each of the defendants the wife might have testified in all cases except her husband's; but when all were sued in one suit, the proceeding was substantially the same as if five separate suits had been brought, and all by consent heard together. The wife did not, therefore, testify for her husband. She testified only for the other defendants, and her evidence can not be rejected because the jury might unconsciously give it effect as to him. In tort cases against several defendants it often happens that evidence is admitted against some of the defendants or in their favor which can not be considered as to the other defendants. Thus an admission may be made by some after the wrong has been committed, and this may be proved against them, but not against the other defendants. One may be released and others not. One may, by conduct, show malice, and this may be done without the knowledge of the others, so that these facts are not competent against them. It, therefore, often happens in cases of this character that evidence is admitted which is only to be considered by the jury as to some of the defendants.

In *Shields v. Ruddy*, 2 Idaho T., 883, the plaintiff in a tort action offered to introduce the wife of one of the defendants as a witness against the other defendant under a statute substantially the same as ours. The circuit court refused to admit the evidence, but on appeal the judgment was reversed, the court holding that inasmuch as a separate judgment might have been rendered in the case against each defendant, the wife of one was competent against the other under instructions from the court that her testimony should not apply to her husband.

In *Albaugh v. James*, 29 Ind., 308, the husband and wife were sued for a joint tort, and each was offered as a witness in his own behalf. The wife was not allowed to testify. On appeal this was reversed. The court said: "The defendants had each the right to testify in their own behalf. Because the testimony of the husband might benefit the wife, and that of the wife might

benefit the husband, is no reason for excluding the evidence. It would, however, be the duty of the court, by instructions, if asked, to limit the effect of the testimony to the case of the party testifying. When a party is sued he or she has the right to testify in his or her own behalf; and a plaintiff can not deprive a defendant of this right by joining husband and wife in the same suit. A husband could not call a wife to testify for him, nor could a plaintiff call her to testify against her husband, but a husband and wife jointly sued may each testify in their own behalf."

The tendency is to do away with the old restrictions, and to let the jury hear the evidence and judge of its credibility. In England, by statute, a man's wife may testify for him just as his children, and the same rule prevails in many of the States. Our Code was intended to broaden the rule for the admission of witnesses, and its proper construction requires that every witness shall be allowed to testify, with the exceptions named in the statute. We, therefore, conclude that the statute not forbidding the wife of one defendant to testify for another, she is a competent witness where a separate judgment may be rendered as to each of the defendants. The answer not controverting the allegations of the petition, but pleading matter in avoidance, the burden of proof was on the defendants. The other matters relied on in the admission or rejection of evidence were of minor consequence, and were properly ruled by the circuit court. The instructions fairly submitted the issue to the jury, and on the whole case we find no reason for disturbing the verdict.

Judgment affirmed.

MORSE v. CHESAPEAKE & OHIO RY. CO.

(Filed December 10, 1908.)

Negligence—Injuries from fright—There can be no recovery for injuries resulting from fright occasioned by the negligence of a railroad company in backing its cars off its track towards and close to the house of the frightened person where no immediate personal injury or trespass to real estate resulted and no breach of any contractual relation occurred.

W. C. Halbert and S. J. Pugh for appellant.

W. H. Wadsworth and E. L. Worthington for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Zona B. Morse, sought in this action to recover damages from the Chesapeake & Ohio Ry. Co. for "fright and mental suffering," and superinduced subsequent nervous prostration and injury, although there was no contemporaneous physical injury inflicted by the appellee. The facts which the plaintiff relied upon to support her cause of action are in substance that she owns a house and lot, located on the west side of Main street of the village of Quincy, in Lewis county, in which she resided at the time of her alleged injury; that the street was thirty feet wide, and that appellee's depot grounds and switch yards were located immediately opposite her residence on the west side of Main street; that a short time previous to the commission of the acts complained of the appellee constructed upon its

yards a switch from its main track to the east side of the street directly opposite her residence; and that they failed to erect and maintain a bumping post at the end of this track, and that as a consequence thereof several of appellee's cars were backed over the end of this switch out into the street and within fifteen feet of her yard and towards her residence, where she was at the time, which greatly frightened and alarmed her, and in consequence of which she suffered such nervous prostration and physical disability as confined her to her home for more than two months under medical treatment, and at great expense; that the injuries had been and would continue to be permanent. The petition further alleges that appellee was grossly negligent, both in the construction of the switch and in the operation of its trains thereon. The court sustained a general demurrer to appellant's petition as amended, and adjudged that her petition be dismissed, and she has appealed.

The exact question presented by the appeal has not been heretofore decided by this court, but it has been decided in a number of well-considered opinions that damages can not be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some direct contemporaneous injury to person or property, or growing out of some contract relation between the parties. (*Dawson v. L. & N. R. R. Co.*, 4 Ky. Law Rep., 810; *N. N. & M. V. Co. v. Gohlson*, 10 Ky. Law Rep., 988; *City Transfer Co. v. Robinson*, 12 Ky. Law Rep., 555.) These decisions are practically in accord with the great weight of authority on this question. In fact, our attention has been called to only one case which may be considered as holding the contrary doctrine, that of *Mack v. R. R. Co.*, 82 S. C., 353. On the other hand, *Thompson on Negligence*, sections 156 and 157; *Shearman and Redfield on Torts*, volume 2, section 761; *Jaggard on Torts*, 369 and 370; *Wood on Railroads*, 2 volume, 1739, assert the contrary doctrine. In the note to the case of the *Gulf, &c., R. R. Co. v. Hayter*, 77 American St. Rep., 860, Judge Freeman, in an elaborate note, has collected practically all the authorities on the point up to January, 1900, and they unanimously hold that there can be no recovery for fright alone, unaccompanied by actual injury traceable directly to contemporaneous physical injury. And they are almost equally harmonious that no recovery can be had for injuries resulting from fright caused by negligence of another when no immediate personal injury is received. This question was fully considered by the Court of Appeals of New York in *Mitchell v. Rochester Ry. Co.*, 45 S. E., 354. In that case the court said: "If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright can not form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom; that the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondents' concession would seem to

be not only that no recovery can be had for mere fright, but also the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned, without detection, and where the damages must rest upon mere conjecture or speculation. * * * To establish such a doctrine would be contrary to principles of public policy. Moreover, it can not be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are ordinary and natural results of the negligence charged, and those that are usual, and, therefore, to be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental and unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to authorize a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."

And the conclusions reached are supported by numerous authorities cited in the opinion. Besides, it is a well settled rule of law that "a plaintiff who grounds his action upon the negligence of the defendant, must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." (Thompson on Negligence, 3; Whitaker's Smith on Negligence, 3.)

The law requires that there shall be no intentional or negligent trespass upon the person or property of another, and if this duty is violated, a cause of action exists in favor of the party whose person or property has been invaded against the violator. But there is no obligation to protect from fright, and the consequence thereof, when disconnected with or unaccompanied by a legal duty. If so, a man whose house caught on fire by negligence would become liable in damages to his neighbor who became frightened for fear that the fire would spread and consume his own house. Or, in the same case, a horse was negligently permitted to escape in the street of a town, and in consequences thereof a woman standing on the sidewalk became frightened to such an extent as to result in nervous prostration, although not in fact suffering any physical contract or injury, would be entitled to sue the owner of the horse for damages. These cases illustrate the danger of opening the door to imaginary claims, if the rule should be adopted and a recovery permitted for mere fright and its consequences. While the authorities are not absolutely uniform, we have reached the conclusion that no recovery should be allowed for injuries resulting from fright occasioned by negligence, where there is no immediate personal injury, trespass to real estate, or some contract relation.

Judgment affirmed.

DANVILLE, DIX RIVER AND LANCASTER TURNPIKE ROAD CO.
v. LINCOLN COUNTY FISCAL COURT.

(Filed December 9, 1903—Not to be reported.)

1. Fiscal court—Minutes of proceedings—The fiscal court of a county is bound in its contractual relations with others only by the entry of orders upon its order book and after they have been read and signed, as required by sections 1842 and 1843 of the Kentucky Statutes, hence in an action involving the question whether the fiscal court agreed when it purchased a turnpike road to cancel its own stock therein and thereby surrendered its right to a part of the purchase price no evidence was admissible to prove a verbal agreement or contract with reference to the sale not embraced in the order, in the absence of an allegation of fraud or mistake.

2. Same—Evidence—It was not competent to prove what contract the turnpike company made with the fiscal court of another county, to which it had sold part of the same road, as to the cancellation of the stock held by that county, nor to show what construction that court placed upon the contract made with it where the sale to it was a separate and distinct transaction from that in suit.

John T. Hays for appellant.

H. Helm and P. M. McRoberts for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Danville, Dix River and Lancaster Turnpike Road Co., is a corporation, which owned and operated a turnpike road twelve and three-fourths miles long, running through the counties of Lincoln, Boyle and Garrard; three and three-fourths miles of the road lay in Lincoln county.

The capital stock of the corporation is four hundred sixty-six and one-fourth shares, of the par value of \$50 each, of which appellee owns forty-one shares.

During and prior to April, 1898, there had been an uprising of the people of the three counties in favor of free turnpikes, which found expression in deeds of violence, known as tollgate raiding, which, of necessity, resulted in a great depreciation in the value of turnpike roads. Appellant, in the spring of 1898, entered into negotiations with the fiscal courts of the three counties in which its road lay, with the result that it sold to these several courts so much of its road as lay in the respective counties, for the purpose of establishing free turnpikes therein. These three sales were entirely separate and distinct, and had, so far as the record shows, no connection whatever with each other. The sale to appellee took place on the 15th day of April, 1898, and is evidenced by the following order entered upon appellee's order book on the day named:

"Lincoln County Fiscal Court met pursuant to adjournment, this 15th day of April, 1898, Hon. Jas. P. Bailey, Judge, presiding, with the following justices of the peace, to wit: J. A. Singleton, W. D. Wallin, W. A. Coffey and J. H. Raines.

"Moved and seconded, that this court accept the proposition of J. S. Robinson, president of the Danville, Dix River and Lancaster Turnpike Road Co., at the price of \$1.250 for three and three quarter miles of said road in

Lincoln county, for the individual stock owned in said road, it being 51-92 part of the whole road, including one-half of two bridges, one across Dix river and the other over Hanging Ford creek. The same to be paid for as follows: Three hundred and twelve dollars and fifty cents to be paid out of the levy of 1898; \$312.50 out of the levy of 1899; \$312.50 out of the levy of 1900; and \$312.50 out of the levy of 1901, all sums to bear interest at the rate of 5 per cent. until paid. The insurance on the bridges is to be transferred at once, there being \$1,000 on each bridge."

Afterwards appellee paid off and discharged the first three installments of the purchase money. When the fourth became due it refused to pay, claiming that, as it owned forty-one shares of the capital stock of appellant, its share of the proceeds of the sale of the road to Boyle and Garrard counties was greater than the unpaid balance due from it to appellant, and that appellant was really indebted to it on its counterclaim. Whereupon appellant instituted this action for the recovery of the last installment of the purchase price, amounting to \$32.50, with interest from the date of sale until paid, alleging that under the contract of sale appellee had agreed, in addition to the sum of \$1,250, which was to be paid in cash, that it would surrender up and cancel its forty-one shares of the capital stock which it owned in appellant's road.

Appellee filed an answer, traversing the fact that it had ever agreed to surrender up and cancel its forty-one shares of stock; alleging the sale by appellant of parts of its road to Boyle and Garrard counties, and claiming that its distributable share of the proceeds of these sales amounted to more than the sum it owed appellant, and prayed for a judgment over on its counterclaim. The issues were made up on these lines. The action was in equity, and upon trial the chancellor rendered a judgment in favor of appellee for the sum of \$232.35 on its counterclaim, from which judgment this appeal is prosecuted.

There is but one question in this case, and that is whether or not, under the contract between appellant and appellee, the latter agreed, as a part of the consideration for the purchase of the three and three fourths miles of appellant's road, to surrender up and cancel its forty-one shares of the capital stock. If it did not, then it is conceded that the judgment of the chancellor is correct; if it did, the case must be reversed. There is no pretense that there is any fraud or mistake in the contract as written; on the contrary, appellant relies on it as written as the basis of its action. The statute organizing, empowering and regulating fiscal courts is contained in chapter 52 of the Kentucky Statutes. The fiscal court consists of the county judge and the justices of the peace of the county, and it possesses the corporate powers of the county. Section 1842 provides: "Before every adjournment the minutes of the proceedings of said court shall be publicly read by the clerk of the court, and corrected, if necessary; and the same shall be signed by the county judge, or presiding judge, with the approval of the justices of the peace present when the court was held."

"Section 1843. No minute or order of the fiscal court shall be valid until the same be read and signed, as before said, nor unless the record shows by whom the court was held."

The fiscal court of Lincoln county being a court of record, it can only

speak by its record. The contract it made with appellant, of necessity, was set forth in its order book; it could bind itself in no other way. (*Fletcher v. Leight, Barrett & Co.*, 4 Bush, 303; *Commonwealth v. Williams, &c.*, 14 Bush, 297.)

When appellant contracted with appellee, it had to take notice of the law limiting the latter's contractual powers; and when the contract between the parties was reduced to writing by the clerk, and publicly read, and approved by the members of the fiscal court, and signed by the judge, without objection on the part of appellant, whose chief officer and attorney were present, this order must be considered as constituting the contract between the parties; therefore, in the absence of an allegation of fraud or mistake, no evidence of any verbal agreement or contract, prior to the signing of the order containing the stipulations of the parties, was admissible. Nor was it competent for appellant to prove what contract it made as to the cancellation of the stock of Garrard county, or what construction the fiscal court of that county placed upon the contract between it and appellant. This was an entirely separate and distinct transaction, and what the contracting parties did in reference to it throws no light whatever upon the contract between the parties litigant here; and the court properly sustained exceptions to the evidence introduced by appellant on these questions.

It follows, then, that the merits of this controversy turn upon the proper construction of the contract between the parties, evidenced by the written order on the books of the fiscal court. An examination of this fails to show any indication of an intention on the part of appellee to surrender up or cancel its forty-one shares of stock; there is not a word which tends to such a conclusion; the minute clearly states that the sum of \$1,250 paid cash is to be participated in only by the individual stock owned in the road, but it is nowhere stated, or intimated, that the county's stock is to be surrendered up for cancellation, or that it should not participate in the assets resulting from the sale of the balance of the road to the counties of Boyle and Garrard.

In order to reach the conclusion contended for by appellant it would be necessary to interpolate into the written contract words which it does not now contain, the effect of which would be to take from appellee money which would otherwise be due it. No better evidence could exist of the utility of the rule that where parties have reduced their contract to writing, in the absence of fraud or mistake, no verbal evidence will be heard to alter or modify it, than is afforded by the case at bar. Here are all the officers of the fiscal court, who were present when the contract was made, deposing, positively, that nothing was said during the entire time the contract was being negotiated on the subject of the county surrendering its stock for cancellation; and on the contrary, the president of appellant, and several of its large individual stockholders, depose, with equal positiveness, that such was the agreement. The rule in question was established to obviate just such difficulties. But were we less sure of the legal principle enunciated, we are of opinion that the preponderance of the evidence is against the proposition that appellee agreed to the cancellation of its stock. The burden of proving this was on appellant, and there is no reason to suppose that the officers of the fiscal court are less accurate or truthful than the officers and stockholders of the turnpike company.

For the reasons indicated the judgment is affirmed.

SANDERS v. COMMONWEALTH.

(Filed December 9, 1903.)

Constitutional law—Police power—The provisions of section 1274 of the Kentucky Statutes, which make it an offense to sell milk from animals fed upon "still slop," are not violative of the fourteenth amendment to the Constitution of the United States, which forbids the abridgement by any State of the privileges and immunities of citizens of the United States, and are within the "police power" of the general assembly.

Norton L. Goldsmith, Alfred Selligman and Gibson, Marshall & Gibson for appellant.

Warwick Miller and C. J. Pratt for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Chief Justice Burnam.

The appellant, Fred Sanders, was indicted, tried and convicted in the Jefferson Circuit Court for having knowingly sold milk from animals fed upon "still slop," in violation of the provisions of section 1274 of the Kentucky Statutes, which reads as follows: "Whoever shall knowingly sell, or cause to be sold, to any person in this State, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or sell milk commonly known as 'skimmed milk,' with intent to defraud, or shall knowingly sell any milk, the product of a diseased animal, or from animals fed upon 'still slop,' 'brewers slop,' or 'brewers grain,' or shall knowingly use any poisonous or deleterious material or milk from animals diseased or fed as aforesaid, in the manufacture of butter or cheese, shall be fined in any sum not less than \$25 nor more than \$200."

A reversal of the judgment of the circuit court is asked upon the ground that so much of the statute as prohibited the sale of milk from animals fed upon "still slop" is obnoxious to the fourteenth amendment to the Constitution of the United States, which provides, in section 1, that "no State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is based upon the claim that "still slop," when used under proper conditions, is a wholesome and innocuous food for dairy cows; and that the milk from cows fed thereon is a pure and wholesome article of food for human beings. Our attention is called to the fact that there is nothing in the statute nor the indictment which is the foundation of this prosecution which negatives either of these contentions; and that no testimony was introduced by the Commonwealth upon the trial of the case for the purpose of establishing that such was the fact; that the whole proceeding rests upon the naked prohibition contained in the statute itself.

The section upon which the prosecution is based is one of the provisions of the statute aimed at offenses against the public health, and was exercised under the police power of the State for the protection of the health of its citizens.

No exact definition of the extent of this power has, or, perhaps, can be

given. Judge Cooley in his work on Constitutional Limitations has approved that given by Chief Justice Shaw in the *Commonwealth v. Alger*, 7 Cushing, 53, as the most satisfactory and complete to which his attention has been called. It is as follows: "All property in this Commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other usual and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the Constitution may think necessary and expedient. * * * The power is vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power than to mark its boundaries and limit its exercise.

"And this power under the American constitutional system is left with the individual States. It can not be taken away from them either wholly or in part. (*United States v. DeWitt*, 9 Wallace, 41.)

"Neither can the National government, through any of its departments or officers, assume any supervision of the police regulations of the State. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of the National sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the Nation, or deprive any citizen of the rights guaranteed by the Federal Constitution." (Cooley on Constitutional Limitations, 7th edition, 831, and authorities there cited.)

The fourteenth amendment of the Federal Constitution was first called to the attention of the Supreme Court of the United States in the *Slaughterhouse Cases*, 16 Wall., 36. In construing a statute of Louisiana, vesting in a slaughterhouse company the sole and exclusive privilege of conducting a live stock landing and slaughterhouse business, and requiring that all animals should be landed at the stock landing and slaughtered at the slaughterhouse of the company, and nowhere else, it was held that the statute did not conflict with the provisions of the fourteenth amendment. The scope of this amendment, in so far as it relates to the question before us, has been very clearly stated by Judge Cooley as follows: "The guaranteed equal protection is not to be understood to require that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is deemed to be equal, if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds; it can not be a mere arbitrary selection." (Cooley's Constitutional Law.) And the text is supported by numerous adjudged cases.

It is a canon of statutory construction that every presumption must be indulged in favor of the validity of the statute, as the Constitution confers upon the general assembly the law-making power. But notwithstanding

this general presumption, the courts must obey the Constitution and determine in a particular case whether its limits have been passed. As was said in *Marberry v. Madison*, 1 Cranch., —: "To what purpose are powers limited, and to what purpose is that limitation committed in writing, if these limits may at any time be passed by those intended to be restrained.

"If, therefore, a statute purporting to have been enacted to protect the public health is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the Constitution." (*Mugler v. Kansas*, 123 U. S., 623.)

In *Powell v. Pennsylvania*, 127 U. S., 678, it was held that the fourteenth amendment to the Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, prevention of fraud, or the preservation of the public morals; and that it was competent for the State of Pennsylvania to prohibit the manufacture of oleomargarine butter. In that case the defendant offered to prove that he made large profits from the sale of the prohibited article, and that it was a wholesome and innocuous food; that the statute upon which the prosecution was founded was not a lawful exercise of the police power, because it deprived him of the lawful use of his property without compensation. The court sustained an objection to the evidence, and the defendant was adjudged to pay a fine and the cost of the prosecution. The judgment was affirmed by the Supreme Court of Pennsylvania. (114 Pa. St., 265.) Upon appeal to the Supreme Court of the United States the question was whether the prohibition of the sale and manufacture of oleomargarine, a wholesome article of food, was a lawful exercise by the State of the power to protect by police regulations the public health. In discussing this question the court, through Judge Harlan, said: "As it does not appear from the face of the statute or from any facts of which the court must take judicial cognizance that it infringes rights secured by the fundamental law, the legislative determination of the question is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property. * * * The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, * * * will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter can not

interfere without usurping the powers committed to another department of the government."

In *State v. Layton*, 61 S. W., Rep., 171, the Supreme Court of Missouri had before it an act of the general assembly prohibiting the sale of "alum baking powders" as unhealthy. In this case there was no question of deceit in the sale of the prohibited article. The statute upon which the prosecution was based embodied no idea of limitation of a superior article, and the court said: "No baking powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health. * * * While it is true that there are limits under our system to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use and conceded wholesome and innocuous, to be unhealthy, and its production and sale a crime, and who have no hesitancy in declaring such an act void when the act on its face discloses its arbitrary and unreasonable character. * * *

"If it be an article so universally conceded to be wholesome and innocuous that the court could take judicial notice of the fact, the legislature has no right to prohibit its sale. But if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubts." *Cooley's Constitutional Limitations*, 6th edition, and numerous opinions.)

It was decided in the case of *Maryland v. Henry A. Broadbelt*, 45 L. R. A., 435, that the legislature could, "under the police power," require the registration with "the live stock sanitary board" of all herds of cattle of persons selling milk for food, and prohibit the sale of milk from premises found in an unsanitary condition.

The development in the science of bacteriology in recent years has conclusively proven that the microbe is a most potent agent in the propagation of contagious diseases; and that there is no more favorable element for their absorption, growth and development than milk, and that milk contaminated by their presence communicates diphtheria, typhoid fever, tuberculosis, and other kindred contagious diseases, to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where "still slop" is produced are also highly favorable to the development of many forms of bacilli; the heat, dampness, and fermentation, all essential elements in the production of "still slop," are favorable to germ growth. So that we may fairly assume that the general assembly in the enactment of this statute had sufficient information to justify the belief that milk from cows fed on "still slop" had ample opportunity to become impregnated with elements dangerous to public health. Nearly every police regulation affects to some extent property rights, and whilst this power can not be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the legislature may not enact laws apparently necessary for the public health. We have reached the conclusion that under the facts of this case this court has no power to hold

that the general assembly did not have under the "police power" authority to enact the statute under which appellant was convicted.

Judgment affirmed.

MERCHANTS AND FARMERS BANK v. CLELAND, &c.

(Filed December 4, 1903—Not to be reported.)

1. Deed of trust to secure notes—Personal liability of obligor—Where a person executed a deed of trust to lands to secure the payment of notes which she had executed for the purchase money under an assurance from the agent of the payee, with whom the entire transaction was conducted, that she was assuming no personal liability by signing the notes and deed of trust, she can not be held liable beyond the property embraced in the deed.

2. Weight of evidence—The testimony of the agent to the effect that no such assurance was given can not be considered as outweighing the statements of the obligor where his testimony was given first and his attention was not called to her statement, which gave the time, place and details of the representation, and no specific denial was made.

3. Same—The testimony of other witnesses that no such representation was made can not avail to outweigh the obligor's statements where she had testified that it was made at a time and in such a manner that other persons could not have heard; nor does the fact that the language of the notes themselves import a personal liability outweigh her testimony in view of the fact that the representation was as to the legal effect of the notes, and she, as a person inexperienced in business affairs, could not be expected to understand the importance of having the notes express the agreement between them.

H. W. Rives for appellant.

H. P. Cooper, W. S. Pryor, Edward W. Hines and A. M. J. Cochran for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Settle.

The former opinion in this case, which reversed the judgment of the lower court, was withdrawn and a re-argument allowed, which was made before the whole court, and a further consideration of the case by the court as thus constituted has resulted in the conclusions expressed in this opinion.

An agreement was made in the spring of 1896 between the husband of the appellee and the "Interstate Cattle Co.," of Mississippi, whereby the latter was to increase its capital stock to \$25,000, and the former was to take \$7,000 of the increased stock, to be paid for in horses which were to be appraised upon their removal to the ranch of the company in Noxuba county, Mississippi, about January 1, 1897, and in addition he was to receive from the company \$40 per month for managing the ranch. The ranch contained about 1,000 acres of land, and constituted the principal part of the company's assets.

About half of the horses were taken to the ranch in Mississippi at the time agreed upon, but the others were left in Kentucky until the spring of 1897, for the reason, as appellee, claims that the company failed to provide provender for them on the ranch as it had undertaken to do. But the company claimed that the horses that were left in Kentucky were too thin of flesh to

be shipped at the time agreed upon, and were in fact unable to stand travel on the cars to Mississippi earlier than the spring of 1897, and that when they were finally taken to the ranch in that State they were still poor in flesh and feeble. It appears that appellee had to advance \$700 to \$800 to buy provender for the horses that were not shipped January 1, in order to keep them alive while they remained in Kentucky. The horses were all of good stock, and some of them thoroughbreds. Between twenty and thirty of them died in a short time after they were placed on the ranch. It is claimed by the appellant that the horses died from the want of food and sheer poverty, and that they could not be sold or used for any purpose when they arrived in Mississippi, because of their bad condition. But appellee states that the horses were in good condition at that time. As her husband, by reason of his death, could not testify in the case, her statement as to the condition of the horses seems to be unsupported by any other witness.

The horses do not seem to have been appraised after their arrival in Mississippi, the reason it was not done, as stated by the appellant's witnesses, is because appellee's husband refused to permit them to be appraised until they got in better condition. Upon the other hand, appellee testified that the cattle company refused to allow them to be appraised at all. It appears that the horses that died were killed by the disease known as "Texas fever," which they contracted upon the ranch in Mississippi from running on pasture land the company had permitted to be grazed in the summer of 1896 by a lot of Texas cattle, these cattle having left upon the land a tick called "Texas tick," thereby contaminating the soil and grass with deadly poison. This disease does not seem to affect Texas cattle, or stock that are acclimated, but produces death in a short time with unacclimated stock that may come in contact with it.

Because of the death of so many of the horses the husband of the appellee was unable to comply with his contract to take stock in the cattle company. Appellee had already invested some \$3,000 or \$10,000 of her own money in the horses, and had no further means with which to aid her husband. When it became apparent that the contract between appellee's husband and the cattle company would have to be abandoned because of the inability of the former to perform his part of it, the cattle company, through one Jones, who was its secretary, and had brought about the contract between appellee's husband and the company mentioned, procured her husband to induce appellee to buy 640 acres of the company's land, and she did purchase and accept a deed of conveyance to that quantity of the land, for which she agreed to pay \$3,500, and for this sum, in conjunction with her husband, she executed four notes, bearing 8 per cent. interest from date. To secure the payment of these notes she executed a deed of trust on the land purchased, and the horses that were then living, to one C. B. Ames, the lawyer of the cattle company and of the appellant bank as well. The deed of trust contained the provision that if the interest was not paid, or any one of the notes when due was not paid, the whole amount should become due, and the trustee authorized to take possession of the land and proceed to sell it and the equity of redemption therein to the highest bidder at the courthouse door in Noxuba county in satisfaction of the notes, first advertising it for

twenty days, the trustee to execute and deliver a deed of conveyance to the purchaser, pay all attorneys' fees, etc.

Soon after the deed of trust was made two of the husband's creditors brought suit in the chancery court of Mississippi, attacking the same as fraudulent, and alleging that the horses conveyed thereby to C. B. Ames by appellee and her husband were fraudulently conveyed, and that they were the property of the husband, and liable to his debts, and in the lower court and the Supreme Court of Mississippi it was held that the deed of trust was fraudulent in so far as it attempted to convey the horses, and that they were subject to the debt sued on. As the horses were all taken under these judgments against the husband, the land purchased by appellee was all that remained of the security for the payment of the notes executed by her.

The notes given by her for the land became the property of the appellant bank, as did all other assets of the cattle company, and this action was instituted upon the notes in the circuit court of Marion county, Kentucky, to which county and State appellee had removed after the death of her husband.

Appellee resisted the payment of the notes upon the following grounds: First, that she executed the notes and deed of trust under an assurance from Jones, secretary of the cattle company and the agent of appellant bank, that she did not thereby incur personal liability; second, that she was entitled to have the contract reformed so as to express the true terms of the instrument, or to have the same rescinded; third, that if she could not thus be relieved, the notes should be credited with \$600, expenses paid by her for keeping the horses in Kentucky from January 1, 1897, until they were shipped to Mississippi; for the value of the horses that died in Mississippi; for the amount due for the pasturage of other persons' stock upon the company's land during the season of 1897; for the value of her husband's services as manager from January 1 to July 19, 1897; fourth, that the title to the land was defective because five acres of it were in use for cemetery purposes.

The evidence is conflicting as to the right of appellee to the credits claimed by her, and the weight of the evidence seems to be against her right to some of them, but others of them might, with propriety, be allowed her without injustice to the appellant. We are not disposed, however, to enter upon an analysis of the evidence in regard to the credits, for what appellee may lose on that score can hardly exceed the loss sustained by the appellant in being deprived of its security, to the extent of the value of the horses embraced in the deed of trust, by their subjection to the debts of the creditors of appellee's husband. Moreover, if appellee's contention that she is not personally liable upon the notes sued on is sustained, she will have secured some measure of relief, as she will be protected against further loss, and this is evidently the view that was entertained by the chancellor when the case was before him, as the judgment rendered simply dismissed the petition, and allowed appellee her costs.

The further question to be determined then is, did the appellee, in executing the notes and deed of trust, assume any personal liability thereon? She was asked the question: "Before you signed the note and deed of trust, did you and Mr. Jones have any conversation as to the effect of your signing those papers?" To which she answered: "Yes; soon after Mr. Foote and Mr. Allen left, Mr. Jones came over and sat down by me, and I told him

the horses were mine, and that I had put my money in them, and that was the reason I wanted the land deeded to me, and that I was willing to give a mortgage on the land and the horses, but I was not willing to be bound in any other way, and he assured me that I would not be. He then got up and went over and stood by Mr. Ames until he got through writing the paper."

She was further asked: "When you executed the notes and deed of trust, did you have any idea that you were binding yourself to any greater extent than the property covered by the deed of trust?" To this question she answered "no."

She was further asked: "Would you have executed those papers if you had known or suspected that you were thereby binding yourself to a greater one?"

To which her answer was: "I never would have signed them in the world if I had had any idea of it."

Opposed to appellee's sworn statement that Jones assured her that she was assuming no personal liability by the execution of the notes and deed of trust, we have only the general denial of Jones himself that any officer of the bank or of the cattle company ever gave appellee any assurance that she would not be bound beyond the mortgaged property. On this point the interrogatory propounded to Jones was as follows: "State whether at the time of or before the execution of the land notes any officer of the bank or of the cattle company said to Mrs. Cleland that she would not be responsible beyond the land and the stock included in the trust deed, or anything to induce her to believe that would be the extent of her liability? State fully all that was said, if anything, bearing upon the question of her personal liability on account of the land notes?"

The witness' answer to this interrogatory was as follows: "No statement was made to Mrs. Cleland that in the purchase of the land and the execution of the notes therefor she would not be responsible on the notes beyond the land and the stock included in the trust deed, nor was there anything said to her to induce her to believe that that would be the extent of her liability. On the other hand, Mr. Cleland stated to me that Mrs. Cleland had outside resources from which she could make the payment in the event they were not able to do so in the ordinary course of business upon the farm."

It appears from the record that Jones' deposition was given before appellee gave hers. It follows, therefore, that the attention of Jones was never called to the statements of appellee as to the conversation with him, and so he never did in fact deny that he had that conversation with her. The general statement on his part that "no statement was made to Mrs. Cleland" that she would not be liable beyond the land and stock included in the trust deed should not, in our opinion, be allowed to outweigh her positive statement that at the time she executed the notes and trust deed Jones assured her that she thereby assumed no personal liability. Appellee in her deposition gives the time, place and details of the conversation with Jones, and he was never recalled or his deposition retaken to contradict her.

It must be borne in mind that every transaction of appellee and her husband with the cattle company and the bank was conducted with and through Jones as the agent and representative of those corporations; consequently it was perfectly natural that appellee should have communicated to Jones her

purpose to not become personally liable on the notes or deed of trust; and it was also natural that he should have given her the assurance that she did not become personally liable by her execution of the same, and that she should have been satisfied with his assurance to that effect. The general statements of the witnesses Ames and Mahorner, that no assurance was given appellee that she was incurring no personal liability, did not amount to a specific corroboration of Jones, or to a contradiction of her statement that Jones had given her such an assurance, especially as the testimony of appellee as to her conversation with Jones shows that the other persons in the room could not have heard it; but if the witnesses had been asked specifically whether they heard such conversations between appellee and Jones as that to which she testified, they might have remembered it, if in fact they were in a position to hear.

It is true that the language of the notes themselves import personal liability upon the part of the appellee, but the representation made to her by Jones was as to the legal effect of the notes, and not that they should be made to show upon their face that she was not to be personally liable thereon. A person of business experience and sagacity, situated as was appellee, might have been expected to see to it that the notes should be made to express the agreement that he was not to be personally liable for their payment, but it can hardly be expected that a person with as little business capacity and experience as the appellee seems to possess would, under such circumstances, have understood the importance of inserting in the notes themselves such language as would express the agreement to that effect. It is true that appellee's husband was present at the time she executed the notes and deed of trust, but as he is dead, and if living could not have testified after she had done so, her testimony is without support from him. We are of opinion that we can give to the notes sued on no other effect than that which the agent of the vendor of the land represented that they would have, and that appellee intended and understood they would have.

In 2 Pomeroy's Equity Jurisprudence, page 311, it is said: "Whatever be the effect of a mistake, pure and simple (discussing a mistake of law), there is no doubt that equitable relief, affirmative and defensive, will be granted, when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided or accompanied by inequitable conduct of the other party. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud. It is enough that the misapprehension of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party."

The same author, section 847, says: "A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other which he knew of and did not correct."

In *Jordan v. Stevens*, 81 Am. Dec., 556, the Supreme Court of Maine said: "If the party who himself knows the law, should deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud."

In the case of the Chestnut Hill Reservoir Co. v. Chase, 14 Conn., 123, the defendant relied upon a release signed by the plaintiff. Plaintiff replied that he had signed the release upon the faith of defendant's representation that it would have no effect upon the pending suit. The court said: "The facts contained in this replication show that the maker of this release was induced to execute it upon the representation of him who now claims to profit by it; that this was done when he could not conscientiously do it if it is to have the effect contended for; that the defendant, as well as the plaintiff were aware of this, and that the plaintiff did not intend to do any act inconsistent with the rights of his assignee. What he did then was induced by a reliance upon the assertion of the defendant that this receipt would not have that effect, and yet they now use it for the very purpose of producing that effect. Unless the defendant can produce some authority recognizing such a construction this court are not disposed to introduce a precedent establishing fraud by law."

In the case of Cathcart v. Robinson, 5 Pet., 264, there was a contract for the sale of land concluded with the following words: "In further confirmation of the said agreement the parties bind themselves each to the other in the penal sum of \$1,000."

The purchaser, Cathcart, claimed the right to surrender the land and pay the penalty of \$1,000, insisting that he understood when he entered into the contract that it gave him that right, and that Robinson, the vendor, knew that such was his understanding of the contract. The Supreme Court of the United States, in an opinion by C. J. Marshall, held that the defendant was entitled to have the contract enforced in accordance with his understanding of its effect at the time it was executed, the vendor knowing at the time that he understood the contract in that way. The court there said: "Had Mr. Robinson induced Mr. Cathcart to sign this agreement by suggesting that in point of law he might relieve himself from it by paying the penalty, a court of equity would not aid him in an attempt to avail himself of the imposition. The actual case is undoubtedly not of so strong a character. No untruth has been suggested, but if Mr. Robinson knew that Mr. Cathcart was mistaken, knew that he was entering into obligations much more onerous than he intended, that gentleman is not entirely exempt from the imputation of suppressing the proof. This is not a bill to set aside the contract. Mr. Cathcart does not ask the aid of equity. He asks that the parties may be left to their legal rights, or that the contract shall be enforced no further than as avowedly understood at the time of its signatures."

In the case at bar the appellee is only asking that the contract sued on be given the effect which the vendor permitted her to believe it would have, and since the chancellor has given it that effect, this court will be loath to disturb his judgment, unless it be made to appear that it is against the weight of the evidence, and in view of the state of facts presented by the record we are unable to say that the judgment is against the weight of the evidence. An affirmance in this case can only relieve the appellee of the payment of the \$6,400 claimed by the appellant to be yet due it on the notes sued on. It can not restore to her the loss sustained in the death of her horses from the Texas fever, or the sum expended by her in feeding and caring for the horses that were left in Kentucky from January 1 until the

spring of 1897, which losses may be attributed in part, if not altogether, to the negligence and wrongful conduct of the Interstate Cattle Co., or its assignee, the appellant. Upon the other hand, the appellee has gotten back its land, for it appears that after invoking the aid of a court in this State for the enforcement of its demands against the appellee, and while this action was yet pending and undecided, by its direction its agent and lawyer, Ames, who is likewise the trustee in the deed of trust, without notice to appellee, and for the evident purpose of concluding her right to assail the deed of trust, sold the land in controversy in Mississippi at public auction, the appellant itself becoming the purchaser thereof at the sum of \$2,100, and it now holds a deed to the land, and has attempted to give appellee credit for the \$2,100 on the notes sued on. Under these circumstances we find no equity in the claim of appellant to the amount yet demanded by it of the appellee.

Wherefore, the judgment is affirmed.

Whole court sitting.

Judges Hobson and Paynter dissenting.

Judge Paynter delivered the following dissenting opinion December 18, 1903:

I delivered the opinion of the court which was withdrawn, and it so fully states the facts and my conclusions, that I adopt it as my dissenting opinion, with some additional observations.

It reads as follows:

"On April 4, 1896, T. Horace Cleland, husband of the appellee, Ella M. Cleland, entered into a contract with the Interstate Cattle Co. of Macon, Miss., to the effect, that it was to increase its capital stock to \$25,000; Cleland was to take the stock and pay for the same at par value; the amount so invested to be used to purchase blooded mares and other improved stock, suitable for stocking its property. The value of the live stock to be agreed upon by the parties in interest, if possible, but if not, to be determined by disinterested parties in the usual way; Cleland was to give his undivided attention to the business of the company as manager, and for his services was to be paid \$480 per year. He was to have the right to keep some of his own horses and mares upon the property, and for which he was to pay pasturage. The property belonging to the company consisted of 1,600 acres of land in Noxube county, Mississippi, and a cash asset of about \$2,000. The value of the assets was estimated at \$18,000. Cleland was to take \$7,000 of the stock, thus increasing the capital stock to \$25,000. He lived at Lebanon, Ky., and owned seventy-five or a hundred head of pedigreed horses, and it appears to have been understood that he was to ship them to Noxube county, Mississippi. It was in contemplation of the parties, that his subscription to the capital stock was to be paid in the horses, although the written contract did not so state. Under the arrangement he was to take the horses to Mississippi about the first of January, 1897, at which time he shipped part of them, but it is claimed by the appellee, Mrs. Cleland, as there was no feed provided for them by the company, the balance were not then shipped. In March another consignment of the horses was made. Some of them were not shipped until after July 19, 1897. The contract between the parties as to the increase of the capital stock, etc., and acceptance of the horses was

never consummated. The Cleland horses were placed upon the company's land. He took possession of it as manager and proceeded to improve the place. Those representing the corporation claim that Cleland refused to have his horses valued, because he said they were not in proper condition, and that if they were valued he would not get for them what he was entitled to receive. Mrs. Cleland claims that the failure to value the horses was the fault of the cattle company; that when it was suggested that they be valued, its officers would postpone it for one reason or another. The cattle company claims that the horses were in such condition when they reached Mississippi, that they were hardly able to travel from the railroad to the land. Many of the horses died. Mrs. Cleland claims that she owned the horses under a contract with her husband. Some of his Kentucky creditors placed their claims in the hands of a Mississippi lawyer for collection. Thus the matter stood July 19, 1897, when the contract made between the cattle company and Mr. Cleland was abandoned by mutual consent. The cattle company then sold Mrs. Cleland 640 acres of the land. The contract price was stated in the deed at \$8,500, but a part of that amount consisted in advancements which the cattle company had made between January the 1st and that date, for the improvement of the property and the expenses of farming operations. As evidence of the indebtedness of the \$8,500, Mrs. Cleland executed her notes and her husband also signed his name to the notes below her's. To secure her notes, she executed a deed of trust on the land which she purchased and the horses that were then living. The Kentucky creditors instituted a proceeding in a chancery court of Mississippi to subject the horses to the payment of their debts, upon the ground that they belonged to the husband, and that the transaction between him and her was fraudulent. The chancery court decided, that the transaction between the husband and wife as to the horses was fraudulent, and that they should be subjected to the payment of the husband's debts in suit. The Supreme Court of that State affirmed the judgment. The horses were subsequently sold to pay the debts, thus leaving the land alone pledged to pay the purchase money debts. The Mississippi courts held the transaction was valid as to the deed of trust on the land. The land was sold under the deed of trust and only brought \$2,100. Shortly after the notes were executed, they were assigned to the appellant. This action is based upon the notes upon which credit is given for the \$2,100, the proceeds of the sale of the land.

"Mrs. Cleland resisted the payment of the notes upon the grounds: First, that she was assured by Mr. Jones, secretary of the cattle company, that she did not incur personal liability in the execution of the notes and the deed of trust; second, that if she can not thus be relieved, that the notes should be credited with the sum of six hundred and odd dollars, expenses paid by her for keeping the horses in Kentucky from January until they were shipped to Mississippi, and for the value of the horses that died in Mississippi before and after July 19, 1897; for the amount due for pasturage of other persons stock upon the company's land during the season of 1897; for the value of her husband's services as manager from January 1 to July 19, 1897; and some other amounts not necessary to mention; third, that there should be a rescission of the contract, because the land which she bought was infested with ticks; fourth, that the title to the land was defective, inasmuch as about five acres of it was in use for cemetery purposes.

"Under the Mississippi laws a married woman is personally bound upon her contracts. On the day the land was sold to Mrs. Cleland, the president of the cattle company and some of the directors and Mr. Jones, its secretary, met the Clelands at a lawyer's office to consummate the sale. Mrs. Cleland testifies that while the papers were being prepared she had a conversation with Mr. Jones, secretary of the cattle company, in the room where they had all assembled, and details it as follows: 'Mr. Jones came over and sat down by me and I told him the horses were mine, that I had put my money in them, and that was the reason I wanted the land deeded to me, and that I was willing to give a mortgage on the land and the horses, but I was not willing to be bound in any other way, and he assured me that I would not be.' Mr. Jones denies that he gave her such assurance. The lawyer testifies that he never heard such a conversation, and that it was never suggested to him in the preparation of the papers by any person, that Mrs. Cleland was not to be bound by the notes. The other persons interested in the cattle company who testified, deny any knowledge of such an arrangement as claimed by Mrs. Cleland. The notes import a personal liability. The notes were an acknowledgment of a personal liability and promise to discharge it. Her testimony is insufficient to overcome the evidence of the contract furnished by the notes and the testimony of Mr. Jones. In fact she wholly fails to sustain her claim that she was to be under no personal obligation to pay the notes. This conclusion of fact obviates the necessity of determining what would have been the effect had she established the fact that Mr. Jones gave her the assurance claimed.

"Mrs. Cleland testified that the agreement was at the time she signed the notes, that she was to have the credits which she claims. This is denied by Mr. Jones, and there is some other testimony which tends to support him, besides the circumstances attending the transaction are of the same effect. If it was the agreement that she was to have credits on the notes for the amounts claimed, it is inexplicable, why part of them were not given before the notes were executed. The amount of her husband's salary from the 1st of January until the purchase of the land was easily calculated; the amount which she had paid for the feed of horses in Kentucky during the period mentioned was easily given; the amount of the railroad freight was easily ascertained. If the cattle company was to pay for the horses that died previous to that time, and there were several of them, it would have amounted to several thousand dollars. If the credits were given to which appellee claims she is entitled, she would have owed but a small part of the debt evidenced by the notes. If the appellee was to have the credits which she claims, and she was assured that they would be soon given, it is difficult to understand why she would have given her notes for the purchase money of the property for five several amounts and make the last of them mature March 1, 1901. If these claims were to be given as claimed, it is singular that she and her husband would allow the cattle company to include in the notes the sums which it had advanced in the prosecution of the work on the ranch before the sale to her. The evidence shows that under the arrangement in the sale of the property, the appellee and her husband were to have the sums that were due by persons for pasturing stock on the ranch for that season; but the company claims that the appellee's husband who was look-

ing after the business for her was to collect these sums, but that he failed to do so, because he did not require them to be paid before the stock was taken from the place. There is a writing between the parties, which indicates that the cattle company agreed to collect these amounts. We are of the opinion that the notes should be credited with \$450, the amount specified in the writing.

"It is claimed that the contract of sale should be rescinded because the cattle company represented, through one of its officers, that they were native ticks which were affecting the horses, when as a matter of fact they were Texas ticks. It is claimed that the agent of the cattle company knew that they were Texas ticks. The ticks infested the stock early in the spring of 1897, and the record conduces to show that they gave the horses fever from which many of them died. It is not claimed that the cattle company knew that their land was infested with ticks before the Clelands moved upon it, nor is it claimed that the party who expressed the opinion that they were Texas ticks, had seen them at the time he did so. The appellee and her husband were fully aware of the fact that the horses had suffered and died from the bites of the ticks and had known that fact for some time before they purchased the land. It seems to us that it is wholly immaterial, whether they were native or Texas ticks, because their bites seem to have been productive of the death of many of the horses. So any opinion which an officer of the company expressed as to the character of the ticks, could not have deceived the appellee, because she knew the horses were dying of fever produced by their bites. In view of the fact that the record shows that the appellee was fully aware at the time she bought the land of the existence of the ticks upon it and of their effect on stock, she was neither misled nor deceived by any statement which any officer of the cattle company made to her as to the nativity of the ticks.

"The cemetery was situated within three hundred yards of the residence which the Clelands occupied for some months before purchasing the land. She could not help knowing of its existence. There was about five acres in it and it was not excepted out of the deed to Mrs. Cleland. It is not made to appear how the title to the cemetery lot was held. If the cattle company was unable to vest Mrs. Cleland with the fee to the lot, that would be no ground for rescinding the sale, as it was too inconsiderable a part of the tract sold. She is not entitled to damages in excess of the value of the land, because she knew of the exact location of the cemetery, and its proximity to her residence, and has exactly the same effect in the enjoyment of the property as a house, whether the cattle company could or could not vest her with the fee to it. She should be credited on her notes with the value of the land used for the cemetery, to wit, \$50.

"As Mrs. Cleland did not ask the bank to appeal the Lapsley case to the Supreme Court of Mississippi, she should not be made responsible for the damages or costs which appellant was compelled to pay on account of its prosecution.

"The purchase of the land was an extremely unfortunate venture for Mrs. Cleland. The consequences are such as may come to any one who makes a bad bargain. The courts can not make contracts for women any more than for men. They can not refuse to enforce them because they are women.

however calamitous the effect may be on their fortunes, if there is no reason in law or equity for such refusal. Mrs. Cleland instead of taking care of the debt which she had contracted, abandoned the property to be sacrificed at public sale, and the court can not protect her from the consequences of her act."

Courts should be just. It is not their province to be generous, for if they are, their generosity must necessarily inflict a great injustice upon the one at whose expense it is bestowed.

I again recur to the question of Mrs. Cleland's claim that she was to be under no personal liability for the debt. The opinion holds that because Jones was introduced as a witness and testified before Mrs. Cleland, that he never made the statement imputed to him, that Mrs. Cleland should not be "bound in any other way" than by the execution of a mortgage on the land and horses, he did not contradict her. When his deposition was taken, her defense had been filed and he knew what it was. The burthen was on Mrs. Cleland as to this issue of fact. Her deposition presumably was read first, and when his was read in rebuttal there was a complete denial of the statement she made, that she was not to be "bound in any other way." I call that a contradiction. It seems to me that its character as such can not be changed by merely stating that it is not a contradiction. Mrs. Cleland admits the contract of sale had been made before the parties assembled at the lawyer's office to reduce its terms to writing. She also admits the deed to her for the land had been written, signed and acknowledged by Judge Foot, president of the cattle company, in her presence before she claims to have had the conversation with Jones. The writings including the notes were read to her and the notes were signed by her after the alleged conversation with Jones. Is it not remarkable that a woman who was so sagacious, that she did not want to be made personally liable for the debt and had told Jones so and he had agreed that she should not be, that she did not refuse to sign the notes, unless they were so drawn as not to import personal liability? The conclusion to be drawn from the record is, that the business associates of Jones were reputable men and he was especially so for Mrs. Cleland said in her amended answer and counterclaim, that he "was a man of large means and high moral repute and integrity." The president and directors of the cattle company had assembled to reduce the terms of the contract to writing and it is not claimed that a suggestion was even made to them or their attorney that the notes were not to bind Mrs. Cleland.

The only one who did this according to the claim of Mrs. Cleland, was Jones and he did it privately to her. It is not claimed that Jones told Mrs. Cleland, under the laws of Mississippi she would not be bound by the notes, or that the words of promise in the notes did not import a personal liability; nor is it shown that it was to be written in the notes that she was not liable thereon. Hence there was no fraud practiced in obtaining her signature to the notes, nor were there any fraudulent representation as to the law of Mississippi, or as to the legal import of the notes. There is no mistake in the execution of the notes, as the parties did not agree that the notes should be written in words different from those employed in them. So we have a case where a party who executed notes for the absolute and unconditional payment of money is seeking to defeat a recovery by alleging and attempting to

prove the money was not to be paid by the promisor. Suppose a case where A. sells B. a horse for \$100, for which B. executes to A. his note containing an absolute and unconditional promise to pay the money. Can A. defeat a recovery by showing a contemporaneous agreement, that he was not to be personally bound on the note? I think not. There would be a valuable consideration for the execution of the note. It was voluntarily executed, hence there would be neither fraud nor mistake in its execution. The fact that a mortgage was given to secure the note, would not affect the question of personal liability. To refuse a recovery on such a note, would be doing so without either fraud or mistake, or a want of consideration being shown. The evidence that A. agreed that B. should not be personally bound on the note, would be subject to the objections, viz., first, it would be allowing a party to contradict the plain terms of a writing, which could have no legal effect, unless, enforced according to its terms; second, it would be allowing evidence of a contemporaneous agreement, which would not only vary the terms of the writing, but nullify it, without showing that it was omitted by fraud or mistake. This conclusion is supported by Greenleaf on Evidence, volume 1, section 275, wherein it is said: "When parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice possibly of one of the parties is rejected. In other words, as the rule is now more briefly expressed, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

So far as I am aware no court of last resort (except in this case) has ever failed to observe this well settled rule. This court in numerous opinions, has recognized its correctness. As there was neither fraud nor mistake in the execution of the written contract evidence of a verbal agreement pertaining to the subject matter of it made before or at the time of its execution and not embraced therein, is not admissible for the purpose of restricting, enlarging or in any way varying its terms. (*National Mutual Benefit Association v. Heckman, &c.*, 86 Ky., 254; *McDaniel, &c. v. Evans, &c.*, 90 Ky., 568.) The effect of the opinion of the court is to so change the language of the notes that instead of reading "I promise to pay" they are made to read, "I do not promise to pay" the sums stated in the notes.

For the foregoing reasons I dissent.

COMMONWEALTH, USE, &c. v. TRENT, JR., &c.

(Filed December 9, 1903.)

1. Wasting natural gas—The provisions of section 3910 of the Kentucky Statutes, which require the person or corporation in possession, whether as owner, lessee, agent or manager, of a gas well, within a reasonable time, not exceeding three months after its completion, in order to prevent the

product from wasting by escape, to "shut in and confine the same in said well until such time as it shall be utilized," and of section 3912, which imposes a penalty for the violation thereof, are not restricted in their construction to the wasting of the gas at the well, but apply to the acts of persons in possession who, for the purpose of and with the intent to waste natural gas, conveyed the same away from the well by pipes and there burned it under a mere pretense of using it for some lawful purpose.

2. Construction of statute—The fact that certain sections of "An act to prevent the wasting of petroleum, natural gas, salt water, and to provide for the plugging of all abandoned wells," related solely to the plugging of abandoned wells, and the act recited that, inasmuch as there were numbers of wells from which petroleum, natural gas and salt water were flowing because the same had been abandoned and never plugged up, an emergency existed and that the act should take effect from and after its passage, does not justify the construction that, therefore, those sections of the act which related to the plugging and stopping up of wells applied only to abandoned wells.

3. Same—A penal statute should be construed liberally with a view to carrying out the legislative intent and to promote its objects.

J. D. Hardin, Clifton J. Pratt and J. W. Lewis for appellants.

Humphrey, Burnett & Humphrey, F. M. Sackett and Alexander G. Barrett for appellees.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Hobson.

This is a penal action instituted by the Commonwealth against appellees. The court sustained a demurrer to the petition, and dismissed the action. The only question on the appeal is whether the facts stated constitute a cause of action. It is averred in the petition that the defendants conspired and confederated together for the unlawful purpose of obtaining and wasting natural gas from lands embraced in the gas belt of Meade county, Kentucky; that to effectuate and carry out this purpose they bored six wells in this gas belt, four of them proving to be fine producing gas wells and yielding about 600,000 feet of gas per day; that these wells were in the possession and under the absolute control of the defendants, either as owners, agents or managers, and that the defendants, under the pretense of manufacturing lamp-black, but really with the unlawful purpose to waste the gas and destroy the gas territory in Meade county, Kentucky, willfully and maliciously burned and wasted all of the gas from the four wells after it had been piped into a general tank or gasometer from the — day of December, 1901, to the 14th day of June, 1902, in violation of the rights of the owners of the gas land, and contrary to the provisions of the statute. It is also alleged that the wells were not utilized by the defendants within three months after they were bored, nor shut in so as to prevent the product from wasting by escape, but that the defendants suffered and permitted the gas to escape and waste as above set out.

It is insisted for the appellees that the facts stated make out no cause of action under the statute for the reason that it is not charged that the gas was allowed to waste by escape at the well, and that the legislature did not mean to make criminal the use by the citizen of his own property, even though that use brought him no pecuniary profit, or was unwise. On the

other hand, it is insisted for the State that if the defendants willfully and maliciously wasted the gas, the form in which they did so is immaterial under the statute. The question turns upon the proper construction of the act, which is as follows:

"An act to prevent the wasting of petroleum, natural gas, salt water, and to provide for the plugging of all abandoned wells.

"Be it enacted by the general assembly of the Commonwealth of Kentucky:

"Section 1. That from and after the passage of this act any person or corporation, and each and every of them, in possession, whether as owner, lessee, agent or manager, of any well in which petroleum, natural gas or salt water has been found, shall, unless said product is sooner utilized, within a reasonable time, not, however, exceeding three months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized: Provided, however, That this section shall not apply to gas escaping from any well while it is being operated as an oil well, or while it is used for any fresh or mineral water.

"Sec. 2. That whenever any well shall have been put down for the purpose of drilling or exploring for oil, gas or salt water, upon abandoning or ceasing to operate the same the person or corporation in possession as aforesaid shall, for the purpose of excluding all fresh water from the gas-bearing rock and before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty feet above the rock which holds the oil, gas or salt water, and drive a round seasoned wooden plug, at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing; and immediately after drawing the casing shall drive a round seasoned wooden plug, at a point just below where the lower end of the casing rests, which plug shall be at least three feet in length, tapering in form, and of the same diameter, at the distance of eighteen inches from the smaller end, as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven there shall be filled on top of the same sand or rock sediment to the depth of at least five feet.

"Sec. 3. Any person or corporation who shall violate any of the provisions of the first or second sections of this act shall be liable to a penalty of \$100 for each and every violation thereof, and the further penalty of \$100 for each thirty days during which said violation shall continue; and all such penalties shall be recovered, with cost of suit, in the name of the State, for the use of the county in which the well shall be located.

"Sec. 4. Whenever any person or corporation in possession of any well in which oil, gas or salt water has been found, shall fail to comply with the provisions of the first sections of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the neighborhood of said well, may enter upon the lands upon which said well is situated, and take possession of said well from which oil, gas or salt water is allowed to escape, or waste, in violation of said first section, and tube and pack said well, and shut in said oil, gas or salt water, and may maintain a civil action in any court of this State against the owner, lessee, agent or manager of said well, and each and every one of them, jointly and severally, to recover the cost

thereof. This shall be in addition to the penalties provided by the third section of this act.

"Sec. 5. Whenever any person or corporation shall abandon any well, and shall fail to comply with the second section of this act, any person or corporation lawfully in possession of lands adjacent to or in the neighborhood of said well may enter upon the land upon which said well is situated, and take possession of said well, and plug the same in the manner provided by the second section of this act, and may maintain a civil action in any court of this State against the owner or person abandoning said well, and every of them, jointly and severally, to recover the cost thereof. This shall be in addition to the penalties provided by the third section of this act: Provided, This section shall not apply to persons owning the lands on which said well or wells are situated and drilled by other parties; and in case the person or corporation drilling said well or wells is insolvent, then, in that event, any person or corporation in possession of lands adjacent to or in the neighborhood of said well or wells may enter upon the land upon which said well or wells are situated and take possession of said well or wells, and plug the same, in the manner provided for in the second section of this act, at their own expense.

' Sec. 6. Inasmuch as large quantities of petroleum, natural gas and salt water are now flowing to waste in this State from wells which have been abandoned and never plugged up, and inasmuch as the said waste is likely to be greatly increased by developments now in progress, therefore, an emergency exists; and on account of such emergency this act shall take effect and be in force from and after its passage." (Acts 1891-2-3, page 60; Kentucky Statutes, sections 3910-14.)

It is argued with much force that as by section 4 the adjoining owner is allowed to take possession of and plug up any well from which gas is allowed to escape by waste, and as by section 6 the act is made to take effect from its passage because of the gas then flowing to waste from wells which had been abandoned and never plugged up, the whole act applies only to abandoned wells, or those left open, and not to waste of gas elsewhere than at the well. Sections 2 and 5 by their terms apply to abandoned wells, and the existence of these abandoned wells is the reason given in section 6 for making the act take effect from its passage; but sections 1 and 4 are not by their terms limited to abandoned wells; and as abandoned wells are fully provided for by sections 2 and 5, it must be concluded that in sections 1 and 4 the legislature was providing for wells that were not abandoned. The fact that certain cases were deemed by the legislature a sufficient reason for making the act take effect from its passage, does not show that only these cases were intended to be remedied. Nor does the fact that a remedy is given in a certain class of cases to the owners of the adjacent land indicate that appellees might not be liable in another class of cases for the penalty of wasting the gas under section 1. Section 4 applies only to a well "from which oil, gas or salt water is allowed to escape or waste," and from its phraseology applies only to waste at the well or to wells left open. It does not apply to abandoned wells, for these are provided for by section 5, nor does it apply to any well that is shut in, for the adjoining owner is authorized by the section to "tube and pack said well, and shut in said oil, gas or salt water." The

section does not contemplate that the adjoining owner may commit a breach of the peace, or take possession of a well which is shut in, and from which the gas is piped to another point. But section 1 requires that every person in possession as owner, lessee, agent or manager of any well in which petroleum, natural gas or salt water has been found, "shall, unless said product is sooner utilized, within a reasonable time, not, however, exceeding three months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized." This section looks to the utilizing of the product of the wells. It requires the product to be shut in and confined in the well until such time as it shall be utilized in order to prevent its wasting by escape. The person in possession of a well who fails to shut in and confine the product in the well until such time as it shall be utilized, violates the letter of the statute, regardless of how the product may be destroyed after its escape from the well; for if the product is confined in the well until such time as it shall be utilized, as required by the statute, it can not be wasted in any way; and to allow it to waste by escape in any way is not to shut it in or confine it in the well until such time as it may be utilized. Section 4 applies only to wells from which the gas is allowed to escape, but section 1 is not limited to waste at the well, and is violated if the gas is not confined in the well until such time as it may be utilized. Section 1 is much broader than section 4, which covers only a part of the ground covered by section 1. If the gas is confined in the well until such time as it may be utilized, it can not escape from the well; but it may not escape from the well, and yet waste by escape elsewhere, if not confined in the well until it is utilized. The words "wasting by escape" are very broad, and apply equally whether the escape is at the well or at the end of a pipe leading off from the well. The statute must be given a reasonable construction with a view to the mischief intended to be reached. The purpose of the act is to prevent the waste of the natural products referred to, and if the defendants maliciously and willfully wasted, and intended to waste, the gas from their wells, it is immaterial whether they suffered the gas to escape at the well or piped it off to another place, and there allowed it to escape. It is well known that the supply of gas is limited, and may be exhausted. The act is intended to protect the supply from waste. Under the act it is conceded a person to exhaust the supply of his neighbor can not put down wells on his own land and allow the gas to escape at the well. To allow him to pipe it off a short distance from the well and let it escape would be to sustain an evasion of the statute. And if he went through the form of burning it, but simply for the purpose of wasting the gas, and as a pretense to evade the statute, this, too, would not affect his liability. The defendants had the right to use the gas in any sort of lawful business done or attempted to be done in good faith, but if the use of the gas was a mere pretext for wasting it, they are none the less responsible than they would have been if they had allowed it to escape at the well. By sections 459-460, Kentucky Statutes, it is provided:

- "There shall be no distinction in the construction of statutes between criminal or civil or penal enactments. All statutes shall be construed with a view to carry out the intention of the legislature." (Section 459.)

"The rule of the common law that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary, its provisions are to be liberally construed with a view to promote its objects."

All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning."

These are the provisions of "An act concerning construction of statutes," approved December 3, 1892, enacted by the same legislature as the act in question. (Acts 1891-2-3, page 372.) This act materially changes the common law rule as to the interpretation of statutes. It was within the competency of the legislature to enact the statute, and it is incumbent on the judiciary to enforce it. Under it penal enactments must be construed as other statutes with a view to carry out the intention of the legislature, and all untechnical words and phrases must be construed according to the common and approved usage of language. This has been often announced by the court, and there is nothing in the cases relied upon for appellee (*McMasters v. Burnett*, 92 Ky., 358; *L. & N. R. R. Co. v. Commonwealth*, 23 Ky. Law Rep., 1986) that was intended to conflict with the provisions of the statute which is the law of the State. (*Commonwealth v. Gale*, 10 Bush, 488; *Bailey v. Commonwealth*, 11 Bush, 688; *Commonwealth v. Davis*, 12 Bush, 242; *Williams v. Commonwealth*, 73 Ky., 93.)

The common law rule as to the strict construction of penal statutes has in modern times been much relaxed. In *Endlich on Interpretation of Statutes*, section 329, it is said: "A court is not at liberty to put limitations on general words which are not called for by the sense or the objects or the mischiefs of the enactment; nor to so narrow the construction as to exclude cases which the words of the statute in their ordinary acceptation and plain meaning, or in the sense in which the legislature obviously used them, would comprehend; and no construction is admissible which would sanction an evasion of an act or would defeat the obvious intention of the legislature. In order to avoid such a result as has been seen, it is even allowable to reject what is clearly surplusage in an act. It is true that a penal law must be construed strictly, and according to its letter. But this strictness, which has run into an aphorism, means no more than that it is to be interpreted according to its language."

It is true that the legislature, not the court, must define crime, and ordain its punishment. The intention of the legislature is to be collected from the words employed, but in construing a statute, as in the case of other instruments, the court will look to the whole act and the purpose of its makers in its enactment. The court can not depart from the plain meaning of the words in a penal act, and adjudge that punishable under the statute which its language does not fairly cover. (*U. S. v. Wiltberger*, 5 Wheaton, 95.) But in determining what may be punished under the words of a statute, the court must apply the rule that every statute shall be construed liberally with a view to carry out the intention of the legislature and promote its objects, taking all ordinary words and phrases according to the common and approved use of language.

In the case before us it was incumbent on the appellees, under the express
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language of the statute, to confine in their wells the product until such time as it should be utilized, and if they violated this provision of the act they became liable to its penalties. They did not confine the products in the wells if they piped it off and allowed it to waste by escape. The case, therefore, falls within the words of the statute as well as its spirit and purpose. It must be presumed that appellees knew the law, and when they knew that they could not leave their wells open, and thus exhaust the supply, they can not be allowed, as alleged, willfully to accomplish the same result by piping it away from the well, not for the purpose of utilizing it, but as a pretext to avoid the statute, and thus willfully to destroy the gas, notwithstanding its provisions. To hold such a state of facts not within the statute would be to allow a mere evasion to defeat it, and to so limit its application as practically to destroy it.

The position that the defendants may do what they please with the gas after it is reduced to possession by them can not be maintained, for as the gas goes out of the gasometer its place is taken by other gas coming from the well. Property is the creation of law. The use of property may be regulated by law. The legislature may protect from waste the natural resources of the State, which are the common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the State and its citizens of the many advantages incident to its use; that the legislature may prevent this is well settled. (*Ind. v. Ohio Oil Co.*, 47 L. R. A., 627, 177 U. S., 190; *Donahue on Petroleum and Gas*, section 28.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

OWSLEY, SR. v. OWSLEY, JR.

(Filed December 10, 1908.)

1. New trial—Newly-discovered evidence—Where the father had testified, in an action between himself and his son involving the question of the title to a farm which the son claimed as a parol gift from his father, that the various sums which he had expended in the management and operation of the farm had been expended by him in the exercise of his ownership thereof and not on behalf of the son and out of funds belonging to him, as alleged by the son, such testimony being competent on the question of who was in the actual, adverse possession of the farm during the time in dispute, a private memorandum book, in the handwriting of the father, containing admissions damaging to his contention that the sums expended on the farm had not been charged to the son, and which had been concealed, was, when discovered after trial, material evidence which the ordinary diligence of the son could not have produced at the trial and which authorized the granting of a new trial.

2. Same—Cumulative testimony—The entries of the memorandum book having furnished evidence that was unerring and convincing that the father had actually charged the son with the expenses of maintaining and operating the farm in controversy from the date of the alleged gift, as contended by the son on the trial, that fact was material as bearing on the question of

possession, and was not cumulative within the meaning of the rule which forbids the granting of a new trial upon the discovery of cumulative evidence merely.

3. Adverse possession.—Where the father and the son continued to reside together on the farm for many years after the alleged gift from the father to the son, the mere fact of the father's presence upon the premises during the time that the son was claiming the possession and title under the gift was not ipso facto a breach of the son's possession; and if he did not accompany his presence with some claim of ownership, or if he disclaimed ownership, admitting that it was in the son, the running of the statute in favor of the son would not be stopped by such presence.

J. H. C. Sandidge, Allen Sandidge, W. P. Sandidge and Carroll & Carroll for appellant.

Allen & Ewing, Hazelrigg & Chénault and J. E. McMurtry for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge O'Rear.

W. F. Owsley, Sr., a retired banker and merchant, and a man of wealth, owned and lived upon a farm of 235 acres on Cumberland river, near Burksville, Ky. The farm was well improved, and was then worth about \$10,000. His family in 1874 consisted of his wife, single daughter, son (appellee) and mother-in-law. His wife was frail, and died about 1881. His mother-in-law was an invalid. The single daughter married Dr. Grant and removed to Louisville in 1886. Appellant had only three children. Another daughter had married a Mr. Baker before appellant moved to the farm in question, and was living with her husband. The only son had never lived away from his father. He had been reared indulgently, and had all his life been the close companion of his father. The day he was twenty-one years of age his father gave him \$10,000 in secured notes, which were immediately redelivered by the son, with the request to his father to hold them and collect and reinvest them, which was done. In October, 1874, the son married the daughter of an old friend and business associate of his father, and at the latter's invitation brought his wife to his home to live. The son claims that within a few weeks thereafter he and his father walked out on the farm one morning, when his father inquired of him his purpose as to a vocation in life. He answered that he wanted to engage in farming; that he was not qualified for anything else; besides that was in accord with his taste. He says that his father expressed gratification at his choice, and thereupon told him that he would and did then and there give him that farm, and all its stock, and for him to take charge of it; that he did then and there assume charge, and took entire control of the farm; that upon returning to the house appellant repeated in the presence of his wife and daughter-in-law what had occurred; that continuously from that time to the present appellee has occupied, used and controlled that farm, laboring upon it and improving it, under claim of title, as his own, exclusive of all others. The father continued to live in the house; his wife lived there, too, till her death; his mother-in-law lived there till her death; his youngest daughter lived there till her marriage to Dr. Grant.

The son (appellee) began to handle horses. The father (appellant) suggested to handle them on a larger scale, and of a finer quality. So they em-

barked in that business about 1887 under the style of W. F. Owsley & Son. The father claims he had no interest in that partnership; that he merely loaned his name to give credit to his son. The son claims that the partnership did exist; that he and his father agreed that the father would put into the enterprise the use of three other farms which he owned lying adjacent to the home place, and the son agreed to put in the use of his farm, the home place; that the father agreed to advance the necessary cash to conduct the business. It was continued about eight or ten years, and then abandoned. Whether it made or lost money is not clearly shown. An incident connected with the firm's bank account in which the son took a position contrary to his father's views, and hostile to his interests as he thought, produced strained relations between them about 1899. Up to that time all the expenses of running the farm, maintaining the family, even to clothing and schooling the son's children, were paid by appellant. Appellee claims that that occurred this way: That his father had the possession of all his money, the \$10,000 and its accumulations; that every dollar of produce and stock sold from the place was taken by him and delivered to his father, who made, or was supposed to make, proper entries of it on his books. The purchase price of horses and other live stock brought to the place was likewise paid by appellant, and when they were sold by appellee he handed the money to appellant. Appellee says his father was cashier, as it were, and was helping him in his business, telling him all the time that he was keeping an accurate account of all that he paid out for him, and that it would be charged against appellee in the final settlement and distribution of appellant's estate. The father's sagacity and success as a business man were well known, and appellee says he relied on these qualities as aid given him by his father; that the daughters had been abundantly provided for by similar gifts, aggregating from \$30,000 to \$50,000 each, and that he understood from his father that he was by this conduct of his affairs giving him an equivalent sum. Following the difference above alluded to, appellant refused to pay certain bills contracted for the family in the usual course, including the payment of the tuition and board of one of appellee's daughters at college, which appellant had been theretofore paying. Appellee's wife then said she would pay it, and for him (appellant) to charge it to her account out of her money that he had. Appellant denied that she had any money; and denied that either of them had any money or any other property. Appellee and his wife had evidently been under the impression that they had considerable property. So, she brought a suit to compel an accounting by appellant of her estate which she says he had received for her from her former guardian directly after her marriage. The facts of that controversy and its result may be seen in an opinion this day delivered in the appeal of W. F. Owsley, Sr. v. Sallie A. Owsley. Thereupon appellant left the home, electing, so he says, to be dispossessed, and brought an action of ejectment against appellee to recover the possession of the home farm of 235 acres. The case came on to trial regularly, before a jury, resulting in a verdict and judgment in favor of appellant. Upon that trial appellee testified to the facts in his favor above stated. Appellant denied that he had ever given to his son the home farm; or that he had ever surrendered the possession of it to him. A great many witnesses were introduced whose testimony tended to show that appellee had

been in the possession claiming the farm as his own, and that they had heard appellant during many years state that he had given the farm to his son who was in possession and control of it. Appellee's defense relied upon an adverse possession for fifteen years under the parol gift, thereby vesting him with the title to the land. So that the whole case turned upon the question of who was in fact in the possession of the place during the time from 1874 till the suit was filed in 1900. The fact that both appellant and appellee had during the whole time lived there, complicated the question. The further fact that appellant paid all the expenses, including farm hands, servants at the house, for fuel, grocery bills, clothing bills, for repairs in the way of fencing, new buildings, etc., was, unless explained satisfactorily, crushing evidence to defeat the son's claim of possession. To offset that, appellee testified and proved that his father had the \$10,000 mentioned of his, the son's, money in possession, and that it had been used in paying these very expenses. But it was shown that the money so paid out by appellant was largely in excess of the son's money which he held. This was explained by the son, that he also turned back to his father, as cashier, all money derived from sales of the produce of the farm and stock. Still, that fact, by itself, proved little or nothing, for it was not incompatible with appellant's claim of ownership and possession. Indeed, it proved about as much one way as the other. The son then claimed that some part of these expenses had been charged to his wife, whose money his father held. If appellant was using appellee's money, and his wife's money, in paying the family and farm expenses, it amounted to the fact that the family and farm were being managed and run by appellee, and not by appellant. But the amount expended exceeded in the aggregate both the son's and wife's personal estates which appellant had. Appellee also testified that his father at the time and at various times told him that he was giving him the sums so paid out for him; that they were in the nature of advancements, and would be and were being charged against his interest in appellant's estate; that in this way he was being equalized with his sisters. If this is true, it would amount to this: Appellant had given his son \$10,000 in money, and paid out for him about \$40,000 additional net, which he at the time intended, and which was in fact of the nature of a settlement in life. It does not matter that the sums were paid out at different times and in small amounts. If the aggregate sum of \$40,000 had been turned over to the son, and he had used it as it was used, it would not be questioned that it was his money, and that in so employing it, he had defrayed his own expenses, and would thereby have tended strongly to prove his possession of the farm upon which it was expended. Or, if the \$40,000 had been turned over to the son in one lump, and he had entrusted it to his father precisely as he did the \$10,000—and then the father at his son's instance, had paid the latter's bills and accounts for managing and running the farm, it would be the same thing in fact, and in law, as if the son had done the paying in person. So, it will be appreciated that the question of appellant's intent, and of his statements to his son that he was giving him as a portion in life, these various expenses, was not only of material, but might be of controlling importance in fixing the question of who was actually in possession of the farm. Appellant testified in that action as a witness on his own behalf. He claimed that he had managed the farm

during all those years, claiming it as his own, and that he had not paid any of the expenses mentioned out of either his son's or daughter-in-law's money, and had not told his son that these payments were gifts to him, and that he had not charged or intended them as such. Admissions against interest are not of the highest order of evidence, and, when they do not amount to an estoppel, are by no means conclusive. So, although many witnesses, fifteen or more in number, testified that appellant had told them at various times running through the period of twenty-five years in question, and although appellant in a certain law suit had testified under oath, that he had given appellee the farm, and that appellee was in the possession of it, yet if in fact appellant had not surrendered the possession and control, the jury in the ejectment suit were authorized in finding for him.

After the term of the court at which the ejectment action was tried, appellant gave his deposition as a witness in his own behalf in the suit pending in the same court, of Sallie A. Owsley v. W. F. Owsley, Sr. That case has been referred to above. To understand the question here presented, it is enough to state that in that action Mrs. Owsley claimed that she had delivered to appellant to be held by him in trust for her about \$11,000 in cash, derived from her father's estate, and that he refused to pay it over to her, or to account for it. He denied the existence of the trust agreement, and averred that he had already paid it to her and to her husband at her instance. In testifying in that action in support of that defense, he stated that the money was paid out to the husband and at his instance (but comparatively little of it was paid to her directly) in the matter of paying his accounts. These accounts were put in evidence. They were for merchandise for his family, grocery supplies, fuel, servants' hire, wages of farm laborers, purchase price of the horses and other live stock bought and brought to the farm; for fencing and other improvements put upon the farm; indeed, it embraced every conceivable item of expense in managing and operating that farm, including all the household expenses, throughout the term in question. She denied that appellant paid these sums either for her or her husband, otherwise than as gifts by way of advancements to W. F. Owsley, Jr. Appellant, in testifying, said that they were accounts charged to her husband, every dollar of it. He was confronted on cross-examination by his statement on the trial of the ejectment suit that none of these matters had been charged to her husband or to her, and asked to explain it. He answered that the question involved in that suit was one of possession, and that he made the statement on the trial of the ejectment suit "for the purpose of possession," whatever that may mean. But the important fact was developed in the examination that appellant had kept certain books, which he called "head books," and cash books. On these he undertook to enter every financial transaction of his life, as it occurred daily, from about 1861 to that time. These "head books" were small pocket memorandum books. They were more in the nature of a diary of his money transactions. They were in no sense books of account, or what is known as "shop books." From these books appellant drew off in or about the year 1894 an account against his son, Wm. F. Owsley, Jr., charging him thereon with all the items constituting the expense of running the farm and the household from 1874 down to the date the account was stated. He says that he was then engaged in drawing off the accounts

of all his children, with the view to seeing what he had advanced or paid out for them. About that time he made a will. This statement and these books, with appellant's testimony in the Sallie A. Owsley case, show indisputably the following facts; that appellant did keep a memorandum of every item paid to or for any of his children; that he had, before this suit, and before any controversy, drawn off an account against each of his children, setting down the item he deemed it proper to be charged to each, not with any intention or expectation of having them account for them, but to "see how much he had advanced to them," as he put it; that on Wm. F. Owsley, Jr.'s, account were included the items which the son claims were paid for him as gifts to become advancements. These books and accounts are all in the handwriting of appellant, and show what was probably his intention at the time of the payments made by him. The will made by him at or near the time these accounts were drawn off was not produced. Appellant says that since this controversy he had destroyed it, and written another. When asked what the destroyed will contained, his counsel objected, and advised him not to answer. Though pressed, he refused to answer. It may be that that will would have shown conclusively the purpose of drawing off the accounts, as well as the purpose in carefully keeping a diary of money and property paid for or given to his children.

Upon these developments in the Sallie A. Owsley suit appellee filed his petition in the Cumberland Circuit Court for a new trial of the ejectment suit, alleging newly-discovered evidence, to wit, the fact that his father had kept an account in which all the expenses of maintaining and operating the farm since 1874 had been charged to appellee, that the fact of the existence of the books and accounts was unknown to appellee till after the term of court at which the ejectment case was tried, and that he could not have learned of it sooner by any sort of diligence.

The circuit court granted the new trial. This appeal is prosecuted to reverse that judgment. A private memorandum or account book, in the handwriting of a party to a litigation, containing admissions damaging to his cause, the existence of which is concealed, if discovered after the trial, are clearly of that character of material evidence which the ordinary diligence of his adversary could not have produced at the trial. The adversary party not only did not know of the existence of such an account, but was further misled by the testimony of his opponent into supposing that none was in evidence.

It is objected, though, that the newly-discovered evidence is merely cumulative, and as this court has repeatedly held that a new trial will not be granted upon the discovery of evidence that is only cumulative, the circuit court should not have granted this new trial. The newly-discovered evidence was of a higher grade and different character from any heard on the original trial. It was not cumulative in the sense of the term as generally employed in opinions passing on that question. The trial court is enjoined to disregard those matters of practice that do not affect the substantial rights of the parties (section 134, Civil Code). It is because of this policy, and the phrase in section 340, Civil Code, "material to the party applying," that this court holds that the discovery of more evidence of the same character and grade as that already heard and considered by the trial court, and

which would not in all probability affect the result of another trial, will not justify the granting of a new trial. But where the newly-discovered evidence is of a character that is unerring, and convincing, satisfying the mind of the judge that it will probably have a preponderating influence upon another trial, a new trial should be granted. If appellant's position in the Sallie A. Owsley suit as to charging these items to and furnishing them for his son, is true, it would follow that if appellant died intestate, these items or the great bulk of them could be charged against appellee's interest in his father's estate as advancements. Appellee would in that event be made to pay for them. Yet, in the ejectment suit they were necessarily treated by the jury, because of W. F. Owsley, Sr.'s, statements when testifying, as not being appellee's accounts. If the truth is, that these items were given to him by his father as advancements, for which he will ultimately have to account, then appellee ought to have the benefit now of that fact as bearing on the question of his possession and control of the farm in dispute. But the question most seriously urged is, whether the evidence upon the former trial, even when considered with that newly-discovered evidence, does not show that as a matter of law appellant was never out of the possession of the farm.

It is conceded that by the parol gift no title passed to appellee. Nor did appellant's admission that he had given his son the property, nor did even his oath to that effect in a trial in another case, divest appellant of his title. If that has been done it is solely because appellee has, by a continuous adverse possession for fifteen years, under claim of title, thereby acquired it. It has been decided a number of times by this court that such possession by the donee under a parol gift, will ripen into a fee-simple title. (*Commonwealth v. Gibson*, 85 Ky., 666; *Thomson v. Thomson*, 98 Ky., 435; 14 Ky. Law Rep., 518; *Creesh v. Abner*, 106 Ky., 239, 20 Ky. Law Rep., 1812; *Gilbert v. Kelly*, 22 Ky. Law Rep., 353.)

But it is urged with great force that appellant has never been disseized; that he has daily entered upon the premises in dispute, and has exercised acts of dominion over them; and that the law attaches the actual possession to the holder of the legal title when both he and an adverse claimant are upon the disputed premises.

The character of possession for the statutory period necessary to toll the right of entry by the legal title holder, must be such as amounts constantly to a trespass against the true title; that is, it must be an actual physical entry upon or control of the premises, and be continuous; it must be open; that is, it must of itself be such as to afford notice to the rightful owner of its hostile nature; it must be adverse; that is, it must be against and in defiance of the claim of the real title holder, and be such as to exclude his authority, and it must be accompanied by the claim by the occupant that it is his property. This claim may be by speech, or by such acts of authority as indicate it. It is obvious that two persons claiming against each other, can not at the same time be in the actual possession of the same premises, either in law or in fact. If both are present claiming the title, the possession is his who has the title. The possession of the wrongful occupant in that case would be restricted to that space over which he wields an exclusive physical dominion. But it does not follow by any means that the mere presence of a

person upon a piece of property gives him the possession of it, either in fact or in law, for any purpose, e. g., a guest in my house, or the presence of my servant, or of a bare licensee. It is equally essential that the physical entry should be accompanied by a claim of right. So that if one enters, admitting the title and possession of another as owner, the latter's possession in law is not disturbed. To oust the actual possession of a claimant, another must enter also claiming the right of entry. When the owner sells or gives his land by parol, he is not forced to repudiate his act. He may recognize it as valid if he chooses. If his vendee is in possession, claiming the title as a right, the owner of the legal title may admit, when subsequently entering upon the land, that both the title and possession are in his vendee, and that his presence is in nowise hostile thereto. If he does, then by what principle of law can there be ascribed to his presence an effect which he neither designed nor at the time desired? Why should the law claim for him that which he failed to claim, and claim it in spite of his intent?

Therefore, if appellant, though present on the land which he is alleged to have given to appellee by parol in 1874, and put him in the possession of, was not claiming the land as his own, but was on the contrary disclaiming it, and if he in fact exercised no act of ownership, in authority as owner, but was there as the guest of his son, the latter's possession was not thereby interfered with.

In *Thomson v. Thomson*, 93 Ky., 485, it was held that an entry by a donee under a parol gift was hostile to the legal title, and if possession was held thereunder for fifteen years, the title in the donee was perfected. In that case, the court, in most emphatic language, approved this instruction as embodying the law of adverse possession: "If the jury believe from the evidence that the plaintiff, Patrick Henry Thomson, made an absolute and unconditional verbal gift of his entire title to the land described in the petition to his son, Rodes Thomson, and in pursuance of such gift, he, the said Rodes Thomson, entered into the possession thereof, claiming title thereto according to such gift, and that such possession of said land continued for a period of fifteen years previous to Rodes Thomson's death, and during said period his possession was actual, visible and notorious, then such possession is adverse, and the jury will find for the defendant."

In *Commonwealth v. Gibson*, 85 Ky., 666, where a parol gift of land was made by a father to his children, and they had occupied it adversely for more than fifteen years, it was said: "If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse. * * * The moment such possession begins the owner is disseized. * * * If after entry, the newcomer claims the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseizen."

It is not shown by either of the two foregoing opinions whether there was or not an entry meantime by the donor. But in the later case of *Ward v. Edge*, 100 Ky., 757, it does appear that the gift by parol was executed by the donee taking possession, while the donor, a widower, continued to reside upon the premises for many years thereafter. The question was, whether the donee had been in the adverse possession for fifteen years. The court cites without disapproval the character of evidence heard, which was in

many particulars substantially the same as in this case as to the donees' claim and acts of ownership, and of the donor's disclaimer and recognition of the title of the donee. The court observed: "It seems to us the issue in this case is simply whether defendant had acquired title to the land in dispute by gift from Walter Ward, and whether under such gift he had held same adversely to the donor, and with the knowledge of donor, for the fifteen years."

The court approved the following instruction as correctly stating the law applicable to the foregoing facts and issue: "If the jury believe from the evidence that Walter Ward, fifteen years or more before the institution of this action, gave the land in controversy to the defendant, and he under or by reason of said gift, took possession of said land, claiming as his own adversely to Walter Ward, with his knowledge, and continuously held and occupied it adversely to and with the knowledge of said Walter Ward for a period of fifteen years or more before the institution of this suit, they should find for defendant."

There was evidence before the jury in the instant case of appellant's contemporaneous claim of title and exercise of ownership with his presence upon the land, during the fifteen years. It was a question for the jury whether there had been in fact a disseizen of appellant. The only point we feel called upon to decide just here is, that the mere fact of appellant's presence upon the premises now in dispute during the time of appellee's claim of possession and title, was not ipso facto a breach of appellee's possession; and that if appellant did not accompany his presence by some claim or act of ownership, or if on the contrary he disclaimed ownership, admitting it was in appellee, then the statute would not be stopped in its running in the latter's behalf.

The newly-discovered evidence discussed above, was of such material character bearing on the question as to who was in the actual possession of the farm, that appellee was entitled to have it considered by the jury trying that question.

The judgment awarding the new trial is affirmed.

The whole court sitting, except Judge Settle.

Chief Justice Burnam dissents.

OWSLEY, SR. v. SARAH OWSLEY.

(Filed December 10, 1903—Not to be reported.)

1. Trust—Property held for separate use of wife—The testimony in this case, which shows that appellant received certain personal estate of the appellee and thereafter managed and invested it and made entries in his private memorandum book indicating an intention to keep that fund separate from funds of her husband which he also had in charge, is sufficient, in connection with the testimony of disinterested persons to the effect that appellant had stated that he intended to invest her estate so that her husband could not get it, to show that he took the property under an agreement with appellee, as contended by her, with the consent of her husband, to hold and employ it for her sole and separate use, and not as her general estate as contended for by appellant.

2. Evidence—Admissions—While entries made by the trustee in his memorandum book in his own favor may not be evidence for any purpose, entries in favor of the cestui que trust by way of admissions against his claim that the fund was her general estate are competent against him.

3. Same—The fact that the trustee listed the wife's property on her husband's tax list for a number of years is not a material circumstance to show the nature of the trustee's holding of the wife's funds.

4. Settlement of trustee—The defense of the trustee that he had paid out the entire fund belonging to the wife to her husband in the way of the expenditure of sums of money in the management and conduct of the farm upon which they all lived together and in maintaining the family of which they were all members does not avail to defeat her right to require him to account for the trust fund with interest from the date of its receipt, subject to certain credits for taxes and similar items, where she never consented to such a use of the fund, and where he recognized the trust until within a few months before the institution of her action for an accounting.

5. Stale claim—The trustee having until within a short time before the institution of an action by the cestui que trust recognized the trust by his entries upon his books, by his treatment of the property, and by his declarations, and having never denied it until very shortly before the bringing of the suit, no ground exists for the contention that the claim of the cestui que trust is stale.

J. H. C. Sandidge, Allen Sandidge, W. P. Sandidge and Carroll & Carroll for appellant.

Allen & Ewing, Hazelrigg & Chenault and J. E. McMurtry for appellee.
Appeal from Cumberland Circuit Court.

Opinion of the court by Judge O'Rear.

The controversy in this case is as to whether appellant became the trustee of an express trust in behalf of appellee. He denied the trust. The circuit court found and adjudged that appellant took the property in question under agreement with appellee, and by the consent of her husband, to hold and employ it for her sole and separate use. This appeal seeks to reverse that judgment.

There was no writing between the parties concerning the alleged agreement. The subject matter was personal estate only. Counsel for appellant truly urges the great danger in allowing the establishment of an express continuing trust, against which the statutes of limitation do not avail, by oral evidence. After the lapse of many years, by reason of the death of contemporaries to the transaction, and of forgetfulness of other witnesses, and of the temptations to perjury, as well as that it is very hard to prove a negative at any time, particularly long after the date of the alleged arrangement, it is argued that the result must be uncertain and unsatisfactory to the judicial mind. Admitting the dangers and the trouble, we do not understand that it has ever been denied that a valid trust as to personal estate may not be created by parol agreement. (Lewin on Trusts, 58-54-60). The dangers alluded to are probably as threatening to the cestui que trust as to the trustee. The history of this case proves that. Still, the courts may well bear in mind the very difficulties suggested, and as the time of the creation of the alleged trust becomes more remote, they may maintain the balance by requiring that the evidence upon which the erection of the trust depends,

be so certain as to fully persuade the cautious mind of its existence. (*Parker v. Parker*, 10 Ky. Law Rep., 919.) It is upon this basis that we have proceeded in the examination of the facts of this case.

Appellant is now about ninety years of age. He early in life had accumulated a considerable fortune. He was a forceful man in business and otherwise. He had three living children; two daughters and one son. His son bears his full name, and has, since his earliest childhood, been his constant companion. Though about fifty years of age now, until after this suit was begun, they had never lived apart. Their affection for each other was manifested in innumerable ways. Yet the younger Owsley was just the opposite of his father in the quality of self-assertiveness and independence. Though not lacking in mental ability, apparently, he yielded unquestioningly to his father's will and direction in everything. About a year before the marriage of the son to appellee, his father gave him \$10,000 in secured notes. He turned them back to his father to keep and manage for him. He took no memorandum of the payors, dates, amounts, or of the father's agreement to hold them for him or other evidence of the fact of his ownership than his father's good faith.

Appellant had for many years been a banker and merchant. He was associated in the banking business with his neighbor and friend, F. W. Alexander, and was one of the executors of his will. In October, 1874, appellant's only son was married to appellee, the daughter of appellant's deceased partner, Alexander. Appellant was much pleased with the match, and at once took the young couple to live at his home upon his farm on the Cumberland river, near Burksville. Appellee's guardian then held her estate. Shortly after her marriage appellee says she proposed to her husband that he take charge of her estate, but that he declined, saying that he could not manage his own. She says that it was then suggested that it be put in the hands of his father. She testified that they went to appellant and she repeated to him what had transpired between her and her husband on the subject; that after canvassing the matter, appellant agreed to take and manage her estate, for her sole use. Appellant denies that the agreement, as alleged, was made. But he admits that there was turned over to him directly about \$11,258 of her property. This consisted about one-half of railroad bonds and cash, and the other half the proceeds of lands situated in the State of Missouri, which were sold shortly thereafter. As appellee's husband is incompetent to testify in this case, either for or against her, the two principals to the transaction were the only witnesses to the original agreement. Appellant's contention is that he received the money and bonds as appellee's general estate, and on behalf of her husband; that the husband had the right then or thereafter to reduce it to his possession, and thereby make it his own, and that he did in fact so reduce it, by having appellant pay it out for him and on his account; that appellant did receive appellee's property, all of it, is beyond question. It is not reasonable, and, therefore, not probable, that he took it without her request, or in the absence of some sort of agreement or understanding about what was to be done with it. In view of W. F. Owsley, Jr.'s, having given back to his father to keep and manage for him, his estate of \$10,000 (above alluded to), and of his refusal to receive his wife's, it is probable when he took charge of appellee's money and bonds

that appellant also undertook to keep and invest them for her. Appellant, as stated, had the young couple living at his home. The manner of his treatment of his son, though then twenty-two years of age, and while evincing great fondness for him, rather indicated a lack of faith in the son's business capacity and ability to manage his own, without oversight and assistance. It is not likely then that a man of just instincts, under the circumstances, would have done otherwise than to secure a favorite daughter-in-law her patrimony, where it would be safe from the business errors of an inexperienced, if not an incompetent, husband. At least such a course was perfectly natural and wise. The circuit court would scarcely have been justified in adopting appellee's version of this transaction instead of appellant's, if rested alone upon the testimony of the two witnesses, although the failing memory of appellant, consequent upon his extreme age, and his violent dislike brought about by a business disagreement with his son just before this suit, were circumstances tending to weaken the effect of his statements. But that was, by no means, all of the evidence. We will notice some of the corroborative evidence.

Before all of appellee's estate had been reduced to possession by appellant, and at the termination of an arbitration between appellee and her former guardian involving some part of it (which was managed even to the employment of the lawyers by appellant), he said to one of the attorneys, in speaking of the property: "William is not worth killing, and will not be as long as I live. He has no confidence in himself, and depends on me for everything. Don't you think, he has refused to take charge of or control of any of Sallie's money, and at her solicitation I have agreed to take her money and invest it for her; and I intend to invest it so it will not get mixed with my estate, and so William can't get it. I despise to handle anybody's money, but as he is so contrary, I will fix it so he can't get hold of it."

One of the arbitrators in the litigation just mentioned, testified: "I have heard Judge Owsley (appellant) say that he had received and intended to receive all the money that was coming to Mrs. Owsley from the Alexander estate; that he was going to manage it for her, and not let William have anything to do with it; that he (William) did not know how to handle money; that William invested his money in (live) stock, and that he would invest Mrs. Owsley's money in something that would produce a greater income for her."

To another witness, Mrs. Skinner, appellant told substantially the same.

To Dr. Plumlee he said, in speaking of appellee on one occasion: "She is the best woman living. She entrusted every dollar her father left her to my care, and I have it safely invested for her. I don't intend this fellow (indicating W. F. Owsley, Jr.) shall ever touch a cent of it."

To L. T. Neat and W. G. Simpson he made substantially the same statement, but at different times. The record shows no reason for discrediting these disinterested witnesses. The effect of this testimony corroborates appellee that appellant took her money to keep it for her sole use, free from the control and claim of her husband. Her husband was shown to have been present at some of these conversations, acquiescing in what was said, as well as in what had been done, thereby assenting to the arrangement, even if he had not done so before.

Appellant kept a system of books, in the nature of a financial diary, rather than books of account. He called them "head books," and entered in them from day to day every transaction, even the most trivial, where money was involved. In these books are numerous entries concerning appellee's property received by him. He generally entered the item as appellee's. A few illustrations will suffice, as follows:

"January 17, 1887, Louisville City National Bank, Dr. 1 coupon of Sallie's Short Line R. R.	\$35 00
"July 16, 1888, Louisville City National Bank, Dr. 1 coupon belonging to Sallie	35 00
"Cut 3 coupons off of R. R. bond, Sallie's payable April 1, 1890	105 00
"April 5, 1892, Bank of Cumberland, Dr., to Sallie, 2 J. M. & I. coupons	70 00
"To Sallie, 1 L. & N. coupon	35 00
	<hr/> \$105 00

"November 23, 1896. Also started with Sallie's bond on Louisville, Frankfort & Lexington R. R., Cincinnati Branch, bond No. 871, for \$1,000, due and payable to James Guthrie, January 1, '97, in. on said sum at rate of 7½ per cent. per annum, payable semi-annually on first days of January and July in each year on presentation to them in city of New York. Coupons all cut off, said bond deposited in Louisville City National Bank. \$1,000, int., \$35.00."

It is also true that in these books appellant sometimes made the entries to show that the fund was "William's and Sallie's," and occasionally "William's." In nearly every instance—there are but few exceptions—the entries show that appellant was not only intending to keep these funds separate from his own, but generally they were earmarked so as to indicate appellee's title to them. It may be doubted if the entries in appellant's favor are evidence for any purpose, while undoubtedly those in the nature of admissions against his interests are. (*Brannin v. Foree*, 12 B. Mon., 508; *Poor v. Robinson*, 13 Bush, 292.)

Appellant made out yearly the taxing lists of his own and his son's property. They show that for some years he listed appellee's funds on her husband's list. She knew nothing of that, nor did her husband. We do not regard the circumstance as material as affecting the nature of appellant's holding.

We have no doubt from the record that appellant received appellee's property under an agreement to hold and employ it for her sole use, and that he has done so. As late as the entry copied above, dated November 23, 1896, appellant recognized appellee's title, and had the possession of an interest-bearing security at a high rate, which he admitted was hers. He made no statement showing when he sold her bonds; nor how he had invested her money (though it appears some of it was loaned), nor what income he derived from it. Consequently it was not improper for the chancellor to charge him with at least legal simple interest from the time the principal was received. Appellant claims that he had paid out for appellee, and at her instance, and for her use, the whole of the fund, principal and interest.

Some items were shown, and were allowed by the chancellor, which were

paid out at appellee's direction. Appellant was also allowed credit for the taxes paid by him, assessable against her property, and by certain other sums which had been paid out on merchandise accounts for the family which the trial court found had been paid by appellee's coupons with her knowledge and assent.

Appellant and his son lived in the same house, in the same family. During the time from 1874 till 1899 the farm of 235 acres was conducted; a partnership in dealing in and breeding fine horses was carried on by appellant and his son. These matters entailed heavy expenses and outlays of money. In an itemized account filed appellant showed that he had paid out a considerable sum of money, probably as much as \$90,000 in gross during the twenty-five years, consisting mainly of expenses for maintaining the family including servants' hire, clothing, provisions, fuel, etc.; also wages paid for farm laborers and workmen about the stables, and repairs upon the buildings, fencing, etc. He now says that all this was paid out for or to appellee's husband, and that at least to the extent that it was used in maintaining the family, it was paid out for appellee. We think not. It was not shown that she was ever told that her means were being used in that way, or that she ever consented that they should be so used. The duty to support the family was not hers, it was her husband's. The expenses were enormously augmented by the nature of the stock business being conducted by appellant and his son. Appellee contributed her labor, care and oversight as housekeeper, no inconsiderable item, to this. It is not contended that appellant at the time ever charged her with any of these expenses advanced by him for his son, nor that he intended then that she should pay them. In truth, his own book entries show that at a time long after both her and her husband's funds in appellant's hands would have been exhausted by his advancements of the nature named, appellant had in his possession her securities which he was then recognizing as hers. He also told numerous persons that he yet had her funds safely invested, and accumulating for her; that appellant paid out the great sum, in the aggregate charged, is admitted. But it is claimed that this was done as an advancement by appellant to his son. For the purposes of this case, it is necessary, at least proper, that we should notice this feature of the case. Strictly speaking, whatever may have been the nature of the payments made by appellant, and whatever may have been his purpose at the time, they can not be "advancements" so long as appellant is alive. An advancement is that bestowment of property by one standing in loco parentis to another, in anticipation of the latter's share in the donor's estate. It may, in one sense, be a gift. But its treatment in law as an advancement depends upon two facts: One, that the donor shall die intestate, totally or partially; the other, that the gift shall have been in fact with a view to a portion or settlement in life upon the donee. (Section 1407, Kentucky Statutes; *Bowles v. Winchester*, 13 Bush, 1.) Though the donor may have intended it as a gift, not to be charged in the settlement of his estate, it will, nevertheless, be treated as an advancement, if he die intestate, if it is in fact of the nature fixed by the statute. The donor's purposes in the matter can be made effectual only by his leaving a will disposing of all his estate, and therein treating of the gift. Still that transfer by the parent which may or may not be an advancement, need not create a debt,

either. An examination of the innumerable transactions between appellant and his son, and between appellant and his other children, considering the amounts given and paid out for them by appellant, evince not only a purpose to give them the various sums and items of property, generally speaking, but they are in the aggregate so large, amounting to from \$30,000 to \$50,000 approximately to each child, that appellant evidently contemplated them as, and they in fact partook of, the nature of, settlements or portions in life to his children. He says it was never intended by him to collect them from his children. He did not charge them as matters of account. They were in fact, apparently, treated by him and the children as gifts. He can not, therefore, by any subsequent change of purpose alter them into either debts, or payments on his liabilities. A child may be willing to accept property as a gift, which he would not take under an obligation to pay for it. Under the evidence we can not find that appellant paid out any of appellee's money, other than that credited to him in the judgment, for her or her husband's support.

It may be that appellant has been too generous with his son. But if that be so, he ought not to charge his lavishness to his daughter-in-law. We have not concerned ourselves with looking to an equalization of appellant's children in the division of his estate. We have noticed the fact of his gifts in the way of settlements in life to his other children, in connection with the relation and situation of the parties to this suit, only as an aid in determining whether appellant at the time he made the payments for his son, intended them, too, as similar gifts; to see what appellant has already done, not what he should have done.

It is said for appellant that appellee's claim is stale, and, therefore, is not favored in equity. So long as an express trust exists, and is recognized by the trustee, it never becomes stale. Up to within four years of the beginning of this suit appellant, by his deliberate entries in his memorandum books, and by his treatment of the property, as well as by repeated declarations, recognized the title and claim of the cestui que trust. He never denied it, so far as this record shows, till within a few months before this suit was filed.

Authorities are cited to the effect that when a husband and wife are living amicably together, and the trustee pays the income of the wife's separate estate to the husband, and it is applied by him in the support of his family, his wife included, it will be presumed that the payment was by the wife's direction. In this case, however, there is no room for indulging a presumption on that subject. For the wife positively testified that she did not request the payments to be made to or for her husband (further than as credited in the judgment), and, furthermore, that she never knew of it nor suspected it. Appellant admits that appellee did not give such direction. A presumption of a fact can be indulged only in the absence of proof as to the existence of the fact. We have just found, too, that the payments made by appellant were not made as payments of a debt or obligation, but were in the nature of gifts by appellant to his son. Even if they were debts from the son to appellant, they could not be set-off against the wife's separate estate in the appellant's hands. While the credits given appellant by the judg-

ment of the circuit court are liberal, we will not undertake to interfere with the chancellor's finding of the facts upon which they were based.

From what has been said, it follows that the judgment on the original appeal must be affirmed, with damages; and that the judgment on the cross appeal will also be affirmed.

The whole court sitting except Judge Settle.

LEE & HESTER v. HUGHES, &c.

(Filed December 10, 1908—Not to be reported.)

1. Homestead—Sale of—Intention as to reinvestment of proceeds—The mere intention at the time of the sale of one's homestead to leave the State and permanently reside elsewhere does not of itself amount to an abandonment and render the proceeds of the sale subject to debts without a carrying out of the intent.

2. Same—Debts existing at time of purchase—One who sells her homestead right in lands and reinvests the proceeds in other lands, on which she resides, has a homestead right in the latter as against debts which she contracted between the date of sale and the reinvestment.

3. Homestead of married woman—A married woman, who is a bona fide housekeeper, with a family, resident in this Commonwealth, who owns and resides with her family on a tract of land, is entitled to a homestead right in it as against her own debts.

Lee & Hester and W. H. Hester for appellants.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by the appellee in the Graves Circuit Court to set aside the sale of a house and lot in the city of Mayfield, made under an execution in favor of the appellants, amounting to \$88, it being alleged in the petition that she is the owner of the house and lot, and was occupying the same as a homestead at the time of the sale, and that she was then and is now a bona fide housekeeper with a family.

The judgment upon which the execution issued was rendered against her for a fee due from her to the appellants, for services which they rendered in a suit instituted by her against her husband for divorce and alimony. The amount of the fee was \$75. The costs of the action and of the sale \$13, making altogether \$88, as stated.

It appears that the appellee, M. A. Hughes, was formerly the wife of R. T. Anderson, with whom she resided for many years on a farm near Lynnvill, in Graves county. Anderson died owing certain debts which were secured by a lien on the farm mentioned. These lien debts were purchased by the appellee with her own money, and after thus acquiring them she brought suit in equity for the purpose of subjecting the land to their payment, and for the further purpose of obtaining a settlement of the decedent's estate. While this action was still pending, she intermarried with one T. A. Hughes. When the land was sold by the master commissioner, it was

bought by her to satisfy her lien debts, and under an agreement with her husband, T. A. Hughes, whereby he was to pay certain of her debts, perhaps a part of what she was to pay for the land, in consideration of which she caused the land to be conveyed by the commissioner to herself and husband jointly. The land was continuously occupied by them as a homestead until about August, 1900, and was then sold by them for \$2,400. They paid some debts out of the sum realized for the land amounting to about \$400, and the \$2,000 remaining of the money realized from the sale they deposited in a bank in the town of Murray. This sum remained in the bank until December, 1900, at which time domestic trouble arose between the appellee and her husband, and he, without her knowledge or consent, drew out of the bank \$750 or \$800 of the amount they had on deposit, and at the same time apparently abandoned his wife. She then secured possession of what was left of the money in bank, amounting to \$1,200 or \$1,250. About that time she employed the appellants (lawyers) to bring for her the suit for divorce and alimony against her husband, T. A. Hughes, and the suit was filed by them December 24, 1900. But the case appears to have been settled by the parties; at any rate, it was never prosecuted to judgment, and the fee which they charged her for their services in that case is the same for which they obtained a judgment against her as already stated.

On the 4th of January, 1901, the appellee bought from F. W. Bagby a small tract of land near Sedalia, Ky., in which she invested not less than \$1,000 of the purchase money which she had received from the Lynnville farm. The title to the Sedalia land was conveyed to appellee alone by deed from Bagby, and she at once moved on the land with her family, composed of herself and her son, Hugh Anderson, who was then fifteen years of age. Her son-in-law, John Jenkins, and his wife also moved upon the Bagby land and lived with her. Appellee continued to live upon and occupy the Bagby land as a homestead until the 3d day of June, 1901, when she exchanged it for the lot in the city of Mayfield in controversy in this action, which lot has been occupied by appellee and family as a homestead from the 3d day of June down to the present time. According to the evidence found in the record, the fair market value of the lot will not exceed \$800.

It seems to be conceded by the appellants that the Sedalia, or Bagby land, which was exchanged for the house and lot in Mayfield, was purchased by the appellee with the proceeds realized from the sale of the Lynnville tract, and that the Sedalia land was acquired by the appellee for use as a place of residence and homestead, and it is not denied by them that the house and lot in Mayfield has been so used by appellee and her family. It is, however, contended by the appellants that their debt against the appellee was created before her purchase of the Sedalia farm, and after her sale of the Lynnville farm, and that the sale of the latter farm was made by appellee and her husband with the intention of leaving this State, and for the purpose of permanently locating in the State of Arkansas, to which State her son, Charles Anderson, soon thereafter removed, to engage in the business of manufacturing brooms, and that the money with which to engage in that enterprise was furnished him by the appellee with the understanding that upon the removal of herself and husband to the State of Arkansas, they would become partners with Charles Anderson in that business. It is

further contended that the sale of the Lynnville farm by appellee and her husband for the purpose of taking up their residence in Arkansas, amounted to an abandonment upon their part of their homestead; that is to say, that the appellee thereby lost her right to be longer regarded as a housekeeper with a family, which right could not be revived by a subsequent determination to remain a resident of the State of Kentucky, or by the purchase of another tract of land, with the intention of living upon and occupying it as a homestead. Unfortunately for the appellants, this contention does not receive the support of the Kentucky authorities, for under the law as held in this State, even if appellee had sold the Lynnville farm with the intention of moving permanently to Arkansas, she would still have been entitled to all of her exemptions until her expectation had been accomplished, or at all events until she reached the border of the State. In other words, the intention to remove without a completion of the act does not constitute abandonment. (*Hemphill v. Haas, Lyons & Co.*, 88 Ky., 495; *Carroll, &c. v. Dawson, &c.*, 108 Ky., 786.)

The evidence in the case does not sustain appellants' contention. Upon the contrary, it shows that appellee had no intention whatever of removing from the State of Kentucky to permanently reside in Arkansas, or elsewhere. She did contemplate a visit to her son in Arkansas, but not for the purpose of remaining there, or of going into business with him. It is true that she furnished him \$400 but only as a loan, evidenced by his note taken at the time the loan was extended, and it is shown by the testimony of S. R. Doughtie, Erwin Palmer and John Canter that she talked with each of them about buying land of them. These conversations occurred in part about the time of, and soon after, the sale of the Lynnville farm, and in part some months after its sale, and it is shown by the testimony of appellee herself, that of her son, Hugh Anderson, and her son-in-law, Jenkins, that she began negotiations looking to the purchase of the Sedalia farm from Bagby, shortly before the institution of the suit for divorce against her husband, and consequently before the creation of the debt for which her house and lot was attempted to be sold.

It is true that the appellants both testified that in a conversation with them at the time of instituting the divorce suit, they received from appellee statements to the effect that she was going to Arkansas, to reside permanently, and they embraced in the petition for a divorce a statement to the effect that such was her purpose. But one of them, Hester, in giving his deposition, declined to state that she used the words permanent, or permanently, in connection with her going to Arkansas. It is also true that Bagby, from whom she purchased the Sedalia farm, in giving his deposition, stated it as his recollection that the first conversation that he had with appellee in reference to the sale to her of the land, occurred the day before the sale was consummated, but in this he is contradicted by appellee, her son, Hugh, and son-in-law, Jenkins, the latter of whom testified that the first conversation between appellee and Bagby on that subject occurred about a week before the trade was made, and appellee and her son, Hugh both testified that negotiations with Bagby for the purchase of the Sedalia land began before the institution of the divorce suit. It is not, however, material whether the purchase of the Sedalia land was made before or after

the creation of the appellants' debt, as it appears from the record that though the Lynnville farm had been sold some four or five months before the Sedalia farm was purchased it was the intention of appellee at the time of its sale to reinvest its proceeds in other real estate in Kentucky to be occupied by her as a homestead, that this purpose continued in her mind down to the time of the purchase of the Sedalia farm, and that she preserved at least as much as \$1,000 of the proceeds of the sale arising from the Lynnville farm to be used in purchasing the desired homestead. The money so held and preserved by her could not at any time before its investment in the Sedalia farm have been subjected to the payment of any debt owing by the appellee. (*Brooks v. Collins*, 11 Bush, 622, 21 Ky. Law Rep., 295.)

Such seems to have been the ruling of this court in the case of *Cooper v. Arnett*, 16 Ky. Law Rep., 145, wherein it is said: "As to Arnett it is evident that as he had a homestead in the Henderson county farm, he had one in the land bought in Hopkins county with the proceeds of its sale. It is said that the answer does not disclose that he sold the first farm with the intention of reinvesting in a homestead, and the purchase of the latter must be regarded as an original purchase of the homestead, and, therefore, the debt of the appellant was created prior to the purchase. We think this contention demands too strict a construction of the homestead act. Before any effort was made to reach the proceeds of the sale of the lands in Henderson county, or while such proceeds were in the hands of the debtor, at which time the inquiry might be material as to the intention with which the proceeds were held, the debtor does, in fact, invest it in a homestead, and this, we think, was not an original obtention or purchase of a homestead, or one obtained or purchased after the creation of the debt set up in this case."

We find, therefore, that under the rule announced in the case, *supra*, the owner of land in which a right to the homestead exists, who sells and reinvests the proceeds in other lands on which he resides, has a homestead right in the latter against debts existing at the time of its purchase. Such a purchase of land is but the continuance of the original homestead right, and is not the obtention of a new homestead. But it is insisted for the appellants that the husband is the head of the family, and that he alone can claim a homestead, and that such a right can not exist in behalf of both husband and wife at the same time; in other words, that as the husband of appellee is still living and undivorced from her, the right to a homestead exists in the husband alone, if it exists at all in this case, and can not, therefore, be asserted by the wife, although the lot sought to be subjected to the appellants' debt was paid for with the wife's money exclusively. Section 1709, Kentucky Statutes, provides that there shall be exempt from all debts or liabilities "so much land, including the dwelling house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family resident in this Commonwealth, as shall not exceed in value \$1,000." The homestead exemption here allowed is not for the head of the family, but it is for the benefit of debtors who own land, and who are actual bona fide housekeepers with family, resident in this Commonwealth.

Undoubtedly the wife may own land, and also be a debtor, and why may she not also be an actual bona fide housekeeper with a family? Unquestionably such would be her status if the husband should fail to provide

a home for the family. In *Johnson v. Kessler*, 87 Ky., 458, it was held that where the husband and wife jointly own property in which homestead exists, the husband, as against his debts, is entitled to have the entire homestead allotted out of his interest. And this rule applies although the house occupied is on the land of the wife.

In *Herring v. Johnston*, 24 Ky. Law Rep., 2d part, page 1940, a common law judgment was rendered against husband and wife on a note executed by them since 1894, and an execution issued thereon, which was levied on a tract of land belonging to the wife. She insisted that even if the land were subject to the execution, she was entitled to a homestead in it, and that none had been set apart to her. In passing upon the claim of the wife to the homestead in that case, this court said: "Appellant at the time of the levy of the execution upon her land, and of its sale thereunder, was a married woman with a family. The family was composed of appellant, her husband, and a number of infant children. Appellant was the debtor in this case. * * * The statute (section 1702, Kentucky Statutes) exempts from ordinary debts a homestead. Unlike the statutes of many of the States, this exemption is not to 'the head of the family,' nor to 'the householder,' but it is 'so much land, including the dwelling house and appurtenances owned by the debtors, who are actually bona fide housekeepers, with a family, resident in this Commonwealth, as shall not exceed in value \$1,000.' It is true, where the husband is living, he is still bound, notwithstanding the removal of the most of the former legal disabilities of married women, to provide a home and support for his family, his wife included. But many of them do not do it. Married women have been given more and more rights over their property, and more power to contract and trade as if single. The design of the legislature has been to enlarge their opportunities and privileges to the end that their conditions might be improved. It could never have been their purpose to give married women the almost unrestricted right to contract debts, and not to afford them the same exemptions from debt that are given to men. If the woman assumes debts, having a family, she ought to be, and is, entitled to just the same exemptions as a man with a family. If her husband can not, or will not, support her and her children, she must do it herself. When she becomes the debtor, the statute is for her protection, and for the protection of those dependent upon her. (*Wapples Homestead and Exemption*, 125.) The legislature has expressly recognized that the married woman may own a 'homestead' in her own right, by section 1708, Kentucky Statutes, providing that 'the homestead of the woman shall, in like manner, be for the use of her surviving husband, and her children.'"

It is true that the court held that it was unnecessary to determine in the case *supra* the question of whether or not the wife and her husband were entitled each to a separate homestead in their lands respectively, and the point was not, therefore, decided because not presented, although the husband owned a small tract of land adjoining his wife's, but without a dwelling house on it, and which had never been occupied by either of them as a homestead. In the case at bar, although it appears that the husband and wife were joint owners of the Lynnville tract of land, it is not averred in the petition, or in any subsequent pleading filed by the appellant, that the wife's (appellee's) right to the homestead in the lot in controversy is in any

way affected by the fact that the husband owned an undivided half of the Lynnville farm at the time of its sale, though the question is attempted to be raised in the brief of counsel for appellants, so that question is not before us for decision, nor is its decision necessary, because it is manifest that not more than appellee's half of the proceeds of the Lynnville farm went into the Sedalla tract which was exchanged by her for the lot in controversy. It is further manifested that the husband is asserting no claim in this case to a homestead in his own behalf, and as he unites with the wife in this action for the purpose of confirming her title to the homestead in controversy, he will, by reason thereof, be estopped from making any future claim to such a homestead for himself.

In our opinion, it is not material whether or not the husband of appellee contributes to any extent to the support of the family. In view of the fact that she owes the debt due the appellants, and that she is a bona fide housekeeper with a family, resident in this Commonwealth, and the owner of the lot in controversy, and was occupying it as a homestead at the time it was levied upon and sold under the appellants' execution, we know of no reason why she should not be entitled to it as a homestead. We are, therefore, of the opinion that the judgment of the chancellor allowing her the homestead is sustained by the evidence, and authorized by law.

The judgment is, therefore, affirmed.

WESTERN AND SOUTHERN LIFE INS. CO. v. BRENNAN.

(Filed December 10, 1903—Not to be reported.)

Recovery of life insurance—In this action to recover on a policy of life insurance, the verdict not being palpably against the weight of evidence and no exception having been taken to the instructions of the court, the judgment in favor of the plaintiff is not disturbed.

B. F. Graziani for appellant.

W. H. MacKoy and J. N. Hutchins for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellant is an insurance company incorporated under the laws of the State of Ohio. Its home office was in the city of Cincinnati. The appellee resided in Covington, Ky. In the year 1888 appellant issued a policy in the sum of \$500 on the life of Mary Brennan, payable at her death to appellee Brennan. The premiums of 35 cents were payable on Monday of each week, and in case of a failure to pay these premiums, the policy should lapse and become void after the expiration of four weeks from the last payment. Mrs. Brennan died on March 30, 1900.

Appellee demanded of appellant company the payment of the \$500. The company refused payment, and this action was instituted for the recovery of the amount of the policy, which was resisted by appellant. The pleadings were completed, a trial was had, which resulted in a verdict for appellee. The facts as they appear from the record are in substance as follows: Appellant paid all premiums until the 18th day of December, 1899, as is shown by

a book which appellee was required to keep. By the terms of the policy it was made appellee's duty, when he paid a premium, to see that the agent of the company entered the payment in this book, giving the date of the payment. Appellant claimed that the policy had lapsed and was void by reason of his failure to pay any premium after the 18th day of December, 1899. Appellee, to avoid the effect of this plea, alleged that on or about the 18th day of January, 1900, and before the policy had lapsed or become void, that one King, the superintendent of appellant company, called upon him at his place of business in Covington for the payment of premiums due upon this policy, and that some contention or dispute arose as to the amount of the premiums that had been paid upon the policy, and the date of the payment of the last premium; that at the request of King, he, appellee, turned over to him this book and the policy upon the promise of King to investigate the matter further and correct the book, and that he would return the book and policy, and receive from appellee the actual and true amount due for premiums upon the policy. Appellee claims that at that time he paid to King 85 cents; that under this agreement with King the latter took and carried away the book and policy and did not return same; that on or about the 10th of February, 1900, he, appellee, met King in Cincinnati, naming the street and corner, and paid him \$1.50 to be applied to the payment of the premiums upon this policy, and that on or about the middle of February of the same year he paid the said King \$1.70 as premium on this policy. Appellee claims that King assured him at all times that this policy was in force, and promised him time and time again to return him this policy and book, and that on the morning on which his wife died, he called at the office of appellant to see King, and to ask for the return of this book and policy. King was not at the office. On the afternoon of the same day, and after the death of his wife, appellee called again and found King, and as he, appellee, claims, informed King of the death of his wife; that he was then informed that the book and policy were at the residence of King in Covington; that King then made some calculations and stated to appellee that the balance of premiums due on the policy was \$2.10, but that if he, appellee, would pay him \$2 he would remit the 10 cents, which was done, and a receipt was executed therefor by King. Appellee, in his testimony, stated in substance the above alleged facts. King, in his testimony, disputes all of these statements. He stated that when he took the book and the policy that appellee fully understood that the policy had then lapsed, and that he declined to pay any further premiums thereon. He denied that appellee paid him the 85 cents at that time, or that he paid him \$1.50 in Cincinnati, or that he paid him \$1.70 about the middle of February, but admits that he paid him the \$2 on the 30th of March, but that it was paid without the knowledge on his part that appellee's wife was dead; that appellant concealed that fact from him until after the payment of the money and execution of the receipt, and that when the \$2 was paid it was understood that that was not in full satisfaction of the past premiums; that it was agreed when the \$2 payment was accepted, that the physician representing the company was to visit Mrs. Brennan on the next day and make an examination as to the condition of her health, and, if satisfactory, then the remaining amount of due premiums was to be paid; that when appellee informed him that his wife was then

dead, he tendered to him the \$2, which he had just received from appellee, who refused to accept it. There was other evidence introduced that tended to corroborate the statements of both appellee and superintendent King. Then the court gave the following and only instruction: "If the jury believe from all the evidence, that, in January, 1900, there existed a question or doubt as to the state of payments on the policy of insurance mentioned in the proof; and that, at said time, the superintendent, King, of defendant company, took from the possession of plaintiff the said policy and the receipt book or books mentioned in the proof, for the purpose of investigating the said state of payments, and that they were taken for that purpose by said superintendent by agreement between plaintiff and said superintendent; and that the said superintendent retained said papers; and that the plaintiff requested the return of same to him, but that said superintendent failed to return same; and if the jury believe that, by reason of the retention of said papers by said superintendent, the said plaintiff did not regularly keep up the payment of premiums on said policy during January, February and March, 1900; and that said superintendent during said months of January, February and March accepted money from said plaintiff as payment or part payment of premiums on said policy; and that, during said months of January, February and March accepted money from said plaintiff as payment or part payment of premiums on said policy; and that, during said months of January, February and March, 1900, the said superintendent represented to said plaintiff, and induced said plaintiff to believe, that the said policy was then continuing in force; and that the said plaintiff believed and relied upon said representations, then the jury should find a verdict for plaintiff for \$500, with interest from May 5, 1900. Otherwise, the jury will find a verdict for the defendant."

Neither party objected or excepted to this instruction, and no other instruction was offered. The jury returned a verdict in favor of appellee for the amount of the policy. The only question at issue between the parties was submitted to the jury under this instruction. The jury found against appellant, and we do not feel authorized to disturb the verdict, as it is not palpably against the weight of the evidence. We deem it unnecessary to refer to and to discuss the other questions raised on the motion for a new trial, as they are without merit.

The judgment must be affirmed.

LEE v. GRANT COUNTY DEPOSIT BANK.

(Filed December 10, 1908—Not to be reported.)

1. Note to bank—Principal and surety—Where it appeared that during the entire time a note executed to a bank was in existence the borrower's deposit account with the bank was overdrawn in excess of the amount of the note, there was never a time when he had a sufficient sum in bank to pay the note or any part thereof, and the defense of the surety on the note that he was released by reason of the negligence of the bank in allowing the principal, after the maturity of the note, to withdraw funds which should have been applied to the note failed.

2. Usury—The borrower was not prejudiced by the failure to allow credit

for usury paid to the bank in transactions other than the note sued on, where the note itself embraced no usury and there was still an overdraft due the bank in an amount exceeding the amount of the usury.

Montgomery & Lee for appellant.

W. W. Dickerson for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Settle.

Appellee sued the appellant, J. L. Lee, and D. W. Williams, his surety, in the lower court upon a \$1,250 note. The surety by separate answer, among other defenses, interposed the plea of non est factum. The appellee, by reply, pleaded the want of knowledge as to this defense of the surety, and further that as the note sued on was but a renewal of a former one of the same amount, which was signed by the surety, he was liable for one or the other of them. This fact was not denied by the surety, and so the plea of non est factum was eliminated from the case.

The appellant, Lee, admitted the execution of the note sued on, but in avoidance of a recovery thereon, pleaded a set off, based upon the following alleged state of facts. He avers that he had been a depositor of the appellee bank for eight or ten years, during which time his account was considerable, and that he made frequent discounts of negotiable paper with the bank, and often borrowed of it, being all the time dependent upon those in charge of the bank to keep a correct account, which he alleges they did not do, and that in his account he is wrongfully charged with various checks with which he was not properly chargeable; and that further that he was charged with usury upon many items of the account, and not credited with several notes executed, or paid by him to the bank.

The averments of the appellant's answer and set off were denied by reply, and, in addition to such denials, the reply contained the averment that the appellant, by permission of appellee's cashier, and without the knowledge of its directors, wrongfully overdrew his account in a large amount, which was unsecured, and that appellant was then and is now insolvent, and further that the amount of his overdraft due the bank was between \$5,000 and \$7,000 at the time of the execution of the note sued on, a large part of which remained unpaid at the maturity of the note, and when the action thereon was instituted.

After the completion of the issues by further necessary pleadings, the cause was referred to a special commissioner to audit and settle the accounts between the appellant and appellee, who, after taking all the proof offered by the parties, made his report, which shows that after correcting all errors in appellant's account, and allowing all credits to which he was entitled, he was overdrawn in the appellee bank at the date of the maturity of the note sued on, viz., January 2, 1896, \$6,103.16. His deposits made after the maturity of the note did not materially lessen this overdraft. It appears that the sureties on the bond of Nesbitt, the cashier, were liable to the bank for \$4,759.41 of the appellant's overdraft, as the same to that extent was created without authority from the directors of the bank and contrary to law. This sum of \$4,759.41 was paid by the sureties, and that much of the appellant's overdraft was assigned to them by the bank. Thereafter, and after the ma-

turity of the note sued on, the appellant paid the sureties the \$4,750.41, in whisky, but this payment still left a considerable part of the appellant's overdraft in the appellee bank unpaid, and his indebtedness for this remainder of overdraft is in addition to what the appellant owed upon the note sued on.

The special commissioner seems to be a lawyer of skill and experience, for his report manifests the care with which he passed upon the questions of fact, and matters of account, presented for his consideration. We find no error in the conclusions contained in his report. They show beyond question that the appellant's overdraft in the bank existed all the time the note sued on was in existence, and that it exceeded the amount of the note. It follows, therefore, that there was never a time when he had to his credit in the bank a sum sufficient to pay the note, or any part thereof; consequently there was no negligence or failure of duty on the part of the bank whereby injury or loss resulted to the surety on the note, and, therefore, the surety's defense that he was released from liability by reason of the conduct of the bank's officers in permitting appellant, after maturity of the note, to withdraw from the bank funds which should have been applied to the payment of the note, is unsupported by the evidence.

We have not gone into a consideration of the question of usury set up by the appellant, for the reason that the commissioner only found \$234 of usury in the appellant's entire account, and as there is more than that amount of his overdraft yet due the bank, he has not been prejudiced by the failure of the commissioner to allow credit by the usury on the note sued on. There was no usury in the note. It only bore interest from its date, and the judgment rendered by the lower court for the amount of the note only allows 6 per cent. interest thereon from its date.

The lower court did not err in overruling the exceptions to the commissioner's report, or in the judgment rendered in appellee's favor, and the judgment is, therefore, affirmed.

SALYER v. ELKHORN LAND IMPROVEMENT CO.

(Filed December 10, 1903—Not to be reported.)

Division of lands between joint owners—Defective petition—In an action by one of several joint owners of a tract of land for a division between them it is the duty of the plaintiff to state in his petition, if known to him or it can be ascertained, the interest of each of the parties to the action, and an allegation that their respective interests and the names of the persons interested can not be ascertained without the loss of much time, labor and expense does not relieve the pleader of that duty; and a failure to so set forth the various interests renders the petition defective and insufficient.

Roscoe Vanover for appellant.

W. H. Flannery and Hager & Stewart for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Pike Circuit Court sustaining a demurrer to the petition and amended petition of appellant, refusing appel-

lant's motion to take the allegations of the petition as true as against the defendants therein not demurring, and upon the failure of appellant to plead further, dismissing his petition.

The appellant in his original petition claimed that he owned 1-45 interest in a tract of about 600 acres of land, describing it, and that the defendants, Elkhorn Land Improvement Co., a corporation, Northern Coal and Coke Co., also a corporation, A. E. Auxier, James Hatcher, J. C. C. Mayo, Steth B. Spragins, Samuel B. Buck, Ballard Weddington and George Pinson, Jr., owned the other 44-45 in this land; that he did not know the amount of the interest that each of the defendants owned, and that he had no means of ascertaining the same, and asked the court to compel the defendants to answer and set forth their respective interests therein. The Northern Coal and Coke Co., the Elkhorn Land Improvement Co. and J. C. C. Mayo filed a demurrer to this petition. The court sustained the demurrer.

The appellant then amended his petition, and in his amendment gave an additional description of the land, and a more particular derivation of title, and alleged that one Ramey devised this piece of land to Rebecca Osborn for life, and at her death to go to her children; that appellant's title was derived from Perry Ramey, who was a child of Pricy Ramey, a daughter of Rebecca Osborn; that Pricy Ramey had died and left eight children, Perry Ramey being one of them. He further stated in his amended petition "that all of the children and real representatives of the said Rebecca Osborn to whom the tract of land herein described descended, five of same are dead, and the number of children to whom their several parts descended is unknown to this plaintiff and he can not now find out same and it would take an immense amount of time and labor to ascertain same."

This action was instituted by appellant under section 499 of the Civil Code for the purpose of having a division of this land between the joint owners thereof. This section of the Code is as follows: "A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit court or county court of the county in which the land or the greater part thereof lies a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and, thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition."

The appellant filed with his amended petition the evidence of his title, and stated that he only owned 1-48 instead of 1-45, as alleged in his original petition. We do not deem it the duty of the plaintiff in an action under this section of the Code to file the written evidences of the title of the defendants to their interest in the land. It is his duty, however, if known by him, or can be ascertained from the records, to set forth the interest of each of the parties to the action, both plaintiff and defendant. The appellant, by stating in his amended petition, that six of the descendants of Rebecca Osborn had died, leaving children, and the names of these descendants being unknown to him, and that he could not ascertain their names, and the amount of their respective interests without the loss of much time, labor

and expense, made his pleading defective and insufficient. The court could not have made a division of this land without knowing the interest of each joint owner. If the appellant had stood by the allegations of his original petition that he did not know and had no means of ascertaining the interest of each of the defendants and had the court to compel them to answer and disclose their interest, then the case would have been different. In view of these facts we are of opinion that the lower court was right in sustaining the demurrer.

Therefore, the judgment is affirmed.

KENTUCKY RACING AND BREEDING ASS'N v. GALBREATH, &c.

(Filed December 10, 1903.)

Corporations—Appointment of receiver for—While it is the general rule that a creditor of a corporation is not entitled to have its property and assets put into the hands of a receiver until he has reduced his claim to judgment and procured a return of "nulla bona," where it is made to appear that the assets of an insolvent corporation, which the creditor is entitled to have applied to his debt, will probably be lost or fraudulently disposed of by improvident or corrupt officials unless a receiver is appointed and the creditor has no adequate remedy at law, the courts will place the assets in charge of a receiver.

C. J. & W. W. Helm for appellant.

Galvin & Galvin for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment of the Kenton Circuit Court appointing a receiver for the Kentucky Racing and Breeding Association, a corporation organized under the laws of West Virginia, and the Queen City Jockey Club, a corporation organized under the laws of the State of Kentucky, at the instance of the appellee, Leslie Galbreath, a creditor of the Racing Association. The plaintiff alleges in his petition that he is a creditor of the Kentucky Racing and Breeding Association; that the company is hopelessly insolvent; that it owns a majority of the stock of the Queen City Jockey Club; that Clem Creveling, the president of the association, had with the knowledge and consent of the officers of the Jockey Club, instituted a suit for the recovery of \$2,330, alleged to be due to him for services as president, and had sued out an attachment which had been levied upon the interest of the racing association in the Jockey Club for the purpose of securing to Creveling a fraudulent preference over the other creditors of the racing association as operator of the Jockey Club. He also alleges that the racing association was, in violation of law, selling pools upon the result of races, and was thereby subjecting itself to fines and the forfeiture of its charter under the laws of the Commonwealth; that its indebtedness was daily increasing; that it was indebted to numerous other persons; and that its property would be entirely consumed if not taken in charge by the court; and that he and they would lose their debts. Upon the averments of the

petition, the circuit judge of the Kenton Circuit Court appointed George M. Keefer, receiver, and directed that he should take possession of the books, accounts and other assets of the company, and hold them subject to the future orders of the court. George M. Keefer and West B. Wilson filed their petition to be made a party to this proceeding, and alleged that the Queen City Jockey Club was also insolvent; that there had been no meeting of its stockholders or election of directors for more than a year; that the directors last elected had failed and refused to qualify or meet for the purpose of electing officers of the company; that there was a judgment against the Jockey Club for \$30,000, and that an attachment had been issued against its property; that it had disposed of a part of its personal property, and its assets were in danger of being dissipated, and asked that a receiver should also be appointed to take charge of the assets and property of the Jockey Club for the benefit of the creditors. Keefer was also appointed receiver of the Jockey Club, and executed bond as required by law. The defendant, the racing association, filed an answer, in which they deny that the plaintiff was a creditor of the association, or that the officers of the Jockey Club had consented to the suing out of the attachment of Creveling, or that the association had sold pools in violation of law. They allege that the only assets of the racing association was a small amount of furniture in Newport, Ky., not exceeding in value \$200, and the stock in the Queen City Jockey Club, which they alleged is of no value, as it is hopelessly insolvent. A number of other creditors filed their petition to be made parties to the proceeding, and united in plaintiff's prayer for the appointment of a receiver. The defendants excepted to the orders appointing a receiver, and have prosecuted an appeal to this court, and ask a reversal on the ground that a general creditor of a corporation is not entitled to obtain a receiver of the corporate property until he has reduced his claim to judgment, and had execution issued, and return of "nulla bona" thereon.

As a general rule, a creditor of a corporation is not entitled to have its property and assets put in the hands of a receiver until he has reduced his claim to judgment and procured a return of "nulla bona." But there are exceptions to this rule, as where the assets of an insolvent corporation, which a creditor is entitled to have applied in satisfaction of his demands, will probably be lost or fraudulently disposed of by improvident or corrupt officials, unless a receiver is appointed, and the creditor has no adequate remedy at law. When this is made to appear, the courts will take charge of the assets of the insolvent company, and apportion them among the creditors entitled thereto. (Clark & Marshall on Private Corporations, volume 3, section 785; Beech on Private Corporations, section 715; 3 Cook on Corporations, 4th edition, section 863; 2 Marawetz on Private Corporations, section 860; Smith on Receiverships, section 227, and authorities there cited.)

We are of the opinion that the allegations of the original and cross petitions in this case present such a state of fact as made out a *prima facie* case for the appointment of receivers for the defendant corporations. Defendants have made no showing by motion to set aside the order appointing the receiver, or otherwise, to negative the averments of the original and amended petitions. We, therefore, conclude that the trial court did not err in the appointment of a receiver.

Judgment affirmed.

MASON v. ILLINOIS CENTRAL R. R. CO.

(Filed December 19, 1903—Not to be reported.)

Smallpox—Recovery of damages—A person who contracted smallpox from a gang of railroad workmen who had the disease and were quartered in boarding cars located on a spur of a railroad track near his house, is not entitled to recover damages of the railroad company where he contracted the disease about sixty days after the workmen and the cars had been taken charge of and quarantined by the county health officers, and in the absence of anything to show that the company did not in good faith comply to the best of its ability with the directions of the health officers in charge or that it was guilty of any negligence in the management of its hands.

Shelbourne & Kane for appellant.

Pirtle, Trabue & Cox for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, John D. Mason, brought this suit against the appellee, the Illinois Central R. R. Co., for damages for a case of smallpox, which he claims was communicated to him in consequence of the negligence of the railroad company. He alleges in his petition that his residence is close to a spur track of the defendant, leading from its main line to a gravel pit; and that the defendant placed certain of its cars on this spur track in which it lodged and boarded a gang of section hands: "That during the months of November and December, 1901, some three or four of these employes of defendant on said cars became afflicted with smallpox, and of which defendant had knowledge; and that defendant knowing at the time that its said employes were afflicted with smallpox carelessly and negligently placed two of its said boarding cars in which its said employes were sick and afflicted with the smallpox, and in which it was nursing and caring for its said sick employes, and in which it did so use and care for its said employes in front of and within a few feet of plaintiff's said residence on its said branch road, and suffered and permitted the same to be and remain there for several days, and left the doors thereof open next to and adjoining his said residence, and when said employes became well of said disease, it further carelessly and negligently threw out and burned up within a few feet of said residence all the beds and bedding and furniture that it and its said employes had used while they were sick with said disease; and that plaintiff contracted smallpox from the said cars, the said employes and the said furniture and bedding, that was so destroyed by the defendant; and that by reason thereof he was made dangerously sick and ill for a long time and suffered great physical pain and mental anguish, and expended large sums for physicians and nursing, and was by said disease permanently marked and disfigured; and that said disease was from him communicated to other members of his said family, and that he expended large sums of money in caring for and nursing the said members of his family."

In their answer the defendants traversed all of the affirmative allegations of the petition charging negligence, and for further answer stated that about the 11th. of October, 1901, that it had a gang of men working for it under the charge of one Dunlap; that about this time one of these men became

sick; that Dunlap sent for Dr. W. L. Mosely, a practicing physician, who diagnosed the disease to be smallpox; and that Mosely at once notified Dr. J. S. Petrie of the existence of the disease; and that on the 11th of October, 1901, Dr. Petrie, as health officer, took charge of the cars in which the smallpox prevailed, as well as the other cars which constituted the boarding train on the switch; and that by virtue of his authority as health officer, ordered these cars placed on the siding, equi-distant from the house of plaintiff and that of one Brown, who lived on the siding. It also alleges that Dr. Petrie, as health officer, caused all of the bedding, bunks, and other paraphernalia of the cars to be burned without the assistance of the defendant or any of its employes, and fumigated the cars. It further alleges that plaintiff did not take the smallpox until about the 10th day of December, 1901, about sixty days after the train of boarding cars and the section hands had been taken in charge by the health officer of Carlisle county; that the period of incubation of smallpox does not exceed two weeks; and that plaintiff, therefore, contracted the disease while these cars and their inhabitants were under the authority and control of the health officers of the county; that it and its employes obeyed the direction given to them as to the location of the cars, and the handling, nursing and treatment of the afflicted; they further plead that plaintiff was guilty of contributory negligence in that he persistently refused to be vaccinated himself, or to cause the other members of his family to be vaccinated, although so warned by the health officer. The reply controverted the alleged contributory negligence.

The testimony introduced by the plaintiff in the case conduces to show that the "spur track" leading from the defendant's main line to the gravel pit is about — feet in length; that in September, 1901, the defendant placed a train of boarding cars on this spur track, which were occupied by about twenty-five men who were employed as laborers by the railroad company, and were under the charge of a boss by the name of Dunlap; that the boarding cars were stationed not very far from the main line; that when they were placed there, a vacant car stood in front of plaintiff's residence; and that about two weeks after the arrival of the train of boarding cars a sick man was taken out of one of these cars and placed in the car in front of plaintiffs' residence; and that shortly afterwards they rolled a second car from the boarding train down next to the car in front of plaintiffs' residence; that a sick man was in it, and that a week afterwards Drs. Mosely and Petrie came out and pronounced the disease to be smallpox; and that they had the two cars in front of appellant's residence moved up towards the main track about three hundred feet, and directed that the section hands be confined to the cars. Plaintiff testified that no closets were provided for the use of these men near the cars, and that they went for this purpose to a point in the woods near the right of way, and in so doing passed in front of his house. Nearly all of the section men had the disease, including Dunlap, the boss; on the 30th of November Dr. Petrie had all the beds, bedding and other paraphernalia of these cars thrown out and burned on the side of the track, and the cars fumigated, and all the boarding train, with its occupants, were taken away, except the foreman, Dunlap, a cook and a negro boy, who waited upon him. The testimony conduces to show that at this time all of them had recovered from the smallpox, except, perhaps, Dunlap;

that after its fumigation, the same car which had stood in front of plaintiff's residence at the beginning was rolled back to its old place, and on the 5th of December, Dr. Petrie, the health officer, came down and had the bunks, which were made of plank, knocked out and burned in front of the plaintiff's house. Plaintiff also testified that after the health officer took charge, he went to see Dunlap's straw boss, after he had taken sick. At the close of plaintiff's testimony, the circuit judge gave to the jury a peremptory instruction to find for the defendant, and this appeal is prosecuted from the judgment dismissing plaintiffs' petition.

The testimony in the case seems to show conclusively that appellant contracted the smallpox at least six weeks after the boarding train and section hands of the railway company had been taken in charge by the health officers of Carlisle county; and that the burning of the beds, bedding and bunks occupied by the section hands was all done under the personal direction of Dr. Petrie, the health officer. While the evidence shows that the section men did leave the cars in answer to the calls of nature, there is no evidence which conduces to show that the defendant did not in good faith comply to the best of their ability with the direction of the health officers; or that after their boarding train was taken charge of by the health officers that they were guilty of negligence in the management of their hands. In fact, they had no way of controlling the movements of these men after they became sick. The duty of establishing quarantines at places where smallpox is prevalent is imposed by law upon the health authorities of the State; they are authorized to make and enforce rules and regulations to obstruct and prevent the introduction or spread of smallpox, and for this purpose are by law authorize to establish quarantines, to erect temporary hospitals necessary for the medical treatment of any persons who may be kept in quarantine, and affected with smallpox, and to assign the charge and control of such person to competent physicians and nurses. It is the duty of all persons in charge of any railway train, passenger coach or steam boat, or other private conveyance, to obey the regulations of the board of health. In our opinion, the testimony in this case entirely fails to show that appellant's attack of smallpox was superinduced by any negligence or carelessness on the part of the defendant, and that the trial court properly instructed the jury to find for the defendant.

Judgment affirmed.

MOORE v. POTTER.

(Filed December 10, 1908—Not to be reported.)

Action on note—In this action on a note executed for a deferred payment on the purchase price of lands the testimony supports the contention of the defendant that he had executed a note to the wife and children of the plaintiff in lieu of the one sued on and that he had paid it, and the judgment dismissing the plaintiff's petition was proper.

Bart Belcher for appellant.

Roscoe Vanover for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 3d day of October, 1898, the appellant, S. K. Moore, brought this suit against the appellee, Levi Potter, on the following obligation:

"Note \$300.

"This 19th of March, 1895. On or before the 1st of October, 1896, I bind myself to pay to S. K. Moore the sum of \$200 in cash, it being for purchase money on land lying on Shelby creek, with interest from date. Interest on note \$45.80. Jerry Osborne deeded said land to S. K. Moore.

his
"LEVI x POTTER.
mark

"Attest: T. J. MULLINS."

Alleging that the note was executed as a part consideration of a tract of land sold by plaintiff to the defendant to secure the payment of which a lien was retained in the deed which plaintiff made to the defendant, and which had been accepted by the defendant and was on record in deed book No. 13, page 146 of the Pike County Court clerk's office. The defendant, Potter, for answer, admitted the execution of the note, but plead by way of avoidance and defense that he had purchased from plaintiff the tract of land described in the petition at the price of \$1,500, \$500 of which was paid in live stock, \$300 in money at the date of the trade; and that he had executed three notes for the unpaid purchase money, two of which were for \$200 each, and the \$300 sued on; that he paid off each of the \$200 notes; and that one James Soward had recovered a judgment against the plaintiff and against him as garnishee in the Pike Quarterly Court for \$35; that the plaintiff thereupon asked him to execute a new note in lieu of the \$300 note sued on to his wife, Tebitha Moore and his two sons, Alfred and Taulby Moore, which was to take the place of the \$300 note sued on; that plaintiff represented that the \$300 note was in Montgomery county, but that if he would execute the new note, he would destroy the old one upon his return to Montgomery county, where he then lived; that in compliance with this request, he executed a \$300 note as requested to the wife and children of plaintiff, and that plaintiff subsequently sent this note to one Esaw Moore for collection, and that he paid the whole of it after deducting the \$35, for which Soward had obtained a judgment and asked that the note sued on be cancelled, and that he be quitted in the title to the land. In his reply, the plaintiff denied that the \$300 note executed to his wife and children by the defendant was in lieu of the \$300 note sued on, but alleged that it was in lieu of another note for \$300, which was also a lien on the land.

Plaintiff testified that defendant promised to pay \$500 in live stock, and \$1,000 in money for the land sold to him; that the live stock were delivered and that four notes, two for \$200, and two for \$300, were executed by defendant for the unpaid purchase money; that both of the \$200 notes were paid by the defendant; and that for one of the \$300 notes defendant substituted by agreement his note to his wife and two sons of plaintiff; that the other \$300 was the note sued on, and had never been paid. Defendant, on the other hand, testified that in addition to the \$500 in live stock, he paid \$300 in cash at the date of the purchase, and only executed three notes aggregating \$700, two for \$200, and one for \$300; that by agreement he subsequently executed a note for \$300 to the plaintiff's wife and two sons for the \$300.

note, under promise from the plaintiff that he would destroy the note sued on. The testimony of Potter is corroborated by that of T. J. Mullins, who testified that he wrote three notes for the deferred payments, and that they only aggregated \$700, two being for \$200, and one for \$300; also by S. W. Powell, who testifies that he wrote the \$300 note payable to plaintiff's wife and children in lieu of the original note; and that at the date of this transaction, plaintiff claimed that the defendant still owed him a balance on one of the \$200 and some smaller notes which he had given for furniture; and that plaintiff agreed to extend the time for the payment of the \$300 at the time of the change. Wilburn Belcher testifies that he heard the parties talking to each other about their land trade and that his recollection was that defendant paid \$300 in cash, in addition to live stock; and that he loaned defendant \$210 of this amount. W. B. Vanover also testifies that he was present when Mullins wrote the notes for the deferred payment, and that they aggregated only \$700, two of them being for \$200, and one for \$300; and that it was his understanding that defendant paid the balance of the \$300 in cash, in addition to the live stock. Plaintiff introduced his son as a witness, a boy eighteen years old, who testified that some three years before he had seen his father destroy a note for \$300 executed by defendant as a part of the purchase money for the tract of land, but he also testified upon cross-examination that he knew his father had received some money in cash in addition to the live stock at the time of the trade. The deed to the property which would probably have thrown some light upon the transaction was not introduced in evidence. Under this state of the testimony, the circuit judge dismissed the plaintiff's petition, and he has appealed. It seems to us that the clear preponderance of the testimony supports the contention of the defendant and the judgment of the trial court.

Judgment affirmed.

OWSLEY, JR. v. OWSLEY, SR.

(Filed December 10, 1903—Not to be reported.)

Dismissal of appeal—Appeal should be dismissed where the trial court awarded new trial and set aside judgment after appeal was granted.

Hazelrigg & Chenault and Allen & Ewing for appellant.

W. P. Sandidge for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge O'Rear.

In an ejectment suit brought by appellee against appellant the verdict and judgment were for the former. The latter prosecutes this appeal from that judgment. After the appeal was granted the circuit court awarded a new trial of the action and set aside the judgment. There is nothing yet from which appellant can appeal. This appeal is, therefore, dismissed.

NEW YORK LIFE INS. CO. v. HORD.

(Filed December 11, 1908—Not to be reported.)

1. Deceit—Pleading—In an action to recover the amount of a life insurance policy paid upon the death of the insured on the ground that the issual of the policy had been procured by deceit, misrepresentation and fraud, an allegation that the plaintiff did not know of the deceit, misrepresentation and fraud before the payment of the policy, was necessary to support a cause of action.

2. Life insurance—Where a life insurance company paid the amount of its policy on the death of the insured with full knowledge of the alleged fraud and deceit in the procurement of the policy, its action was a ratification of the original contract of insurance, and it can not subsequently complain of the deceit.

Allan D. Cole for appellant.

L. W. Robertson and E. L. Worthington for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellant, the New York Life Insurance Co., against the appellee, W. H. Hord, and the personal representative of Mary L. Weaver, deceased, for damages, in which they charge that appellee and the deceased, Mary L. Weaver, by deceit, misrepresentation and fraud procured the issual by them of an insurance policy upon the life of Mary L. Weaver for \$10,000, which was paid at her death to her personal representative. The personal representative of Mary L. Weaver demurred to the plaintiff's petition, which was sustained, and the action as to him dismissed. The plaintiff appealed in that case to this court, and the judgment of the circuit court was affirmed. (New York Life Ins. Co. v. Weaver's Adm'r, 24 Ky. Law Rep., 1096.) Upon that appeal attention was called to the fact that plaintiff did not allege that they did not know of the existence of the alleged deceit, misrepresentation and fraud, before they paid their money to the personal representative of Mary L. Weaver, after her death, and it was decided that these were necessary averments in order for appellant to recover damages for the deceit alleged to have been practiced upon them. Nor is there any allegation in this case upon this appeal that appellant did not know of the alleged falsity of the statements made to them by appellee, and Mrs. Weaver in the procurement of the issual of the policy before it paid the money, or that it was paid in ignorance of the alleged deceit. We still adhere to the opinion that these were necessary averments in order to support a cause of action.

We find no fault with the contention that in an action for damages in a sale, that the vendee may affirm the contract and recover damages for the deceit; or he may disaffirm the contract and sue for the price with offer to return the property. For instance, one who has been deceived in the purchase of a horse which has been delivered to him, may sue for the rescission of the contract of sale with an offer to return the horse; or he may, at his election, keep the horse and sue for damages for the deceit practiced upon him. But it will not be contended that he could, after discovering that the vendor had made false and fraudulent representation to him as to the sound-

ness or qualities of the horse, consummate the trade by the acceptance of the horse and payment of the purchase price, and then sue for deceit and misrepresentation.

Nor do we see how this well settled rule of law can be made available in this case. Appellant lost nothing by the mere issual and delivery of the policy of insurance, it was only the evidence of an agreement on their part to pay a stipulated sum at the death of the insured. If they learned of the alleged deceit and fraud which had been practiced upon them to induce the issual of the policy before its maturity, or the payment of the indemnity contracted for, it can not be well said that they did so because of appellee's misrepresentation and deceit, but rather in spite of it. Having elected with their eyes open to the facts of the situation to pay the contract of indemnity, they can not then turn around and sue upon the theory that they had paid it is ignorance of the true state of fact, or because of the alleged deceit. If they had availed themselves of their legal rights after the discovery of the alleged deceit which was practiced upon them to induce the issual of the policy, it would have been unavailing; but when they paid with full knowledge, it was a ratification on their part of the original contract of insurance, and they can not subsequently complain of deceit in the issual of the policy.

For reason indicated the judgment is affirmed.

BEREA COLLEGE v. POWELL.

(Filed December 11, 1903—Not to be reported.)

Libel—Verification of petition—The petition in an action for alleged libel is required to be verified by section 116 of the Civil Code; and the right to require the plaintiff to verify it is substantial. The refusal of the trial court to require the plaintiff to verify his petition on motion of defendant authorizes a reversal of the judgment.

Smith & Bush for appellant.

H. C. Hazelwood for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

Appellee instituted this action against appellant to recover for an alleged libel published of him by appellant. Appellant moved the court to require the plaintiff to verify his petition. The motion was overruled, and the plaintiff excepted.

By the Code of 1851 it was provided that verification of pleadings affecting injuries to persons or character should not be required. (Myers Code, section 148.) This provision has been omitted from our present Code, which requires all pleadings, with certain exceptions not here material, to be verified by an affidavit to the effect that the affiant believes the statement of the pleadings to be true. (Civil Code, section 116.) The court, therefore, erred in overruling the motion to require the petition to be verified. The right to require the plaintiff to verify his petition is substantial, and, in the absence of a bill of exceptions, we can not say that the defendant was not prejudiced thereby.

Judgment reversed and cause remanded for further proceedings consistent herewith.

CALOR OIL AND GAS CO. v. McGEHEE.

LOUISVILLE GAS CO., &c. v. KENTUCKY HEATING CO.

(Filed December 11, 1903.)

1. Wasting natural gas—The owner of natural gas wells has no right to draw off the gas from the wells and waste it, or to use it in a manner not beneficial to himself for the sole purpose of injuring his competitor in business, where such use results in a depletion of the common source of supply and in injury to the right of the competitor to use it.

2. Cancellation of lease—Fraud—While it appears that the motive of the lessees of natural gas lands in securing the leases was to waste the gas which they might strike and thereby injure the owner of other wells in the neighborhood, and that the lessor might not have leased the lands if he had known of their intention, the lease will not be cancelled in view of the expenditure of large sums of money in putting down the wells and the requirement of the law that they shall confine the gas until such time as it may be utilized.

Humphrey, Burnett & Humphrey, J. S. Wortham, F. M. Sackett and Alexander G. Barrett for appellants.

Matt O'Doherty, Edward L. McDonald, J. W. Lewis and J. Morgan Richardson for appellees.

Appeals from Meade Circuit Court.

Opinion of the court by Judge Hobson.

There is a natural gas field in Meade county from which the gas is piped to Louisville by the Kentucky Heating Co., and there sold for heating and illuminating purposes. The Louisville Gas Co. claimed the exclusive privilege of selling illuminating gas in the city of Louisville. There was a long litigation between it and the Kentucky Heating Co., resulting in a judgment of this court on June 20, 1901, that the heating company has the right to sell natural gas for heating and illuminating purposes; also the right to make and sell artificial gas for fuel, but not the right to sell artificial gas alone or in mixture with natural gas for purposes of illumination without violation of the gas company's exclusive privilege. (Kentucky Heating Co. v. Louisville Gas Co., 23 Ky. Law Rep., 730.) On September 3, 1901, or about three months after this judgment was rendered, the Calor Oil and Gas Co. was incorporated; its capital stock was fixed at \$1,000, divided into one hundred shares of \$10 each; John A. Gray, Harry Wirgman and W. A. Jones were the incorporators, subscribing for the entire stock of the company; but neither of them paid anything therefor or really owned the stock. They subscribed for it for A. Hite Barrett, the chief engineer of the Louisville Gas Co.; Udolpho Sneed, the president of the gas company, and Will Sneed, the son of J. B. Speed, a stockholder in the gas company; the stock was paid for by A. Hite Barrett, Udolpho Sneed and J. B. Speed, who were the real organizers of the company. The articles of incorporation were drawn by a son-in-law of J. B. Speed, and he is now the president of the company. The money which was paid in for the stock was placed in bank to the credit of the company thus formed, and has since remained there. In the winter before this corporation was formed, John H. Trent, a lawyer living in Meade county, who seems to have been in the employ of the gas company

previous to that, began taking leases of land for gas in the gas field, and took quite a number. In doing this he acted it appears as the agent of Barrett, Sneed & Speed, and after they organized the Calor Oil and Gas Co. these leases were assigned to it. It is also shown that for some time before the organization of this company they had been considering the gas field in Meade county from which the Kentucky Heating Co. obtained its gas, and one of their objects in getting the leases and organizing the Calor Oil and Gas Co. was to interfere with the supply of that company and thus cripple it as a rival of the Louisville Gas Co. They put up between them about \$10,000, which they spent in Meade county in boring wells and in erecting what is called a lamp black factory. In addition to this when the depositions were taken they had incurred liabilities for about \$8,000 more, which were then unpaid. They succeeded in getting several good gas wells from which the gas was piped to their lamp black factory. When they began operations, the Kentucky Heating Co. had a gas pressure of something over sixty pounds. In five or six months this was run down to less than thirty. On these facts the chancellor on the petition of the Kentucky Heating Co. enjoined the operation of the lamp black factory on the ground that it was operated only to waste the gas, and thus destroy the Kentucky Heating Co. From this judgment the defendants appeal.

A close fence twelve feet high was built around the lamp black factory, and no one was admitted within the enclosure. It stood on a half acre of ground leased for that purpose, and no one was permitted to come on this half acre. Fire arms were discharged there to deter the neighbors from coming about. The structure was out in the country where such enclosures are unusual, and, as shown by the evidence, unnecessary. The man in charge of the factory was the lawyer, Trent, who lived at the county seat, and knew nothing of the manufacture of lamp black. There were only two other persons employed, one the day man, was a boy sixteen years old, the other, the night man, somewhat older, but both entirely ignorant of the manufacture of lamp black. During the five months the factory was operated, they manufactured about three hundred pounds of lamp black, worth four cents a pound. In this time they burned all the gas they could obtain, the total amount being about ninety millions of feet. No lamp black was shipped away from the factory. The gas was burned night and day, and it is evident from the proof that in a short time more the pressure upon the pipes of the Kentucky Heating Co. would have been so low as to destroy its usefulness. Other facts might be stated, but the testimony of the defendants themselves whose depositions were taken by the plaintiff is sufficient to show that they conceived the idea of securing leases on territory connected with the gas reservoir from which the Kentucky Heating Co. obtained its supply and by boring numerous wells to draw off the gas and practically destroy the business of the Kentucky Heating Co. The organization as the Calor Oil and Gas Co., and the establishment of the lamp black factory, was a part of the plan to evade the statute against the wasting of natural gas and to waste the gas.

It is earnestly maintained that the statute does not apply to the case, and that at common law there is no remedy. We can not concur in this conclusion. Independently of the statute, the common law affords an ample rem-

edy for a wrong like this. While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his own property with due regard to the rights of his neighbor. He can not be allowed deliberately to waste the supply for the purpose of injuring his neighbor. While a bad motive will not render that unlawful which is lawful (*Chambers v. Baldwin*, 91 Ky., 121), a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all. The gas under the ground may go wherever it will, but the defendants can not be allowed to draw off the gas from under the plaintiff's lands simply for the purpose of injuring it, for the plaintiffs' lands are thus clandestinely sapped, and their value impaired. These principles have often been applied in the case of underground waters, and we see no reason why the same rule should not apply to natural gas. (*Wheatley v. Baugh*, 25 Penn. State, 528, 64 Am. Dec., 721; *Haldeman v. Bruckhardt*, 45 Penn. State, 514, 84 Am. Dec., 511; *Greenleaf v. Francis*, 18 Pick., 117; *Walker v. Cronin*, 107 Mass., 562; *Chesley v. King*, 74 Me., 164; *Bassett v. Salisbury Co.*, 43 N. H., 569; *Swett v. Cutts*, 50 N. H., 439.)

In 21 Am. & Eng. Ency. of Law, 2 edition, page 417, it is said: "Though gas is a mineral, the decisions governing ordinary minerals apply to it only with many qualifications; and it is governed by rules analogous to those governing water percolating beneath the surface. Water, oil and still more strongly, gas, may be classed by themselves, and have been not inaptly termed minerals *ferae naturae*." Also to same effect 2 Snyder on Mines, section 1171.

The doctrine that an act which is legal in itself and violates no legal right, can not be made actionable on account of the motive which induced it, has no application; because the acts of the defendants in wasting the gas violated the plaintiff's legal rights. Both the parties drew gas from the same reservoir. It was incumbent on each to exercise his right so as not to injure the other unnecessarily. If one wasted all of the gas from the reservoir, there would be nothing left for the other. Every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor. This principle has been often applied. Thus each riparian owner may make a reasonable use of a lake or stream of water flowing through his land, but he can not make an unreasonable use of it. Every traveler may make a reasonable use of a highway, but not an unreasonable use to the detriment of another. No one may make an unreasonable use of the atmosphere. In all these instances the party aggrieved by the unreasonable use may maintain an action for redress. In the case before us, the plaintiff and the defendant have each the right to take gas from the common source of supply, but neither may by waste destroy the rights of the other; and as in the case of other like wrongs, the action for redress may be brought in the name of the real party in interest. (*Mfg. Gas Co. v. Ind. Gas Co.*, 155 Ind., 461; *Ohio Oil Co. v. Ind.*, 177 U. S., 190, and cases cited.)

We, therefore, conclude that the circuit court properly granted the injunction complained of, and the judgment in that action is affirmed.

W. C. McGehee, who leased the land on which the wells referred to, or part of them, were situated, filed also an action to cancel the lease, on the ground that it was obtained by fraud. McGehee had leased other lands to the Kentucky Heating Co., and was getting \$700 per year from the Kentucky Heating Co. therefor. He told Trent this when the latter applied for the lease in question, stating that he did not want to do anything that would injure the Kentucky Heating Co. Trent thereupon said to him that the people he represented were law-abiding men, and that they would do a lawful business. The proof warrants the conclusion that the wasting of the gas and the consequent injury to the Kentucky Heating Co. was a motive inducing the defendants to get the leases, and this purpose was in view when they obtained the lease. McGehee would not have leased them the land if he had understood the facts. The chancellor cancelled the lease on the ground that it was obtained by fraud, and that fraud vitiates any contract obtained thereby.

The defendants have spent something like \$20,000 in putting down their wells, perfecting their rights and erecting their buildings and other structures. This will be a total loss to them if their lease is cancelled. As has been recently held in the case of *Commonwealth v. Trent*, it is incumbent on them to combine the gas in the wells until such time as it may be utilized, and if they fail to do this, they become liable to the penalties denounced by the statute. It can not be presumed that the defendants will willfully violate the statute. When McGehee leased them the ground he intended them to have the benefit of the gas, if they found any, and intended them to use the gas. If notwithstanding the statute, they should hereafter use the gas unlawfully, he, or any other person aggrieved, may maintain an action for the protection of his rights. Under the circumstances, and in view of all the facts, the court concludes that a rescission of the lease should not be decreed.

The judgment in the action of *W. C. McGehee v. The Calor Oil and Gas Co.* is reversed, and cause remanded, with directions to dismiss the petition. Whole court sitting.

KENDALL v. CRAWFORD.

(Filed December 11, 1903—Not to be reported.)

Mistake in deed—Power of chancellor to correct—Where the draftsman makes a mistake in a deed by conveying certain real estate to the vendee for life with remainder to her heirs instead of the fee-simple estate as intended, the chancellor has jurisdiction, in an action to which the trustee who holds the property and the only heir in esse are made parties, to correct the deed and vest in the vendee the fee-simple title; and a conveyance by her vests the fee simple title in her grantee.

A. T. Kendall for appellant.

D. M. Rodman and E. L. McDonald for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

In 1865 the Louisville & Frankfort R. R. Co., which was then the owner,

in fee simple, of a lot of ground situated in Louisville, Ky., conveyed it to Isabella Younger (now Crawford) and her husband, Gilbert Younger, and to the survivor of them, during their natural lives, and then to the legal heirs of Isabella.

Afterwards, the husband and wife conveyed the property to E. D. Prewitt, in trust for the sole use and benefit of the wife. Subsequently the husband died, and his widow adopted C. W. Johnson as her heir at law.

On the 7th day of February, 1903, appellee, Isabelle Crawford, having learned that the property in question had been conveyed to her in such manner as that she held only a life estate therein, with remainder over to her heirs, instituted an action in the Jefferson Circuit Court, Chancery Division, in which she made Charles W. Johnson, her heir, and E. D. Prewitt, her trustee, parties defendant, and alleged in substance, that the property had been purchased with her money, and it was intended that it should be conveyed to her in fee simple, but, by mistake of the draftsman, only the life estate had been conveyed to her, with remainder to her heirs; that she was ignorant of this mistake, and had always supposed that she owned the fee; upon which state of facts she prayed for a judgment reforming the deed, by which the property was conveyed to her, so as to give it to her in fee simple, and that the trust created by the deed to E. D. Prewitt be terminated, and adjudged to no longer exist; that the commissioner of the court be directed to execute a deed conveying the property to her in fee simple.

To this action, both E. D. Prewitt and Charles W. Johnson filed answers, confessing the allegations of the petition to be true, and consenting to the relief prayed for. The deposition of appellee was taken, and tends to establish the truth of the allegations of the petition. The case having been submitted, the chancellor rendered a decree granting the relief as prayed for in the petition, and, in pursuance thereof, the commissioner of the court conveyed the property in fee simple to appellee, which deed was duly and legally recorded in the proper office.

On the 26th day of October, 1903, appellee addressed the following communication to appellant:

"Louisville, Ky., October 26, 1903.

"To A. T. Kendall, Esq:

"I offer to sell you my lot on east side of Floyd street in the city of Louisville, Jefferson county, Kentucky, beginning 123 feet south of the S. E. Cor. Floyd and Jefferson streets fronting 19¼ feet on Floyd street and running back eastwardly at right angles to Floyd street 59 feet the same conveyed to me by L. & F. R. R. Co., by deed dated 23d April, 1865, recorded in B. B. L. 22, page 195, J. C. C. Clerk's office, and referred to in judgment in action 38403, Chy. Br. 1st Div. Jefferson Circuit Court, for the sum of \$2,600, one-third cash, balance in one and two years, ten notes by general warranty deed fee simple and marketable title taxes and \$150 mortgage to S. E. Johnson to be paid out of purchase money.

her
"ISABELLA x CRAWFORD."
mark.

This proposition was accepted in the following words indorsed upon the paper containing it:

"I accept the above offer when deed for lot conveying fee-simple title and a marketable title is tendered, ten days time being given to examine title.

"This 27th October, 1908.

"A. T. KENDALL."

Having examined the title, appellant reached the conclusion that appellee could not convey to him a "fee simple and marketable title," and thereupon refused to accept the conveyance and carry into effect the contract; whereupon this action was instituted to enforce the specific performance of the contract. The petition contains, substantially the facts hereinbefore enumerated. Appellant's answer expresses a willingness to take the property, provided he can get a marketable title, which he denies appellee is able to convey him.

Upon the trial of the case the chancellor entered a decree enforcing a specific performance of the contract of purchase; from that judgment this appeal has been prayed. The sole question involved in the litigation is, whether or not the chancellor had jurisdiction to correct the mistake of the draftsman of the original deed in the suit instituted for that purpose; it being objected, on the part of appellant, that the decree in question does not bind the unknown, or possible, heirs of appellee. It is too late, at this day, to question the right of the chancellor to correct mistakes in deeds conveying real property; nor can it be doubted that the judgment of the court, in the suit for correction, if the proper parties in interest were before it, is conclusive of the question decided.

In the leading case of *Worley v. Tuggle*, 4 Bush, 168, it is said: "This case presents a mutual mistake of law and fact by both the contracting parties and draftsman; and though the land was conveyed to the minor children of the purchasers, yet, as they are mere volunteers, they stand in no more favorable attitude, nor have they higher equities, than if it had been conveyed to the parents."

In order to correct the mistake in the deed under discussion, appellee brought before the court all of the parties in being, who were interested in the question. In *Calvert on Parties*, page 251, it is said: "If a suit is instituted which affects an entire fee, the general rule is that it is sufficient to bring before the court the persons whose several interests combined make up the first estate of inheritance."

In *Faulkner v. Davis*, 18 Grattan, 651, it is said: "In respect of the first estate of inheritance and of all interests depending upon it, it is sufficient to bring before the court the person entitled to that first estate, and if there be no such person, then the tenant for life * * * This rule of representation often applies to living persons who are allowed to be made parties by representation, for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self interest and affection to make such defense, and they, therefore, consider it unnecessary to make such persons parties, and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them."

In *Freeman on Judgments*, section 172, it is said: "If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him, and a verdict and judgment for or against the former may be given in evidence for or against any

of the latter. Between a tenant for life and a reversloner no privity exists, and a judgment against the former does not bind the latter. If there be ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." (Barnes v. Barnes, 12 Ky. Law Rep., 708; Parke v. Humpeoh, 12 Ky. Law Rep., 879; Robinson v. Columbia Finance and Trust Co., 19 Ky. Law Rep., 1771, and Brown v. Ferrell, 88 Ky., 417.)

In this case the appellee is a widow sixty-one years of age; she has been twice married, and bore no children. The record shows that she has no collateral kindred of whom she has any knowledge. In the suit to correct the mistake of the draftsman, her adopted heir and her trustee were parties defendant, and consented, in writing, to the decree of correction. The court had jurisdiction of the subject, and had all of the parties in being, who were interested in the question, before it, and it seems to us that the decree rendered invests the appellee with the fee-simple title to the property.

If the chancellor had no jurisdiction to correct the mistake involved in this litigation, then it follows that there is a large class of mistakes in the conveyance of real property which can not be corrected at all; for, until the death of the grantee, it can not be known who are his heirs; and, therefore, if one purchases real property, and undertakes to have it conveyed to himself, but, by mistake, the draftsman conveys it to him for life, with remainder to his heirs, then, in the face of this calamity he is helpless, because he can never obtain a decree of correction binding those who may be his heirs at his death. We are of opinion that appellee acquired a fee-simple title to the property by the decree of correction, and that the judgment enforcing a specific performance of the contract between appellant and appellee was proper.

Wherefore, the judgment is affirmed.

BANK OF CUMBERLAND v. SIMPSON.

(Filed December 11, 1898—Not to be reported.)

Judgment—Validity of—The judgment of a circuit court in an action instituted by the holder of a claim for the construction of a public school building against the trustees of the district in their corporate capacity upholding the validity of the claim and placing the building in the hands of a receiver to be rented out until the claim was satisfied is not void, the court having jurisdiction of both the parties and the subject matter; and having never been vacated, modified or reversed, it is binding although it may have been erroneous. Hence, a property owner is not entitled to enjoin the collection of a tax to be used by the school trustees in paying rent on the building, which they were compelled to rent from the receiver, on the ground that the original claim for the construction of the building was invalid because the indebtedness incurred for the building was in excess of the revenue for that year.

J. E. McMurtry for appellant.

Sandidge & Sandidge for appellee.

Appeal from the Cumberland Circuit Court.

Opinion of the court by Judge Paynter.

The appellant sought to enjoin the sale of some of its property in satisfaction of a tax levied by the school trustees of a district of Cumberland county, claiming that the levy of the tax was illegal, because the trustees were to use the tax collected or a part of it to pay the rent of the schoolhouse for the use of the common school district. The facts out of which the controversy arose are as follows: The schoolhouse in the district was condemned by the county superintendent of common schools; the trustees purchased a lot and entered into a contract with one Baker to erect a schoolhouse for the district and to make other necessary improvements connected therewith, at a cost of something over \$1,000, but the indebtedness thus incurred exceeded the income and revenue for that year, and the assent of two-thirds of the voters had not been obtained; thereupon, Frank to whom the contractor had assigned the debt instituted an action in the Cumberland Circuit Court, in which he asserted a lien upon the schoolhouse for about \$900 (the balance having been paid,) and asked to have the property sold to pay his debt, and if that could not be done, to have it placed in the hands of a receiver and rented until the income arising therefrom would pay his debt. The court adjudged that the property should be put in the hands of a receiver, and directed him to rent it until the income derived therefrom would pay the debt; that action was against the trustees in their corporate character. The judgment was rendered in 1899, and no appeal was prosecuted from it. After this was done the school district had no building in which to have the common school taught, thereupon, the trustees rented the school building from Frank (he having rented it under the order of court), and agreed to pay him \$250 for the use of it for a certain time. Frank agreed with the trustees that the whole amount when paid (less \$20, which he had paid for the building at a public renting,) should be applied as a credit upon the debt which the court decided should be satisfied by the rent of the property.

There is no question in the case as to the reasonableness of the rent which the trustees agreed to pay. If a stranger had rented the schoolhouse from the receiver of the court at \$250, that amount less the cost of renting would have been applied by the court as a credit on Frank's debt, which the court had ordered paid with the rent.

The court having taken from the trustees the possession of their schoolhouse, and thus prevented them from having the school taught therein, the court is of the opinion that the trustees had the right to, and it was their duty to rent a suitable place for conducting the school. Doubtless the new school building was the most available and desirable building in the district for that purpose. If the school building had been burned or damaged so it could not be used for school purposes, there certainly can be no doubt but what the trustees would have been authorized to procure another one temporarily.

The real question in the case is, was the judgment of the court in placing the property in the hands of the receiver void? If it is void, then the ques-

tion would recur as to the right of the trustees to levy and collect a tax and apply it to the payment of the debt contracted in the erection of the schoolhouse. Under the law the trustees are a body politic and corporate, capable of suing and being sued. The creditor certainly had the right to go into court and have the question adjudged as to what rights he had against the district for the claim which he asserted for erecting the schoolhouse. The trustees of the district were the necessary and proper defendants in the action. So we have a case where the court had both jurisdiction of the parties and subject of the action and rendered a judgment which has never been vacated, modified, or reversed. If any criticism can be made of the judgment, it is because it is erroneous. The claim in the action might have been invalid by reason of a statute or constitution, but that was a consideration which should have induced the court to have rejected it. The court adjudged that it was a valid claim. In the opinion of the court the judgment is not void. In the case of *Bank of Columbia v. Taylor County*, 23 Ky. Law Rep., 1463, the question arose as to whether or not a judgment was void which was rendered on a debt, the creation of which, it was claimed, was forbidden by section 157 of the Constitution. The court held that the judgment was conclusive against the county, and among other things, said: "The judgment against the county is conclusive on it as to the justice of the debt; that judgment has not been appealed from. The court had jurisdiction of the parties and the subject-matter, and no defense which should have been asserted there can be relied on in this action, for the judgment is not void."

In *Hardwicke, &c. v. Young*, 22 Ky. Law Rep., 1906, the court held that a judgment denying the right to enjoin a tax, which was claimed to have been levied in violation of section 157 of the Constitution, was a bar to another action where the same relief was sought, although in the first action the constitutional question was not raised.

In *Arnold, &c. v. Shields, &c.*, 5 Dana, 19, the court said: "But if, without the enactment of 1836, he (the magistrate) had jurisdiction over a suit for debt, on a claim not exceeding \$50, the fact that there was no debt, because the statute under the sanction of which it alone could exist, was void, could not either oust or translate the jurisdiction to decide whether the debt, as claimed, was due or not. If the statute be unconstitutional, he ought to have so decided, and consequently he erred in rendering a judgment for plaintiff in the warrant, and that error might have been corrected by an appeal to the circuit court. But if he had no jurisdiction, his judgment was not merely erroneous, it was void, and a ministerial officer might have been guilty of trespass in attempting to enforce it by execution. Is the judgment void? We think not, even if the act of 1836 be a nullity. A judgment, however erroneous, is not void merely because it was rendered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not."

We are of the opinion that section 184 of the Constitution has no bearing on the question under consideration. Besides, if it had, then it should have controlled the action of the court in proceeding to place the property in the hands of the receiver, and as that judgment is conclusive of the question,

therein decided, the section mentioned can not be relied upon to sustain this proceeding. For the same reason section 157 of the Constitution is not available for that purpose. The court necessarily adjudged that that section was no barrier to the enforcement of the collection of Frank's claim, through the court's receiver. If we hold that the judgment is void by reason of the sections of the Constitution mentioned, then an anomalous condition would exist, and it is illustrated by a statement of what could transpire.

Suppose this court on an appeal from the Frank judgment had affirmed it, if the argument of counsel be sound, it would have remained void because the constitutional provisions would have rendered void the judgment of this court, if they did that of the circuit court. If this court had affirmed the judgment, it would have in effect decided that the Constitution did forbid the payment of Frank's claim in the manner adjudged by the circuit court. Suppose there was a change in the personnel of the judge of the circuit court and of this court; and the incumbent of the circuit bench should be of the opinion that the Constitution did forbid the collection of Frank's debt in the manner adjudged by his predecessor, and for that reason hold the judgment void; and this court, by reason of the change in its personnel, would affirm the judgment for the same reason which induced the circuit court to render it. The first judgment would not be declared void because the court which rendered it did not have jurisdiction of the parties and subject matter, but because in the opinion of the incumbents of the judicial positions their predecessors rendered erroneous judgments. If this could be done there would be no stability in judgments of courts. The mere statement of the supposed cases answer the argument of counsel.

The judgment is affirmed.

WHITE, BRANCH, McCONKIN, SHELTON HAT CO. v. CARSON & CO.

(Filed December 11, 1903—Not to be reported.)

1. Sales—Time of delivery—Where an order or contract for the purchase of goods fixes the time for their delivery, the date so fixed controls and the failure of the seller to comply with that provision releases the buyer from the obligation to accept and pay for the goods, if subsequently delivered.

2. Acceptance of order by seller—Advice from the seller of goods to the buyer that he would give his order "careful attention" did not amount to an unequivocal acceptance of the order, and when more than ten days had elapsed after the expiration of the day on which the goods should have been delivered the buyer had the right to assume that the seller did not intend to ship them.

3. Acceptance of goods—The mere receipt of the goods by a salesman of the buyer, in the latter's absence, and the opening of them for the purpose of ascertaining whether they were in good order did not amount to an acceptance thereof when delivered subsequently to the agreed date.

4. Questions for court and jury—What constitutes an acceptance is a mixed question of law and fact, and is usually for the jury to determine in view of the particular circumstances of the case.

G. B. Lykins for appellant.

Glenn & Ringo for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 14th day of January, 1902, the appellees, Carson & Co., who were conducting a retail store in Hartford, Ky., gave a written order to a traveling salesman of appellant, the White, Branch, McConkin, Shelton Hat Co., of St. Louis, Mo., who were doing business as jobbers, for \$376.15 worth of hats and caps, which were to be shipped on the 15th of February following.

Upon the receipt of this order, appellants wrote appellee as follows:

"We will give your order our careful attention."

The bill of goods not having been delivered on time, appellees, on the 27th day of February, wrote appellants as follows:

"Suppose you do not intend to ship. Will buy more while in Louisville.

Will not need yours in case you mean to. Sorry that we were disappointed."

Appellants replied to this letter by telegram on February 28, as follows:

"St. Louis, February 28, 1902.

"Carson & Co., Louisville, Ky., Care of Kentucky Jeans Clo. Co.—Letter 27th received. Goods were shipped on the 26th."

Appellee responded as follows:

"Louisville, Ky., March 4, 1902.

"White, Branch, McConkin, Shelton Hat Co.:

"Gents—We got your message yesterday when we came in from Cincinnati. We had bought and the bill had been shipped before we heard from you. We want to know when our bill was ordered shipped. We thought that we had ordered the bill shipped from 10th to 15th. But, if it was later, we are up against it. Write us at Hartford, Ky., as we will leave here Wednesday."

On March 8th, appellees wrote appellants as follows:

"White, Branch, McConkin, Shelton Hat Co.:

"Gents—We are returning all hats bought of you. Sorry you did not ship on time, as we missed business; had to pay the freight on the hats, as well as some labor. We like your Mr. Williams, and only gave him the order on that account.

"Yours,

"CARSON & CO."

It appears from the testimony that this bill of goods arrived at Beaver Dam, Ky., the nearest railway station to Hartford, about the 1st day of March, and were delivered by the railroad company to Henry Fields, who conducted a transfer business between Beaver Dam and Hartford, and were by him delivered in due course to the firm of Carson & Co., in Hartford, Ky., during the absence in Cincinnati and Louisville of Henry Carson, the member of the firm who gave the order for the goods; and that they were taken in charge by a salesman in the employ of the firm, and opened for the purpose of ascertaining whether they were in good order or not. But none of them had been sold or placed on the shelves for sale before the return of Henry Carson, who at once directed that they should be reboxed and returned to appellant in St. Louis. On this state of facts, appellant sued appellees for the contract price of the hats. Appellees in their answer denied

liability because the goods were not delivered by the 15th of February, and made their answer a counterclaim for \$4.80 freight charges, which they had paid. Appellants plead in their reply that appellees had waived the condition as to time in the shipment by the acceptance of the goods. A jury trial resulted in a verdict and judgment for the defendant, which we are asked to reverse principally upon the ground that the trial court erred in the instructions given to the jury, which are as follows:

"1st. The court instructs the jury that if they should believe from the evidence that the goods, the price of which is sued for in this action, were received and accepted by the defendants by opening said goods, and displaying them for sale, they should find for plaintiff the price of said goods sued for.

"2d. But if they believe from the evidence that said goods were not received and accepted by defendant, but were refused, and promptly reshipped to plaintiff, or within a reasonable time, returned or reshipped, said goods to the plaintiff, they should find for the defendant.

"3d. If they find from the evidence that the defendant did not accept the goods sued for and paid the freight under mistake, they should find for defendant the amount of said freight bill."

Where an order or contract for the purchase of goods fixes the time for their delivery, this controls, and a failure by the seller to comply with this provision of the contract releases the buyer from his obligation to accept and pay for the goods, if subsequently delivered. (Story on Sales, 4 edition, section 310; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S., 255.) Appellee was, therefore, under no legal obligation to accept the goods delivered on the 1st of March, which should have been delivered at least ten days earlier. But the proof in this case shows that appellee never received notice of an unequivocal acceptance of their order from appellant. The only notice which he did receive was that appellant would give his order careful attention. When more than ten days had elapsed after the expiration of the day when the goods should have been delivered, he had the right to assume that appellant did not intend to ship them, and to supply his stock by purchase elsewhere. Nor do we think that the mere receipt by the salesman of appellee of these goods in his absence, and the opening of the boxes in which they were packed, for the purpose of ascertaining whether they were in good order, amounted to an acceptance of the goods. What constitutes an acceptance is a mixed question of law and fact, and is usually for the jury to determine in view of the particular circumstances of the case. (24 A. & E. En. of Law, 2 edition, 1088.) It appears from the evidence in this case that appellee never offered the goods for sale, in any way, or exercised any other acts of ownership over them, but, on the contrary, promptly directed their return to appellant as soon as he was apprised of their arrival. It seems to us that the instructions in the case are not objectionable, and that the testimony supports the finding of the jury.

Judgment affirmed.

TINES v. COMMONWEALTH.

(Filed December 11, 1903—Not to be reported.)

1. Criminal law—Evidence—The sworn statement procured from a person by a representative of the Commonwealth under the guise of using it as evidence against the unknown perpetrators of a crime can not be used as evidence against that person when subsequently accused of the crime.

2. Instruction—An instruction which groups certain facts shown by the evidence and accentuates them, and which tells the jury what presumption arises from them, is objectionable under the accepted rule of practice in this State.

3. Same—An instruction which told the jury to draw no presumption of guilt from the failure of the defendant to testify was erroneous in that it called attention to the very thing upon which the law enjoins silence.

B. C. Seay and Sam'l H. Crossland for appellant.

Clifton J. Pratt for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Tom Tines, was indicted by the grand jury of Graves county, charged with the offense of feloniously breaking into the warehouse of Will Ryburn, and taking and carrying away therefrom one set of buggy harness, the personal property of Ryburn. Upon trial he was convicted, and sentenced to one year in the penitentiary.

It was conclusively shown by the Commonwealth that Ryburn's warehouse, or barn, was feloniously broken into, and his harness stolen therefrom, in July, 1901, and that about a year afterward the harness was found in the possession of one Hicks. The only evidence in any way tending to connect appellant, Tines, with the affair is his own affidavit, which the acting county attorney procured from him, under the guise of using it as evidence against the unknown perpetrators of the crime. This affidavit is as follows:

"T. J. Tines, being sworn, states, 'last fall I went to see one of the Mangrums, I think his name was Ed, about buying some hogs to fatten, and I met a man here at the church southwest of Boaz station, who said he had sold his buggy and wanted to sell his harness, he had the harness in his hack or buggy; said he wanted to sell me a pair of harness; I told him that I didn't particular need the harness, and he said he would sell me a pair cheap; I told him that while I didn't particularly need a pair, I would buy a pair; he offered to sell them to me for \$5; I finally bought them at that figure and paid him the money for them; I think probably I had the harness more than a month when I sold them to Hicks, but I am not sure as to the time; I was coming towards home when I met the man that I got the harness from; he was traveling south I think; he was a medium-sized negro; seemed to be a middle-aged man; don't know that I ever met him before or not. I traded it to U. S. Hicks for a double-barreled shotgun, breech-loading shotgun; I gave him \$7 to boot, this trade took place with Hicks some time after Christmas, something near a month after Christmas; I got the gear some time in the fall from the negro, couldn't tell when; don't know the month; couldn't say whether it was the fore part or the latter part of

the fall; don't know whether it was in the middle of the fall or not; don't know whether it was in September, October or November; can't remember positively as to what time it was in the fall; I simply know it was in the fall and before Christmas; don't remember whether the negro I got the gear from was well dressed or not; I made the trade; it was in the road that runs from the schoolhouse to Boaz station that the trade was made; I believe it was about two miles from the schoolhouse; I had done been to see one of the Mangrums; when I met this darkey, after seeing Mangrum I went on down to see Preacher Wilkes; just went to see Wilkes on a visit.

"T. J. TINES." "

Wharton, in his work on Criminal Evidence, section 668, says that "the testimony of an accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn, and examined. This rule is founded upon the unreliable, as well as the inquisitorial character of such statements; and, therefore, when a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate."

We think the affidavit introduced in this case clearly comes within the rule of law above stated, and, as it constituted the sole link in any way connecting appellant, Tines, with the commission of the crime, the court should have peremptorily instructed the jury to find him not guilty.

Neither of instructions numbers two and four should have been given. Numbers one and two contained the whole law of the case. Number two is objectionable, because it groups and accentuates certain portions of the evidence, and undertakes to tell the jury what weight to give the same. This court has often held it to be error to group certain facts shown by the evidence, and to unduly accentuate them; and when the court tells the jury what presumption arises from certain stated facts, it invades the province of the jury, who should be left to weigh the evidence, themselves, and to draw their own conclusions therefrom.

In number four, the jury were instructed "that they shall not comment upon the failure of the defendant to testify; neither shall they draw any presumption of his guilt from his failure to testify." The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the Commonwealth's attorney could have been more injurious to his interest, than was done by this instruction. The court, by the instruction in question, did appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf. (Subsection 1, section 223, Criminal Code.)

For the reasons above indicated the judgment is reversed for proceedings consistent with this opinion.

BEREA COLLEGE v. POWELL.

(Filed December 11, 1903—Not to be reported.)

1. Bill of exceptions—A paper purporting to be a bill of exceptions not signed by the circuit judge, or proved by bystanders, and not filed in the circuit court, being merely tendered, is not properly a part of the record and should be stricken out.

2. Libel—A publication in a newspaper that certain witnesses were on their way to a certain place "where they will testify in the case of the Powell Brothers and Frank Gay for burning the Powell school house" is libelous, and is sufficient to support a cause of action.

Smith & Bush for appellant.

H. C. Hazelwood for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this action to recover of appellant damages for an alleged libel published concerning him in a paper owned and issued by appellant. The publication complained of is in these words: "John W. Cope and Mr. J. W. Vanwinkle, both of Berea, stopped over Thursday night at J. B. Hatfield's. They were going to McKee, where they will testify in the case of the Powell brothers and Frank Gay for burning the Powell schoolhouse." The defendant demurred to the petition. Its demurrer was overruled. It then entered a motion that the court ruled the plaintiff to verify his petition, but no action was taken on this motion, and the defendant filed answer. The jury found for the plaintiff in the sum of \$250. The defendant's motion for a new trial was overruled, and time given until the first day of the next term for it to tender a bill of exceptions. On the first day of the next term the defendant tendered a bill of exceptions. The circuit judge died during that term without signing the bill, and an order was entered allowing until the third day of the next term to complete and tender the bill of exceptions. Without any further order in the case, the defendant has brought the record here, and the plaintiff has entered a motion to strike out the bill of exceptions because it is not signed by the circuit judge, or proved by bystanders, and was not filed in the circuit court, but only tendered. The motion must be sustained, for the paper is not properly a part of the record, or authenticated in any way. This leaves for consideration only the question of the sufficiency of the petition on demurrer, and the sufficiency of the pleadings to support the judgment.

The demurrer to the petition is based on the idea that the words charged were not libelous; it is insisted that they do not import any charge against the Powell brothers, and that on the face of the publication it may be that the case against them was for a negligent burning of the schoolhouse and not for an intentional act. McKee is the county seat of Jackson county. The statement that the persons named were going to McKee where they would testify in the case of the Powell brothers for burning the Powell schoolhouse naturally imported a trial in court, and that the subject of this trial was the case of the Powell brothers for burning the Powell schoolhouse. If it was supposed that the burning was from negligence or accident, and not by design, and this was meant by the publication, the defend-

ant might have pleaded and proved the facts. This it did not do. On the contrary, it pleaded that there was a general rumor that the plaintiff, Gay, had burned the schoolhouse for a certain reason, and that the publication was made under the impression that he would be charged with burning the schoolhouse, and that when it was found out that this was a mistake, it retracted the publication. The answer certainly made the petition good. In the construction of language all the circumstances of its publication must be considered, and that meaning will be given it, which, in the light of the circumstances, it may be fairly presumed to have conveyed to those to whom it was published. (Townsend on Slander, section 133.) The words are to be taken in their natural meaning; courts formerly construed language in mitiori sensu; but this is no longer the rule, and where the words are capable of two constructions, one actionable, and the other not, the court will adopt that construction which the circumstances show the words naturally bore (Townsend on Slander, section 142); and after verdict, it will usually construe the language in that sense which will support the verdict. (Ib., section 142.) In the absence of a bill of exceptions, we, therefore, conclude that there is no ground for disturbing the verdict.

Judgment affirmed.

MILLER v. COMMONWEALTH.

(Filed December 11, 1903.)

1. Criminal law—Gaming—Indictment—Where an indictment, which charged the accused with the offense of setting up a faro bank, in stating the circumstances of the offense charged averred that he operated "a faro bank and other machines and contrivances commonly used in betting," the indictment is not bad for duplicity, but the averment as to the "other machine and contrivances" must be rejected as surplusage, and the prosecution limited to the offense of setting up or carrying on a faro bank.

2. Same—Changing name of game—A person charged with the offense of setting up and carrying on a faro bank is guilty if it be shown that he set up a game of cards played according to the rules of what is known as faro, although modified and changed in some immaterial particular and called by another name.

3. Prejudicial error—Statement of Commonwealth's attorney—The statement of the Commonwealth's attorney, in argument to the court, and in the presence of the jury, that he knew that a witness, who had stated that he did not think the accused was the dealer in a game which he had witnessed, had testified before the grand jury that the accused was the dealer was not prejudicial to the accused where he himself admitted, when he took the stand, that he was the dealer.

4. Same—Bill of exceptions—Alleged misconduct of the Commonwealth's attorney in the final argument to the jury can not be considered on appeal where no exception was taken at the time, and notice was first taken of it on the motion for a new trial.

Chas. J. Bronston for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

The first question made in this case is as to the sufficiency of the indictment, which is as follows: "The grand jury of Fayette county, in the name and by the authority of the Commonwealth of Kentucky, accuse George Miller and Tim McCauliffe of the crime of setting up a faro bank, committed as follows, viz.: That said George Miller and Tim McCauliffe on the 23d day of December, 1902, in the county aforesaid, did unlawfully and wilfully in rooms in a building on Limestone street between Main and Short, and over what is known as Heini's saloon, set up and carry on, keep, manage, conduct and operate a faro bank and other machines and contrivances commonly used in betting whereby money and property might be won and lost, and at which money and property and checks representing money and property were won and lost, against the peace and dignity of the Commonwealth of Kentucky."

The indictment is based on the following statutory provisions: "That whoever, with or without compensation, shall set up, carry on, keep, manage, operate or conduct, or shall aid or assist in setting up, carrying on, keeping, managing, operating or conducting a keno bank, faro bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost; or whoever shall, for compensation, percentage or commission, set up, carry on, manage, operate or conduct a game of cards, oontz or craps, whereby money or other thing may be won or lost, or shall, with or without compensation, percentage or commission, aid, assist, or abet in setting up, carrying on, managing, operating or conducting any game so set up, carried on, managed or conducted, for compensation, percentage or commission, shall be fined \$500 and costs, and confined in the penitentiary not less than one nor more than three years; shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust or profit, whether it be State, county, city or municipal. The judgment of conviction in each case shall recite such infamy and disqualification, and shall not be valid without such recital. The provisions of this section shall not include nor be applicable to persons who play at such games, tables, banks, or with such machine or contrivance, unless they take other part in setting up, conducting, keeping, managing, operating or carrying on such tables, banks, games, machine or contrivance, or aid or assist in setting up, keeping, conducting, managing or operating such game, bank, tables, machine or contrivance." (Kentucky Statutes, section 1960.)

"The change of name of any of the games, banks, tables, machines or contrivances mentioned or included in the preceding section, shall not prevent the conviction of any person violating the provisions thereof; but no prosecution shall be commenced under said section later than five years after the commission of the offense, nor shall its provisions apply to persons who sell combination or French polls on any regular race track during the races thereon. An indictment for a violation of the preceding section may charge the accused in one count with any or all of the offenses mentioned or included therein." (Kentucky Statutes, section 1961.)

The defendants demurred to the indictment for duplicity. The demurrer was overruled. A separate trial was awarded, and on the trial of the appellant, Miller, the court limited the evidence to the setting up of a faro bank.

By section 194 of the Code, the indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. Under this section it has been held that the indictment in the part of it (naming the offense charged) must correctly designate the offense. (*Brooks v. Commonwealth*, 98 Ky., 148; *Commonwealth v. Tupman*, 17 Ky. Law Rep., 217.) The indictment before us in this part of it specifies the offense with which the defendants were charged as the crime of setting up a faro bank. This was the only offense charged, although in the accusative part of the indictment it is stated that he had not only set up a faro bank, but other machines and contrivances commonly used in betting. For the latter words must be rejected as surplusage as only the offense of setting up a faro bank is charged against the defendants in the part naming the offense. Under this indictment no conviction could be had except for setting up or carrying on a faro bank, and the court properly so ruled, excluding all evidence except that relating to this offense.

The proof leaves no doubt that the defendant, Miller, set up and carried on a game at which money and property was won and lost. He rented the rooms, and was the dealer in the game, but it is insisted that the game was not faro, but baccarat. Faro is played with a pack of fifty-two cards dealt from a box with a layout of thirteen cards spread out on the table or fastened to the table or painted on it or on the cloth over it. The dealer deals out the cards from the box. The players bet against the bank or dealer, placing their money on some card on the table, and winning or losing according as the cards come out of the box. In baccarat a similar box is used. The cards are dealt in the same way, except there are no sevens in the deck, the pack, therefore, consisting of forty eight cards. The betting is done in the same way, and there seems to be no difference between the game of baccarat and faro according to the evidence, except that in baccarat the sevens are not in the deck, and there is no seven in the layout on the table, and from the absence of the seven, as explained by the witness, "If you put a bet on the corner, the five next to the six, it is not a bet—it don't take the next card, because there is no next card there, but in faro it would involve the five or seven." Except for the absence of sevens, the game of baccarat, as shown by the evidence, is precisely the same as a game of faro in the way the game is played, the way the bets are made, and in every other respect. In illustration of this, it may be added that some of the witnesses for the Commonwealth, who had more or less experience in playing faro, took the game dealt by appellant to be a game of faro. On these facts, the court instructed the jury as follows:

"1st. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, George Miller, in Fayette county, Kentucky, between the 23d day of December, 1897, and the 23d day of December, 1902, in a room in a building on Limestone street, between Main and Short streets, in Lexington, Ky., and over what is known as Heintz's saloon, conducted or operated a faro bank, which was commonly used in betting, and that money, or checks representing money, was then and there bet, won and lost upon games played upon said faro bank, the jury should find the defendant guilty.

and unless the jury do so believe from the evidence beyond a reasonable doubt, they should find the defendant not guilty.

"2d. If the defendant did conduct or operate a machine or contrivance commonly used in betting—and if, upon said machine or contrivance, money or checks representing money were bet, won and lost, yet the jury should find the defendant not guilty unless they believe from the evidence beyond a reasonable doubt, that such machine or contrivance was a faro bank.

"3d. A game of cards played according to the rules of what is generally known as faro, is a game of faro—and even if the game so played is modified or changed in some immaterial particular, it is still a game of faro, provided the game as played, is played in accordance with the rules and principles by which a game of faro is played, unless the game as so modified or changed is generally known and called by some other name than faro. Any game not played in accordance with the rules and principles of faro is not a game of faro, and any game not played in strict accordance with the rules and principles of faro, if the game as played has a commonly known and distinctive name not that of faro, is not a game of faro."

The appellant complains of so much of the charge of the court as required the game to be "generally known and called by some name other than faro," and asked the court to charge the jury to find for him if the game had a distinctive name other than that of faro commonly given to it by persons participating in it and familiar with it. It is earnestly insisted for him that the majority of people may never have heard of the game of baccarat, and that it was erroneous to require that the game should be generally known and called by that name. But it will be observed that this qualification made instruction three more favorable to the defendant than the instruction would have been without it. But for it the jury would have been authorized to convict the defendant if the game as played was played in accordance with the rules and principles of faro, although modified or changed in some immaterial particular. Not only so, but by the last clause of the instruction if the game as played has a commonly known and distinctive name other than faro, there could be no conviction unless it was played in strict accordance with the rules and principles of faro.

These instructions were more favorable to the defendant than the law warranted; for by section 1961, Kentucky Statutes, above quoted, the change of the name of any of the games mentioned in section 1960 shall not prevent the conviction of any person violating its provisions. By section 459, Kentucky Statutes, there shall be no distinction in the construction of statutes between civil or criminal and penal enactments. All statutes shall be construed with a view to carry out the intention of the legislature; and by section 460, are to be construed liberally with a view to promote their objects. The purpose of the provision in section 1960, that the change of name shall not prevent a conviction, is to avoid the confusion arising from the fact that games frequently have in the sporting world names not generally known among the class of people constituting the grand juries.

The rule is well settled that only the substance of the issue need be proved. (1 Bishop on Crim. Pro., section 488b; Jones v. Commonwealth, 2 Ky. Law Rep., 68; Williams v. Commonwealth, 78 Ky., 98; Sutton v. Commonwealth, 97 Ky., 308; Boyd v. Commonwealth, 22 Ky. Law Rep., 1017.) The defend-

ant was informed by the indictment that he was charged with carrying on a faro bank in a certain house on a certain street in Lexington. He was, therefore, not misled as to the nature of the accusation against him and if the game he carried on there was in substance a game of faro, although called baccarat, the substance of the issue was proved and the defendant was properly convicted. In lieu of instruction three the court should have simply told the jury that if the game was played in accordance with the rules and principles of the game of faro it was a game of faro within the meaning of the instructions, although it was modified and changed in some immaterial particular.

When the witness, Ed. Oder, was on the stand for the Commonwealth and testified to seeing some games going on in the room he was asked who was the dealer, and said he did not know. Being then asked if he knew the defendant, Miller, he said he did. He was then asked if he was the dealer and answered he didn't think he was. Being then asked if he testified before the grand jury a month or six weeks before, he said he did. Then this occurred:

"Q. Didn't you testify that Mr. Miller was the dealer."

Defendant objects, which objection is sustained by the court. In argument upon said objection the Commonwealth attorney made, in substance, the following statement: "I do not intend to be trifled with in this manner, when I know that the witness testified before the grand jury that he played at a game of faro with Miller dealing, and that we sent out for Charley Oldham and fixed the date and time. The attorney for defendant moved the court to set aside the swearing of the jury because of the prejudice this statement by an attorney for the Commonwealth would make. Motion overruled, defendant excepts."

It appears from appellant's affidavit that the court ruled the Commonwealth attorney should make no such statement; but it is urged that for this the swearing of the jury should have been set aside.

The remark was addressed to the court and it must be presumed that the jury would try the case according to the evidence as they were sworn to do and not be governed by what one of the attorneys might improperly say in argument to the court. While the Commonwealth attorney, so far as appears, should not have used such words in the presence of the jury, we do not see that the defendant was prejudiced in any way by the remark for when he came on the stand in his own behalf he admitted being the dealer in the game and the only question in effect made was whether it was faro or baccarat, and the exact facts on this question were proved by the witnesses which he himself introduced, there being no substantial contradiction in the evidence as to them.

Appellant also relies on misconduct in the Commonwealth's attorney in his concluding argument to the jury. But there is nothing in the record to show this except the affidavit of the defendant, Miller, filed on the motion for new trial. The decisions of the court upon the motion for new trial are not subject to exception. (Criminal Code, section 281.) The exceptions of a party shall be shown upon the record by a bill of exceptions prepared, settled and signed as provided in the Code of Practice in civil cases. (Code, section 282.) None of the matters complained of as to the concluding argument of the Commonwealth's attorney are shown by the bill of exceptions.

They can not, therefore, be considered in this court. Neither can the objections to the panel of the jury. (*Curtis v. Commonwealth*, 23 Ky. Law Rep., 267; and cases cited; *Knoxville Nursery Co. v. Commonwealth*, 21 Ky. Law Rep., 1483.)

The rulings of the court were more favorable to the defendant in the admission of evidence than they should have been. In a case like this the court may properly allow the witnesses to testify to what they saw going on in the room and also allow proof to be made as to what a game of faro is and then on the evidence the jury should determine whether or not the defendant set up or carried on a faro bank.

On the whole case we see no error to the substantial prejudice of the defendant and the judgment complained of is, therefore, affirmed.

Whole court sitting.

Judges Paynter and Nunn dissenting.

LEWIS v. KASH.

(Filed December 15, 1903—Not to be reported.)

Action to subject interest of debtor in real estate to judgment debt—The evidence is sufficient to show the debtor's interest in the land, and the trial court properly subjected it to the debt.

W. W. Rawlings for appellant.

Hazelrigg & Chenault for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 15th day of November, 1888, Philip Fields executed his promissory note to S. H. Kash for \$35, with interest thereon until paid. In 1898 Kash sued on this note, and recovered a judgment therefor, on which execution issued, and was returned by the sheriff "no property found." In 1899 he brought this suit, in which he alleged that after the creation of the debt for which the judgment was rendered in his behalf, Fields and his father-in-law, Thad Lewis, had jointly purchased from N. C. Potter a tract of 300 acres of land, and that a deed therefor had been executed to them jointly; that after the rendition of the judgment in his favor, Fields and Lewis never having placed their deed on record, had procured the grantor, Mrs. Potter, to execute a new deed to Lewis alone, for the purpose of hindering the collection of his debt. Lewis was made a party to this suit, and filed an answer in which he admitted that Fields and himself had jointly contracted for the purchase of the land from Mrs. Potter, and that she had made to them a joint deed, but that soon after the purchase Fields became satisfied that he would not be able to pay his part of the purchase money, and had agreed that Lewis might assume the whole debt, and become the owner of the entire tract of land; and that in accordance with this agreement, he had actually paid the entire purchase money to Mrs. Potter, and that she had executed to him alone a deed for the land. The testimony of both Fields and Lewis supports the averments of Lewis' answer. Plaintiff, on the other hand, introduced the testimony of two witnesses, Annie J. Fields and Pollie

J. Little, who testified to a conversation between Lewis and Fields, in which it was agreed that Fields should surrender his interest in the land to Lewis; and that Lewis was subsequently to make a deed to Field's part to his wife, who was a daughter of Lewis. It is also shown that both Lewis and Fields lived on the tract of land in different houses, and that before the institution of plaintiff's suit had agreed upon a division of the land between them. It also appears that in a suit brought by Fields against a third party for trespass, that he testified that he was the owner of one-half of the land. Under this showing the trial court decided that Fields was the owner of one-half of the tract of land, and that it was liable for plaintiff's debt.

We see no reason why the judgment should not be affirmed, and it is so ordered.

BRYANT, &c. v. MAIN.

(Filed December 15, 1903—Not to be reported)

1. Pleading—Defects cured by judgment—Where the defendant in an action to recover damages for timber cut and removed from lands filed answer setting up title in himself and pleading an estoppel against the plaintiffs and the allegations of the answer were controverted, the defects therein, if any, arising from its failure to allege that the representations of the plaintiffs that the land was vacant and had not been previously surveyed had been made with knowledge on their part of the facts and with the intention that defendant should act upon them, and to state that the defendant did not know that the land had been previously surveyed with a view to its appropriation, were cured by proof and judgment.

2. Title to lands—Estoppel—Where a county surveyor and one who acted as chain carrier for him employed to make a survey of certain lands represented to one who held county warrants covering the land that the land was vacant and had not been previously surveyed with a view to its appropriation, they are estopped to afterwards claim the lands, as against the holder of the warrants, under a survey which they had previously made and a patent issued thereon.

3. Same—Another person interested with them in the lands, who was present at the time it was surveyed for the holder of the warrants, was also estopped, although he may not have heard the representations made, as he knew the purpose of the survey and that his partners were misleading the claimant into believing that the land was vacant.

4. Same—Where the calls of the surveys made by the surveyor for himself and his partners and those of the surveys made for the holders of the county warrants called for the same natural objects, which were notorious and about which there could be no mistake, indicating clearly a conflict between them, the surveyor and those interested with him can not be heard to say that they were ignorant of the fact that the land in dispute had previously been surveyed by them.

Pitzer D. Black and Jas. D. Black for appellant.

S. B. Dishman for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson.

Pursuant to two land warrants issued by the Knox County Court to appel-

lee, James Main, J. C. Sprouls, the county surveyor of Knox county, on December 18, 1889, laid off and surveyed to Main one tract of 140 acres, and another near by, but distinct from it, of 10 acres. Pleasant Bryant and Hugh Foley were the chain carriers. Main had understood that Sprouls had been surveying in the neighborhood, and after telling Sprouls what land he wanted to run off, asked him if he had ever run it for any one else. Sprouls said he had not; that it was vacant land; and told Main to run it. Main told him what he had heard about his running some land previous to that, and that he wanted him to tell him if the land was not vacant, and Sprouls replied that he had not run it. Bryant, who was present, said that Main was very fortunate in having the warrants and running it that day, and if Main had not done so it was their business that day to have run the land. Main paid Bryant his fees as chain carrier, he also paid Sprouls his fees for surveying, and in addition the register's fees for obtaining a patent, and Sprouls agreed to send the surveys in to the register and get the patent. The patent did not come, and finally Main saw Sprouls and told him if he was not going to send up the papers to give him a copy, and he would send them up. Sprouls promised to do this. Some time thereafter Sprouls sent Main what purported to be a copy of his surveys made on December 18, 1889, but the paper so sent was a survey of 150 acres in one body and embraced different land from that which Main had in fact taken up. About this time Bryan and William T. Golden produced a patent from the Commonwealth issued on August 30, 1890, on a survey made by Sprouls of date November 1, 1889, for 100 acres covering the greater part of the land surveyed by Main on December 18, 1889. While this patent was issued to Golden and Bryant, Sprouls was in fact the owner of one-third of it, and they afterwards executed to him a title bond or deed transferring this interest to him. Golden also transferred an interest in the land to appellant H. B. Lewallen; but none of the transfers to Sprouls or Lewallen are copied in the record. Sprouls then offered to pay back to Main the money that he had paid him in December, 1889, for making the survey, and for the register's fees for the patent, but Main refused to accept it. Main had entered on the land after it was laid off to him and enclosed a part of it claiming to the extent of his boundaries. This action was brought by Bryant, Lewallen and Sprouls against Main to recover damages for timber cut by Main from the land. Main, by his answer, denied that their survey was made on November 1, 1889, or before his survey. He also pleaded an estoppel on the ground that Sprouls, Bryant and Golden had allowed him to make his survey under the circumstances above stated, Golden also being present when it was made and giving him no notice of their claim. The defendants replied denying the facts alleged to make out the estoppel, and the case being submitted, the circuit judge gave judgment in favor of Main. From this judgment Lewallen, Bryant and Sprouls appeal.

While the evidence was conflicting, on the whole it sustains the conclusion of the chancellor. There is neither pleading nor proof in the record that Lewallen was a bona fide purchaser without notice. On the contrary, Main's possession was sufficient to put him on notice. It is earnestly insisted that the answer of Main pleading the estoppel is insufficient in that it does not show that Main did not know at the time he made his surveys that

the land had been previously surveyed with a view to its appropriation, or that the representations then made to him by the appellants were made with knowledge actual or virtual of the facts, or that they were made with the intention that Main should act upon them. But there was no demurrer to the answer. Its allegations were controverted, and if it was defective it was cured by the proof and judgment. The proof shows that the representations as above stated were made by Sprouls and Bryant, and while it is not clear that Golden heard them, he was present at the survey, and knowing the purpose for which it was made, he could not remain silent and allow Main to survey the land without notice of his claim when he knew that one of his partners, Sprouls, was making the survey, and the other, Bryant, was acting as chain carrier, both receiving from Main their pay for doing so. For he knew that Main was taking up the land as vacant, and that his partners, Sprouls and Bryant, were helping him to do so, and he was bound to understand that this was calculated to mislead Main into the belief that they had no claim to the land. The plaintiffs undertook to show that they did not know at the time where their survey was, and that Bryant and Sprouls, in effect, told Main this, or told him that they did not know whether the land was vacant, but the great weight of the evidence is against them in this, and we agree with the chancellor that they were charged with notice that the land Main was surveying is the same as that embraced in their patent. The subsequent conduct of Sprouls is inconsistent with any other conclusion, and so is the long delay of the plaintiffs to claim the land. Main was an old man, and had nothing in his hands to show his right to the land, while they had a patent for it. The calls of the survey, as given in their patents, are as follows: Beginning at a white oak and hickory, standing on Harp's Creek side, it being a corner of a 100-acre survey made in the name of Levi Goin and beginning corner of a 100-acre survey made in the name of James Lee; thence 79 E. 28 poles to a poplar, Goin corner; thence S. 59 E. 36 poles to a black oak locust and white oak, the beginning corner of said Goin, standing on the top of the ridge between Harp's and Greasy creeks and on the Knox and Bell county line; thence with the Knox and Bell line and top of ridge S. 10 E. 500 poles to the corner of Knox and Whitley county; thence with said Knox and Whitley county line N. 87 W. 100 poles, Mack Lee line; thence with said lines to Lewis Sears' lines; thence with said Sears lines to a survey made for James Lee, thence with said Lee lines to the beginning.

The calls of Main's two surveys are as follows:

1st. One hundred and forty acres. Beginning at a beech, a corner of a 100-acre survey made in the name of Lewis Sears; thence N. 53 W. 80 poles to a poplar and dogwood, corner of same; thence S. 60 E. 80 poles to a stake; thence S. 15 E. 100 poles to a stake on the county line; thence with the county line to said Main's old line; thence with same to the beginning.

2d. Ten acre tract. Beginning at a stake, hickory and chestnut oak, a corner of a 100-acre survey made in the name of Lewis Sears, and a corner of a survey made in the name of Mc. Lee; thence with said line S. 15 W. 40 poles to a pine on the Knox and Whitley county lines; then with said line N. 65 W. 70 poles to a stake on said Mains' line; thence with the same to the beginning.

It is incredible that a surveyor on the ground making the last two surveys could have been ignorant of a survey made by him only about a month before, or that he could have failed to know that the last two boundaries conflicted with the first. The surveys call for natural objects notorious and about which there could be no mistake. Plaintiffs' survey calls for the Knox and Bell county line, the corner of Knox and Whitley county and the Knox and Whitley county line. It also calls for Mc. Lee's line and Lewis Sears' line. The defendant's ten acre survey calls for a pine on the Knox and Whitley county line and runs thence with the line of the tract of land then owned by Main. His other survey calls for the county line and to run thence with the county line to his line. All the surveys call for the Lewis Sears survey and the Mc. Lee survey. The conflict between plaintiff's survey and the defendant's survey is so great that with these natural objects before him, a surveyor on the ground could not reasonably be ignorant of the conflict, at least he should be charged with notice of it in view of the natural objects called for. The same is true of Bryant and Golden, for they lived in the vicinity, and hold another patent near by. While the county line is called for in the survey as being "on the top of the ridge," it is spoken of by the witnesses as on top of the mountain, and a natural object as this must have been patent to parties on the ground. All of the surveys call for the land lying between the Lewis Sears 100-acre survey and the county line.

Judgment affirmed.

TOWN OF BROMLEY v. BODKIN.

(Filed December 15, 1903—Not to be reported.)

1. Defective sidewalk—Notice to municipality—Where a sidewalk has remained out of repair for a period of several months, resulting finally in injury to a pedestrian, it is a question for the jury whether or not the town authorities might not, by the exercise of ordinary care, have learned of the defect and remedied it.

2. Same—The fact that the sidewalk, whose defect caused the injury, was constructed by the owner of the property in a town, whose authorities had never required the property owners to build sidewalks, did not relieve the town of liability for injuries resulting from defects therein, provided such defect was known to the authorities, or could have been known by the exercise of ordinary care, in time to have been repaired by them before the accident.

Myers & Howard for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee recovered judgment against appellant in the sum of \$275 for a severe injury to her ankle, caused by a fall which occurred in this way: Appellee was employed to solicit orders for a tea store in Ludlow, and for this purpose went to Bromley, which was not far from Ludlow. In coming out of the house of a customer on Kenton street she undertook to step on the sidewalk, which was constructed of plank laid across scantlings that ran

with the sidewalk. The planks which were laid across the scantlings and at right angles to the direction of the sidewalk were long enough for two people to walk upon when abreast. When appellee stepped upon the plank for the purpose of getting upon the sidewalk, it was not nailed down at the other end, and tilted up with her. By this she was thrown down, and her foot in some way was caught and severely wrenched and sprained. She was laid up for seven months. She proved that the same thing had happened to another person at the same place four or five months before, and that the plank had remained there loose from that time until she was injured, and until about a week afterwards, when the sidewalk was repaired. Bromley is a place of about 600 people. Kenton is a cross street running between Main and Roman. It was laid off by the town about the year 1892, but the town authorities had done no work upon it except to fill some holes in the carriage way, and clean out the gutters. There were gutters on each side made by a plow. There were no sidewalks on the square except the one she was hurt on, which was constructed by the owner of the property. At other points, the people walked on the ground or on planks lying on the ground.

There were a church and three or four houses on the square, but the town authorities had never required the property owners to build sidewalks. It is urged for the town that it is not responsible for appellee's injury because no proof was made showing that it had notice of the defect in the sidewalk, and because the town authorities had not taken charge of the sidewalk on this street.

As the plank had been loose for some months, it was a question for the jury whether the town authorities ought to know of the defect in the sidewalk. Where a defect has existed as long as this, the court can not say that the town authorities might not, by the exercise of ordinary care, learn of the defect and have it remedied. The question, therefore, of notice to the town authorities was properly left to the jury. (*Fordsville v. Spencer*, 18 Ky. Law Rep., 1200; *Wickliffe v. Moring*, 24 Ky. Law Rep., 419.) It is immaterial who constructed the sidewalk if the defect was known to the city authorities, or might have been known by them in the exercise of ordinary care in time to have repaired it before the accident. The sidewalk was old and decayed. The city, in allowing it to remain out of repair, failed to keep the street in order, and is liable because the sidewalk, in the condition it was and had been for some time, was, as found by the jury, dangerous. (2 *Smith on Municipal Corporations*, section 1804.)

In *Henderson v. Sandefur*, 74 Ky., 550, it was held that the city must be permitted to exercise its discretion as to whether the public interest requires the improvement of the streets in the uninhabited or sparsely settled portions of it, and its decision is final; that was an action to recover for injuries to a carriage and horses received on Eleventh street in Henderson, outside of the inhabited portion of the city, and at a point where Eleventh street had never been used by the general public as a street, or recognized as such by the city government, and the evidence tended to show that neither the wants nor the convenience of the public required that it should be maintained as a street. The judgment below in favor of the plaintiff was reversed, but in reversing the case this court said: "If the city council had taken control of the street and by improving or repairing it, had invited the

public to use it, the city would not be heard to say that it was not necessary as a street. Such action would show that the council did regard it as necessary, or, at least, as expedient, to have a street there for the use of the public."

In this case, the city authorities had taken control of Kenton street, and had invited the public to use it. It was within the inhabited part of the town, and was necessary for the wants and conveniences of the public.

Judgment affirmed.

GREER v. GREER.

(Filed December 16, 1903—Not to be reported.)

Opinion, ante, 655.

F. Hagan for appellant.

Bennett H. Young and Marlon W. Ripey for appellee.

Appeal from Jefferson Circuit Court., Chancery Division.

Judge Settle delivered the following response to petition for rehearing:

It is incorrecly assumed in the petition for rehearing that the conclusions of law expressed by the court in its opinion in this case were bottomed wholly upon the cases of Meyer v. Meyer, 3 Met., 298, and Ficener v. Ficener, 8 Ky. Law Rep., 867. In point of fact, the opinion was based more especially upon Ficener v. Ficener, supra, and Hendrix v. Hendrix, 25 Ky. Law Rep., 632. The latter case approves the rule of practice as to the setting aside of judgments of divorce by the court granting them during the term at which they are rendered, where the condition of the parties is unchanged, as expressly declared in Ficener v. Ficener.

It is also incorrectly assumed in the petition for rehearing that the cases of Meyer v. Meyer and Ficener v. Ficener have been "squarely overruled" by Bristow v. Bristow, 21 Ky. Law Rep., 481; that the latter case is in conflict with Meyer v. Meyer must be admitted, for which reason the opinion in Meyer v. Meyer to the extent of such conflict can no longer be regarded as the law in this State, but as the case of Meyer v. Meyer is not mentioned in Bristow v. Bristow, it can not be said to have been "squarely overruled" by that case. Ficener v. Ficener is not only not overruled by Bristow v. Bristow, but there is in fact no conflict between the two cases.

In the former it was held that while the ground for setting aside ordinary judgments at law or in equity after the expiration of the term do not apply to judgments for divorce, which become final, yet a judgment in a divorce case may be set aside during the term at which it is rendered, upon reasonable notice to the opposite party, where the conditions of the parties remains unchanged.

In Bristow v. Bristow a judgment for divorce and alimony was granted the wife by the Kenton Circuit Court, which is a court of continuous session, on November 29, 1898. On December 17th thereafter, which was after the expiration of fifteen days, within which a motion for a new trial in an equity case may be made in a court of continuous session, and as admitted by the petition for rehearing after the term at which the divorce was granted, the husband filed grounds and motion for a new trial, which was overruled

by the court. Upon the appeal of the case to this court, the judgment of the lower court was affirmed, upon the ground that the judgment could only be set aside upon petition as provided by section 426, Civil Code. Obviously the decision was correct, as the motion for a new trial came too late, and was without notice to the opposite party. But it does not conflict with the rule of practice announced in *Ficener v. Ficener*, which holds that such a judgment may be vacated upon proper notice, and before the expiration of the term, where the condition of the parties remains unchanged.

In *Bentz v. Bentz*, 21 Ky. Law Rep., 1225, a judgment of divorce was regularly entered by the Kenton Circuit Court in behalf of the husband, and the case stricken from the docket. In a day or two after the judgment was entered, the husband married another woman; whereupon the judge of the court, upon his own motion, and without notice to the parties, redocketed the case, and set aside the judgment of divorce upon the ground that in thus remarrying so soon after the entering of the judgment of divorce, the conduct of the husband evinced "an utter disregard of the obligations and sacredness of the married relations."

The lower court having refused to set aside the order vacating the judgment, the plaintiff appealed, and upon the appeal this court reversed the judgment annulling the decree of divorce. It can not be doubted that the reversal was proper, as the order made by the lower court vacating the decree of divorce was without notice to, and not upon the application of the parties to the action, and was entered after the condition of the parties had been changed by the marriage again of the husband.

In *McCraken v. McCracken*, 109 Ky., 768, the judgment was entered May 26, 1898, divorcing the plaintiff from his wife. On July 16th following, and after the expiration of the term at which the divorce was granted, the judgment of divorce was, on motion of defendant, set aside. On September 29 thereafter, the defendant filed answer, and reply was then filed by the plaintiff. On January 14, 1899, the cause was submitted, and judgment rendered by the court dismissing the petition. The plaintiff on January 21, 1899, entered motion to set aside the order of submission and judgment of January 14, 1899, also the order of July 16, 1898, which vacated the judgment of divorce rendered by the court in his favor on May 26, 1898. Both motions were overruled by the lower court, and upon the appeal of the case to this court, it was held that the order which set aside the judgment of divorce of May 26, 1898, was unauthorized and void.

This decision was also proper, for as already stated, the judgment divorcing the plaintiff from his wife was set aside by the lower court upon her motion after the expiration of the term at which it was granted. The decision was, therefore, in line with *Bentz v. Bentz*; *Bristow v. Bristow*, supra, and not in conflict with *Ficener v. Ficener*.

In *Hendrix v. Hendrix*, 25 Ky. Law Rep., 632 (which was decided only two days before the case at bar, and which, though cited in the opinion, is not referred to in the petition for rehearing), this court in discussing the jurisdiction of courts of equity over judgments in divorce cases, re-affirmed the rule stated in *Ficener v. Ficener* in practically the same language employed in that case, which is as follows "The grounds for setting aside ordinary judgments at law or equity after the expiration of the term do not apply to

judgments for divorce, which become final. During the term, however, and while the condition of the parties remains unchanged, the judgment may be set aside at the instance of one party, but not without notice to the other."

In the same paragraph with the foregoing quotation, the several cases relied on by counsel in the petition for rehearing are cited, but without any intimation from the court that they are in conflict with *Ficener v. Ficener*.

The quotation from *Meyer v. Meyer*, 3 Met., 310, found in the opinion in the case at bar, was used for the purpose of showing the reasons advanced by the distinguished writer of the opinion in that case, Judge Stites, for affording to courts having jurisdiction in such cases every possible means of correcting any error or injustice committed in the judgment complained of, but inasmuch as the language of the opinion, on the page following that containing the quotation, may be construed as expressing approval of the conclusions of law announced in the opinion of Judge Stites, *supra*, so much of the words of approval contained in the opinion in this case as may be susceptible of such construction are hereby withdrawn. In all other respects, the opinion is adhered to.

If this court should adopt the view of the law as urged by counsel for appellant in the petition for rehearing, its decision would nevertheless have to be for the appellee.

As stated in the opinion, three judgments of divorce have been rendered by the lower court in this case. The one which counsel for appellant now contends the lower court had no right to set aside was the second judgment of divorce. The first, like the third and final judgment, was rendered in favor of the appellee. The first judgment was also set aside by the court. If as contended by counsel for appellant the lower court was without authority to set aside the second judgment which was in favor of the appellant, except upon petition of the parties as provided by section 426, Civil Code, how did it acquire jurisdiction to vacate the first judgment?

It is said, however, that the first judgment was set aside by oral consent of the parties. Conceding this to be true, it does not remove the difficulty, for it is well settled that when the law expressly refuses or withholds jurisdiction, it can not be conferred by consent. So if as contended by counsel for appellant the lower court was without jurisdiction to set aside the second judgment of divorce, which is not a tenable position, consent of the parties to the setting aside of the first judgment did not confer upon the court jurisdiction to do so.

The further consideration of the questions involved in this case, to which we have been invited by the petition for rehearing, has served to confirm the views expressed in the opinion. Consequently, the petition must be overruled.

BASTIN TELEPHONE CO. v. RICHMOND TELEPHONE CO., &c.

(Filed December 16, 1903.)

Parol contract—Statute of frauds—A parol contract between two telephone companies whereby each agreed to construct a telephone line to a certain connecting point within one year from the date of the contract and that each should thereafter for a period of twenty years have the use and the ben-

effit of the other's line and connection free of charge is within the statute requiring contracts not to be "performed within one year from the making thereof" to be in writing in order to be enforceable, the agreement for twenty years' free use of the lines and connection being as much a part of the contract as the construction of the lines within one year.

J. Tevis Cobb, J. E. Robinson and Lewis L. Walker for appellant.

Smith & Bush for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

Appellant sued appellees, the Richmond and Cumberland Telephone Co. for \$2,000 damages, for the violation of a parol contract to the effect that each party should build a telephone line, one from Richmond, Ky., the other from Lancaster, Ky., to a point half way between the two towns, and there connect, and that each should then have the use and benefit of the other's lines and connection free of charge for a period of twenty years. The poles were to be erected by both parties and connection made within a year from the date of the contract. They were actually erected by appellant within the time stipulated in the contract, and appellee Richmond Telephone Co. had partly erected its part of the line, when, as alleged, the appellee, Cumberland Telephone Co., obtained a majority of the stock in the Richmond Co., and took the control and complete management thereof, stopped the erection of this line, and refused to carry out the contract, and had abandoned same.

The lower court sustained a demurrer to the petition, evidently on the ground that an action on such a contract was inhibited by the statute.

The appellant contends that because the contract stipulated that the poles were to be erected on the line between the two towns, and the connection made within the twelve months, and that it was within the power of the parties to the contract to complete same within the time named, that, therefore, the contract was valid and binding.

So much of section 470 of Kentucky Statutes as is applicable to the question presented reads as follows: "No action shall be brought to charge any person * * * upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith." * * *

The statute refers to such contracts as can not be performed by either party within a year, and although it may contain various stipulations, some of which may be performed within a year, yet if any part of it can not be so performed, it is clearly within the statute.

In the case of Holloway v. Hampton, 4 B. M., 415, the plaintiff had agreed to sell and deliver to defendant his crop of hemp then on hand, as soon as prepared for manufacture, to be delivered at a certain place and at a certain price, and in like manner to deliver his crop of the two succeeding years. The suit was brought for the refusal of the defendant to receive and pay for, at the contract price, the next succeeding crop after the date of the contract. Defendant contended that the contract was not to be performed

within a year, and being verbal, within the statute. The court, in discussing that case, said: "The question has presented itself, whether, as the crop of the first year succeeding the date of the agreement might have been delivered within a year from that time, this action might not be maintained upon the stipulations relating to that crop; but upon consideration of the subject, we are satisfied that the agreement, though it consists of various mutual stipulations which may be performed or violated at different periods, must, in view of the statute, be regarded as one entire contract, as indeed it is in fact, and that, although some of its stipulations might be performed within the year, yet as the agreement, that is the entire agreement, for there is but one, is obviously not to be performed within the year, and can not be, no action can be maintained for the breach of those stipulations which might and should have been performed within that time. The statute embraces all agreements which are to be fully performed within the year."

The agreement in that case to deliver the second and third crops of hemp, was as much a part of the contract as the stipulation to deliver the first. So here the agreement for the use of the two telephone lines, the terms upon which each was to use the other's lines, and the length of time for which such use was to exist, constitutes just as much a part and as important an element in the contract, as the provision for the construction of the lines.

The completion of the lines and connection of the wires would not and could not complete this contract. It would be but the beginning of the expected beneficial part of same. An executed contract is defined as "one in which the object of the contract is performed."

The violation of this verbal contract by appellees, and the statutory prohibition in the way of the enforcement of it, will work injury to appellant, but it results from the neglect of appellant in not having this contract, or some memorandum thereof, reduced to writing, and signed by the parties.

For these reasons the judgment is affirmed.

BYBEE'S EX'OR, &c. v. POYNTER.

(Filed December 16, 1903.)

1. Jurisdiction on appeal—The Court of Appeals has jurisdiction of an appeal from a judgment enforcing a lien on real estate regardless of the amount in controversy.

2. Surety on guardian's bond—Limitation—The liability of a surety on a guardian's bond is discharged by the lapse of five years from the date the ward attains the age of twenty-one years without suit thereon; and a devisee of the deceased guardian may plead the statute as against his statutory liability to the extent of the estate received, with the same effect that the guardian could, if living.

3. Limitation—Absence from State—The provisions of section 2532 of the Kentucky Statute with reference to the stay of the running of limitation by reason of the absence from the State of the party against whom an action accrues do not apply to a person who became a nonresident of the State before the accrual of the cause of action, and a plea that such person was a nonresident of the State does not avail as against the plea of limitation.

4. Guardian—Liability—The discharge of a surety and his devisees from liability on a guardian's bond by reason of the lapse of five years after the

accrual of the action does not release the principal, and his interest in the estate of the deceased surety by devise may be subjected to his liability on the bond.

Underwood & Williams for appellants.

Luther James for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

It appears that R. D. Bybee was on the 3d of January, 1880, appointed public administrator and guardian for Barren county, Kentucky, and thereupon executed a bond as such, containing the usual covenants, with William Bybee, his father, and Clinton Bybee, his brother, as sureties. After the execution of this bond, and in the same year, R. D. Bybee received as such guardian \$190.13, belonging to the appellee, who was then an infant, and arrived at the age of twenty-one years in the month of June, 1891. She within two or three years after that married one Poynter (her former name was Kinslow).

In the month of October, 1891, her guardian made a settlement with the county court, and it was ascertained that he then was indebted to appellee in the sum of \$248. R. D. Bybee then gave her a mortgage on two mules to better secure this sum to her. Appellee enforced this mortgage lien in the year 1892, and obtained a judgment against her guardian for this sum of \$248, with interest, and enforcing the lien. The mules were sold, and after paying the costs of the suit, she received of the proceeds \$65. She further received from her guardian in 1898 one mare at the price of \$50. Appellee, in November, 1902, instituted this action upon the guardian's bond to secure the balance due her, against R. D. Bybee, public administrator and guardian, R. D. Bybee, executor of the will of Wm. Bybee, R. D. Bybee, Clinton Bybee and George Bybee. William Bybee, one of the sureties on this bond, died in the year 1885. By his will he nominated his sons, R. D. Bybee and Clinton Bybee, his executors, and after making provision for his wife, Anna Bybee, he directed that the remainder of his estate be divided equally between his three sons, R. D., Clinton and George Bybee. It appears that George Bybee, under this will, secured from the executors about \$800 about the year 1888. Wm. Bybee, by his will, devised to his wife, Anna, for her life, a house and lot in the town of Glasgow, Ky., and at her death it was to go to his three sons herein named, and directed that his executors, at the death of their mother, sell this property and divide the proceeds equally between themselves and their brother George. Their mother died in the year 1898.

Appellee, in her petition, alleged the date of the death of William Bybee, the appointment of his executors in the year 1885; that George Bybee, as devisee, had received of the personal estate of his father more than \$300, and described this house and lot in Glasgow, Ky., for the purpose of obtaining a lien on it, and enforcing appellants' liability as devisees under their father's will, as provided by sections 2084 and 2089 of Kentucky Statutes.

The appellants answered and denied the liability of the sureties of R. D. Bybee on this bond, and interposed the plea of the statute of limitations.

Appellee replied, denying that they were released by such statute, and

alleged that George Bybee had since long before her cause of action accrued, been a nonresident of the State of Kentucky; that his place of abode was out of this State, and that for this reason she was obstructed and hindered in bringing and prosecuting her action against him.

The court rendered judgment against all the appellants for the debt, and adjudged that appellee had a lien on George Bybee's interest in the house and lot at Glasgow, and enforced same, and stated in the judgment that it appeared that this house and lot had been sold in an action by the executors, and the proceeds of the sale were ordered to be paid to the master commissioner. It was further ordered that the two actions be consolidated, and when the proceeds of sale were collected the commissioner was ordered out of George Bybee's one-third interest to pay appellee's debt, interest and costs.

Appellee moved to dismiss this appeal, claiming that the principal of the judgment is less than \$200, and that for that reason this court has not jurisdiction. This appeal is from a judgment enforcing a lien on real estate, and this court has jurisdiction. (See the cases of *Fowler & Guy v. Pompelly*, 25 Ky. Law Rep., 616, and cases therein cited.)

Section 2621, Kentucky Statutes, says that the right of action upon the official bond of a guardian shall not be deemed to have accrued before the ward attains the age of twenty-one years.

Section 2550, Kentucky Statutes, says that a surety for a guardian shall be discharged from all liability as such, when five years shall have elapsed without suit, after the accruing of the cause of action. It is agreed that appellee arrived at the age of twenty-one years in the month of June, 1891; therefore her right to make the sureties of her guardian liable for this debt ceased in the month of June, 1896. Appellee does not attempt in her reply to allege any matter to avoid or stop the running of the statutes in favor of the sureties, but she does state that George Bybee, a devisee of Wm. Bybee, who was a surety, was a nonresident of the State, and for that reason she was hindered and obstructed in the collection of her claim by suit.

Under the statutes and the facts as they appear of record, it was error to render judgment in favor of appellee against the executors of William Bybee and Clinton Bybee, the sureties of R. D. Bybee. It appears, however, that the court did not subject any part of the interest of R. D. and Clinton Bybee in the house and lot above mentioned to the payment of appellee's judgment. This was correct with reference to the interest of Clinton Bybee, but error in not subjecting R. D. Bybee's interest, as he was the principal, and the claim was not barred as to him. It was clearly erroneous to render judgment against George Bybee, and subject his interest in the house and lot to the payment of appellee's claim. He had not signed the guardian's bond, had made no promise or agreement to pay this claim; his only liability thereon existed by virtue of the provisions of sections 2084 and 2089, Kentucky Statutes, and the fact that he had received as devisee a portion of his father's estate. When this action was brought, in 1903, his father's estate was not liable; the claim was barred by the statute of limitations, and he had the same right to interpose the plea of limitation, and with the same effect that his father could, if he had then been living.

The case of *Hopkins, &c. v. Stout*, 6 Bush, 377, was where Stout brought suit on a note executed in 1849 against the administrator of Hopkins and

secured a judgment, to be levied of the assets of the estate, but for the want of personal assets no portion of the judgment was ever collected. Stout then sued the children and heirs of Hopkins to subject real estate to the payment of his claim, which had descended to them from their father. The heirs defended and interposed the plea of limitation. The court, in that case, said: "The judgment against the administrator neither concluded the heirs nor authorized execution against them. The cause of action against them was coeval with that against the obligor, and consequently the time which would have barred an action against him, if surviving, would bar this suit." To the same effect is the case of *Jones' Adm'r, &c. v. Commercial Bank of Ky.*, 78 Ky., 415.

Appellee, in her reply, alleged that long prior to the accrual of her cause of action George Bybee was a nonresident of the State of Kentucky, and continued such until the bringing of her suit. The proof shows that he became a nonresident of this State about the year 1877, which was prior to the execution of the bond, or before any of the Bybees were liable to appellee for anything, and that he had continued to be a nonresident of this State and a resident of the State of Missouri ever since that time.

Section 2531, Kentucky Statutes, in part, says: "If at the time any cause of action mentioned in the third article of this chapter accrues against a resident of this State," etc.

Section 2532, Kentucky Statutes, says: "Where a cause of action mentioned in the third article of this chapter accrues against a resident of this State, and he by departing therefrom, or by absconding or concealing himself, or by any other indirect means, obstructs the prosecution of the action, the time of the continuance of such absence from the State, or obstruction, shall not be computed as any part of the period within which the action may be commenced," etc.

It, therefore, appears that the reply of appellee was insufficient to stop the running of the statutes in favor of George Bybee, as he was not a resident of the State of Kentucky when appellee's cause of action accrued.

In the case of *Seldon v. Purton*, 11 Bush, 191, it was decided that where a cause of action existed in behalf of a resident of this State against a nonresident, the mere fact of the debtor being a nonresident will not prevent the statute of limitation from running, but where the debtor is a resident of this State, and absents himself from the State by removal or otherwise, the period of his absence will be omitted in the computation of time.

For the reasons indicated the judgment of the lower court is reversed and cause is remanded for further proceedings consistent with this opinion.

TOMPKINS v. COMMONWEALTH.

(Filed December 16, 1903.)

1. Murder—Witness—Divorced wife—In a prosecution for murder the widow of the deceased, who was also the divorced wife of the accused, was a competent witness against him as to occurrences subsequent to the divorce.

2. Same—Proof of divorce—The witness having testified orally that she had been divorced from the accused, and there being no rebutting testimony

as to the fact. It was not necessary to prove that fact by the introduction of the record in the divorce suit.

3. Proof of motive—Where the trial court permitted the Commonwealth to prove by the wife of the deceased that the accused had on more than one occasion forced her to go with him and to submit to his society for the purpose of showing a motive for the killing of her husband, viz., jealousy, it was error to refuse to allow the accused to show by other witnesses that the prosecuting witness had not been forced to accompany him, but that she had done so voluntarily and willingly and had herself sought his society for the purpose of proving her statements to be false.

4. Self-defense—Instruction—An instruction on the law of self-defense which did not permit the accused to strike in defense of his life or body unless there was "no reasonably safe means of averting the danger" was erroneous in the use of the word "reasonably."

Lee Gibson and C. J. Waddill for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted and sentenced to death under an indictment charging him with murdering Jim Brame.

The widow of the deceased, Jim Brame, was one of the principal witnesses against the appellant. She had formerly been appellant's wife. She testified that she had, however, been divorced from him, and then had married Jim Brame. Appellant objected to the admission of parol evidence of the divorce, on the ground that there was necessarily a record of the judgment of divorce, and that being the best evidence must be produced. This is the general rule; and in a proceeding involving directly the legitimacy of the second marriage it would doubtless be applied. But here the main inquiry is not whether the witness had or had not been divorced; that question arose collaterally. The law raises a presumption based upon existing conditions; that is, it will be presumed, nothing to the contrary appearing, that the second marriage of a person has been preceded by a lawful dissolution of the first one. This is partly because of the law's favorite presumption of innocence, by which it always supposes an act or state of being to be lawful rather than criminal. There is another policy of the law no less favored than the one first mentioned, which supports the presumption of the legal dissolution of the first marriage; which is, the concern of the law for the legitimacy of the offsprings of men and women; for the integrity of the family; its honor; and a policy that favors the capacity of inheritance. Bishop's Marriage, Divorce and Separation, section 1157, fairly states the rule of practice deducible from the cases, and supported by sound reason, so far as it may be said to be a rule. He says: "In respect of divorce, the proper direct proof of it is by the record, if in existence and accessible, otherwise by showing the contents of it. But marriage being a status, and divorce being the annulling or modifying of it, evidently there are various circumstances in which record evidence can be wholly dispensed with. And if in the particular instance the rules of evidence permit a divorce to be presumed, as often they do, the record can not, and need not, therefore, be shown; for in the nature of things, proof by record is never proof by presumption." (Howton v. Gilpin, 24 Ky. Law Rep., 680.)

It was, therefore, unnecessary to have proved in this case, after the witness, Laura, had testified she was the widow of decedent, Jim Brame, having been married to him, that she had been divorced from her former husband, the appellant. There being no evidence rebutting the presumption that she was legally absolved from the marriage bonds with appellant, she was a competent witness against him as to subsequent occurrences.

The killing occurred on the night of December 24, 1902. Appellant was more or less under the influence of intoxicants. He went to Brame's house, armed with a Winchester rifle. Laura Brame, the woman whom we have just been discussing, testified that she left with appellant, but that he forced her to go. She also testified that on a number of occasions before the killing she had been in appellant's company, but that he had sought her out and compelled her to accompany him. Appellant denied that he had ever forced or compelled Laura to go with him; but that, on the contrary, since his return to the community, she had sought him out, and voluntarily kept him company. Appellant offered also to prove by five other witnesses that Laura had sought appellant's society, had sent him messages, and offered to accompany him to various places; and that he had not sought her. This was rejected by the trial court, which we deem a prejudicial error. The purpose in allowing the prosecution to prove that appellant had forced Laura to accompany him, and on other recent occasions had compelled her to submit to his society, was to show a motive in appellant for the homicide with which he is charged. Otherwise, the introduction of that evidence was prejudicially erroneous. If the witness, Laura, told the truth, it tended to show that appellant was violently enamored of her, likely producing jealousy in him, one of the most controlling passions superinducing criminal violence. It furthermore showed or tended to show incidentally that he was thereby guilty of another statutory felony, that of unlawfully and forcibly detaining a woman against her will with intent to have carnal knowledge of her. (Section 1158, Kentucky Statutes.) At least, such an inference by the jury would not have been unreasonable. While proof of one crime committed by the accused may be allowed as evidence of his motive in committing another, if it have that tendency, yet it would be wholly unauthorized to admit such evidence if it did not have that effect. In every view of the case, it was, therefore, proper to have allowed appellant to show that the prosecuting witness' statements were untrue; that he had not forced her to accompany him, but that she was voluntarily and willingly doing so, and had, time and again, recently sought his society. Although the presence or absence of the facts just discussed may not at all have affected the fact that appellant shot and killed Jim Brame without any lawful justification, they were material as affecting his motive, and particularly so, as bearing on the enormity of the offense, probably impelling the minds of the jury, if believed to exist, to affix the extreme penalty for his act, instead of the lighter one of life imprisonment, or even a term imprisonment under the manslaughter instruction, as they might have done otherwise.

In instructing the jury, the court gave the law of self-defense in its instruction No. 4, as follows: "If the jury believe from the evidence that the defendant at the time he shot said Jim Brame, if he did shoot him, had reasonable grounds to believe, either real or apparent, and did in good faith

believe that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of said Brame, and there was as it then appeared to the defendant, no reasonably safe means of averting said danger, then the defendant had the right, in the exercise of a reasonable discretion, to shoot and kill the said Brame; and if, under these circumstances, he took the life of the said Brame, he is excusable on the ground and under the law of self-defense, and the jury will find him not guilty. The danger which authorizes one to act in defense of his life or in defense of his person from great bodily harm may be either real danger or only apparent danger."

The act of self-defense is instinctive, and the right of self-defense is based upon this law of nature. One's right to protect himself from imminent death or great bodily harm by reason of an unlawful assault, extends only so far as to avert the impending danger. If necessary, or apparently necessary, to take the life of the assailant, it may be done. Whether that is necessary may depend upon the appearances to the assaulted person in the exercise of a reasonable judgment. If, in the exercise of such judgment, there is another means of averting the danger that is as safe to him as to slay his assailant, he must avail himself of that means. He is not bound, though, to take hazardous chances to save himself from the assault. He owes no such duty to the assailant as to take a chance of losing his own life or limb, or sustaining other great bodily harm, in order that the life of his wrongful assailant may be spared; that would be putting the balance against the innocent, and in favor of the wrongdoer. When one assaulted is placed in such immediate peril of his life or limb by the wrongful assault of another, his right of self-defense rests upon, and will not stop short of his own safety. (*Bowsey v. Commonwealth*, 25 Ky. Law Rep., 841; *Meredith v. Commonwealth*, 18 Ben Mon., 50; *Kennedy v. Commonwealth*, 14 Bush, 840.)

The instruction quoted seems to considerably curtail this right of the person assaulted. While it permits him to act upon the appearances, in the exercise of a reasonable discretion, but even then he was not allowed to strike in the defense of his life or body unless there was not other reasonably safe means of averting the danger. The adverb "reasonably" is a qualifying word, and modifies the adjective "safe." Webster defines it as meaning moderately or tolerably; and that is its commonly understood meaning. The instruction as worded then, would mean, if in the exercise of a reasonable discretion there appeared to the accused another means of averting the danger to him, although such means were only tolerably safe, or moderately safe, or, in a measure, safe, or partly safe, and partly unsafe, he could not lawfully strike to save his life or body from the assault. We are aware of no adjudged case in the jurisprudence of any country where the common law prevails, that justifies such a qualification of the right of self-defense. The word "reasonably" discussed should have been omitted from the instruction.

The other matters complained of, that of limiting the argument, and the alteration of an instruction after the argument was finished, are practices which have been discussed and to some extent questioned by this court in the cases of *Williams v. Commonwealth*, 82 Ky., 642; *Harris v. Commonwealth*, 23 Ky. Law Rep., 745; *Combs v. Commonwealth*, 97 Ky., 24; *Smith v. Commonwealth*, 100 Ky., 183; *Wilhelm v. Commonwealth*, 16 Ky. Law Rep., 428;

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Pierce & Howell v. Commonwealth, 12 Ky. Law Rep., 783. We will presume that the trial court is familiar with these opinions and will conform the practice to what is therein said.

The judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

Whole court sitting.

EVANS v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed December 16, 1903—Not to be reported.)

1. Malicious prosecution—Venue of action—An action for malicious prosecution and false imprisonment may be brought in the county in which the acts complained of were committed; and where the wrongful acts consisted, as alleged, in an arrest in one county and the carrying of the plaintiff under arrest on a railroad train through another county and into a third one, the action may be brought in the county through which he passed on the train.

2 Pleading—Curing defect—Where the plaintiff failed to state in his petition that the arrest continued while passing through the county in which he brought his action the averment of the answer that none of the wrongs complained of were inflicted in that county cured the defect in the petition. The action of the court in striking from the files a reply which put in issue that allegation of the answer was error, as was also the refusal to permit an amended petition supplying the omission from the original petition to be filed.

W. T. Cole and A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued appellees in the Greenup Circuit Court, charging in one paragraph of the petition a malicious prosecution of him by the appellees, in another paragraph false imprisonment.

The appellees appeared and objected to the jurisdiction of the court, and filed the following answer: "The defendants for joint and several answer to the petition and amended petition herein, and for objection to the jurisdiction of this court, states: That at the time of the alleged commission of the wrongs in the pleadings set out and complained of, and before and since and now, the plaintiff was and is a citizen and resident of the county of Bath, State of Kentucky, and that none of the defendants were or are residents of Greenup county, Kentucky, and that none of the wrongs complained of were inflicted upon plaintiff in Greenup county, Kentucky. They state that at all of said times the defendants, the Chesapeake & Ohio Railway Co. and Maysville & Big Sandy R. R. Co., were common carriers, and had a chief office and agent and place of business at Maysville in Mason county, Kentucky, and at no other place. They state that the wrongs complained of herein grew out of the breaking into a car of the defendant, the Chesapeake & Ohio Railway Co., upon the line of the Elizabethtown, Lexington & Big Sandy R. R. Co., in Bath county, Kentucky, and was not upon the line of the Maysville & Big Sandy R. R. Co., and said last-named company had no connection whatever with said car, or the line upon which it was located

when broken into, or with the arrest of the plaintiff or the parties breaking into the same; and that the said, the Maysville & Big Sandy R. R. Co., at the time of the wrongs complained of, and before and since and now, had no office or place of business in Greenup county, or any chief officer, or other officer or agent in said county or any other place than in Maysville, Mason county, Kentucky, as afore stated. Wherefore, defendant prays that the petition and amended petition of plaintiff be dismissed," etc.

To appellant's reply the court sustained a demurrer, whereupon appellant filed the following amended reply: "Now comes the plaintiff and amends his reply, and for amendment denies that none of the wrongs complained of were inflicted upon plaintiff in Greenup county. He denies that the Maysville & Big Sandy had nothing to do with the arrest of plaintiff or the wrongs done him; on the contrary, he states that it has leased its road to its codefendant, C. & O. Ry. Co., and is responsible for its torts; that among those committed against plaintiff by defendant was the malicious abuse of the processes of the court in publicly carrying plaintiff against his will and consent, handcuffed, through Greenup county, in a car on a train of defendant, C. & O. Ry. Co., and exposing him to public shame and contempt in said county in order to compel him to give false testimony to secure the conviction of parties prosecuted by it as set out in the petition. Wherefore, plaintiff prays as in his petition and amendments, and all proper relief."

This amended reply was filed at the November term, 1902, and on motion of appellees the action was continued to the April term, 1903, at which term on motion of appellees the amended reply was stricken from the record, to which appellant excepted. Then appellant tendered an amended petition, amending the several paragraphs thereof, by alleging in substance the same facts as stated in his amended reply, to which appellees objected, and the court sustained their objection, and refused to allow it filed, to which appellant excepted and by order of court the proposed amendment was made as part of this record. It is imperative that the court, in order to render a valid judgment in personam, must have jurisdiction of the subject-matter, and also of the person.

Section 73 of the Civil Code provides that an action against a common carrier for an injury to a passenger or to other person, etc., must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff is injured; or in which he resides, if he resided in a county into which the carrier passes. Section 27 provides that an action against a corporation for a tort may be brought in the county where the tort was committed. Section 74 provides that every other action for an injury to the person of the plaintiff, or his character, must be brought in the county of the defendant's residence, or in which the injury was done.

It matters not which of these sections of the Code is applicable to the case at bar. If the injury to appellant charged in the pleadings was done or committed in Greenup county, that court had jurisdiction of both the subject-matter and appellees. It appears that appellant was arrested in Mason county, and carried under arrest by appellees to Owingsville, Bath county. Appellant failed to state in the petition that on the trip from Mason county to Bath, the appellant was under arrest and in confinement while passing through Greenup county. But the answer of appellees had the effect to cure

the defect in the petition in this respect. This language is used in the answer: "And that none of the wrongs complained of were inflicted in Greenup county, Ky." The reply of appellant made an issue upon this point, and the lower court erred in striking this reply from the record.

The court also erred in refusing to allow the amended petition to be filed. There is no reason given or shown in the record why the court struck the reply from the files, or refused to allow the amended petition to be filed. Counsel for appellees contend that the amended petition was not sworn to, and for this reason it was not allowed to be filed, and that the matters alleged in the amendment changed substantially the cause of action, and for this reason the court properly refused to allow it to be filed. Appellant's cause of action was for damages for the injuries alleged to have been done or inflicted upon him by appellees. The county in which the injury was inflicted did not affect his cause of action, but only affected the venue thereof.

We have a case where the injuries and wrongs alleged to have been committed upon appellant, were begun in Mason county, continued in and through Greenup, and into and ended in Bath county. It was one continued transaction. For this injury, if any, appellant has a cause of action, and he had the right to elect in which county he would institute it.

For these reasons the judgment appealed from is reversed and cause remanded, with directions to permit the amended petition, upon proper verification, to be filed and for proceedings consistent with this opinion.

SWANSON v. SMITH, &c.

(Filed December 16, 1903.)

1. *Forcible entry—New trial*—The provision of section 714 of the Civil Code that a "new trial may be granted in quarterly courts, or in courts of justices of the peace, upon motion made within ten days after a judgment has been rendered," is not applicable to a judgment in a forcible detainer proceeding; the only new trial provided for is the filing of a traverse of the judgment with the judge or justice within three days next after the finding of the court or jury, which traverse secures to the unsuccessful party a retrial in the circuit court.

2. *Service of writ*—The service of a writ of forcible detainer may properly be made, in the absence of the defendant, by leaving a copy thereof with his wife, she being at the time a member of his family over sixteen years of age.

3. *Same—Bar to ejectment*—The proceedings of forcible entry affect only the possession and are not a bar to an action in ejectment to recover the land. (Dictum.)

Gourley & Roberts and Riddell & Riddell for appellant.

H. L. Wheeler for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Settle.

Upon complaint made by the appellees to the judge of Lee County Court that the appellant had forcibly entered upon a tract of land in that county of which they were in the peaceable possession, that officer issued a writ of forcible entry in the usual form against appellant, directed to the sheriff of the county, who after service of the writ returned it to the county judge.

The inquisition under the writ was held by the county judge, without the intervention of a jury, and the appellant found guilty of the forcible entry complained of; judgment was thereupon entered in accordance with the finding awarding appellees restitution of the land in dispute, and the appellant having failed to file a traverse of the inquisition on or before the third day after the finding of the inquest, the county judge duly issued a writ of restitution in appellees' favor.

The appellant thereupon filed in the Lee County Court his petition for a new trial in the proceeding of forcible entry, and at the same time obtained of the county judge a temporary injunction restraining the sheriff from executing the writ of restitution. Upon the hearing, before the county judge, of the application for a new trial, it was adjudged that appellant was not entitled to a new trial, and his petition therefor, as well as the injunction to prevent the execution of the writ of restitution, was dismissed. From that judgment the appellant took an appeal to the circuit court, in which court a demurrer to the petition was sustained and the petition dismissed, and from that judgment an appeal has been prosecuted to this court. The question presented for our consideration by the appeal has never to our knowledge, been decided by this court. It is this: Can a new trial be granted in a case like the one at bar?

Section 714, Civil Code, provides that "a new trial may be granted in quarterly courts, or courts of justices of the peace upon motion made within ten days after a judgment has been rendered, of which motion reasonable notice shall be given to the adverse party."

Manifestly, the section, *supra*, would authorize the granting of a new trial by the county judge, upon proper grounds, in any ordinary action or proceeding that had been tried by him. But the provisions of the Code regulating the trial of writs of forcible entry, forcible detainer, or forcible entry and detainer, require the unsuccessful party, if dissatisfied with the result of the trial, to pursue a different remedy. The remedy thus provided is specific, and, therefore, exclusive of all other remedies. It is found in section 463, Civil Code, which provides that "If either party conceive himself aggrieved by the finding of the jury (or court) he may file a traverse thereof with the judge or justice within three days next after the finding aforesaid."

* * *

The traverse serves a two-fold purpose: First, it secures to the unsuccessful party a retrial of the case in the circuit court; second, a stay of the proceedings on the inquisition until the trial in the circuit court may be had. In the meantime no serious loss could result to the opposite party from the stay of proceedings on the inquisition, as he would be protected by the bond required by the Code of the traversee, which must be given at the time of the filing of the traverse.

It is manifest that the granting of a new trial in this class of proceedings was never contemplated by the framers of the Code, for it is further provided by section 461, that, "If the party against whom the inquisition is found fail to file a traverse of the inquisition with the judge or justice who presided, on or before the third day after the finding of the inquest, the judge or justice shall, on request, issue his execution for the costs; and, if the inquisition be in favor of the plaintiff, he shall also (whether requested to do so or not) issue his warrant of restitution." * * *

The section of the Code, *supra*, requires that the issual of the warrant of restitution, if the inquisition be in the favor of the plaintiff, must follow the failure of the unsuccessful party to file the traverse on or before the third day after the finding of the inquest. This requirement of the Code is mandatory. A motion for a new trial made on or before the third day after the inquisition is found, will not prevent the issual of the warrant of restitution at the end of that time. Its issual can only be prevented by the filing of the traverse on or before the third day, and if the warrant of restitution once issues, it can not be suspended, nor its execution delayed, by a motion or petition for a new trial, made or filed within ten days succeeding the inquisition.

Though, as stated, the question under consideration has never been decided by this court, it seems to have been before the Superior Court as far back as the year 1885, in the case of *Skaggs v. Fife*, 6 Ky. Law Rep., 659, wherein it was held that "after judgment has been entered according to the inquisition in a forcible entry and detainer, the judge or justice who presides, has no power to disturb it; the only new trial provided for is by a traverse in the circuit court, which must be taken in three days."

It is insisted for the appellant that the writ of forcible entry has not been served upon him in person, because he was, at the time of its service, absent from the county, and further that the inquest took place in his absence. It appears, however, from the return of the writ that notice thereof, and of the time and place of the trial, was given to and served upon appellant's wife, as he was absent and could not be found. Section 455, Civil Code, provides that the officer having the writ for execution, "shall give to each defendant notice according to the direction of the warrant. * * * If, however, the notice have been given to a defendant, but not three days before the meeting of the jury (or court) the inquest shall, on his motion, be adjourned until the expiration of the three days."

The service of the writ was properly made upon the appellant through his wife, in the manner provided by sections 625, Civil Code, and 2294, Kentucky Statutes, she being at the time a member of his family and over sixteen years of age.

It is averred in the petition for a new trial that the appellant was properly in the possession of the land in controversy as a tenant of J. A. Wallace, who had been given possession thereof under a writ of *habere facias possessionem* from the Estill Circuit Court issued in the action of Crawford's Adm'r v. Elizabeth Hatton, &c., and that Bruce Smith, one of the appellees, had been deprived of the possession of the land in favor of Wallace by the same writ. Bruce Smith was, at the time, the tenant of his co appellee, Mitchell Smith, who then and now claims to own the land. It is not, however, alleged in the petition that the Smiths were parties or privies to the suit in Estill county, or that they acquired possession of the land during the pendency of that action, or with knowledge thereof. It would seem, therefore, that they could not have been legally deprived of possession by the writ from the Estill Circuit Court. But whether they could or not, that question, as well as all other matters relied on in resistance of the writ of forcible entry in the petition for a new trial, could have been determined only in the inquisition before the county judge, or upon a traverse and trial

in the circuit court. The proceedings of forcible entry only affected the matter of possession; that question could not be re-opened by an application for a new trial, whether made by motion or petition. The appellant's only remedy was a traverse, which was not resorted to; consequently, this court is without power to grant the relief asked.

If there is merit in the claim of Wallace to the possession of the land in controversy, it may be suggested that the proceedings of forcible entry will not bar an action in ejectment to recover the land.

Wherefore, the judgment of the lower court in sustaining the demurrer to the petition for a new trial and in dismissing the petition is hereby affirmed.

Whole court sitting.

ROSE v. CAMPBELL, &c.

‘Filed December 16, 1898—Not to be reported.’)

(Correction of opinion—While the court intended to reverse so much of the judgment of the lower court as set aside a deed of conveyance from the appellant to his wife at the instance of a creditor whose debt was created some three years after the conveyance, the reversal of the personal judgment against the debtor was inadvertent and the original opinion is corrected in that respect.

Original opinion ante, 885.

Jas. M. Sebastian for appellant.

E. E. Hogg for appellees.

Appeal from Owsley Circuit Court.

Judge Settle delivered the following supplemental opinion:

A rereading of the opinion recently handed down in this case has resulted in the discovery by the court that it inadvertently reversed the personal judgment rendered by the lower court in favor of the appellees against the appellant, R. W. Rose, when it was only intended to reverse so much of the judgment of that court as set aside the deed of conveyance from R. W. Rose to his wife, Nannie Rose, and subjected the land thereby conveyed to the payment of appellee's debts sued on.

The personal judgment for the debts sued on by appellees will not, therefore, be disturbed, but the judgment of the lower court in so far as it sets aside the deed from appellant, R. W. Rose, to his wife and co appellant, Nannie Rose, and attempts to subject the land thereby conveyed to the payment of appellees' debts sued on, is hereby reversed.

We decline to consider the questions attempted to be presented by the petition for rehearing, because of its offensive and disrespectful tone and language, and for the same reason it is hereby ordered to be stricken from the file, but as this court has no desire to deprive the appellees of their right to ask a rehearing, the time for filing a petition therefor, in respectful language, is extended thirty days from this date.

PIKE, MORGAN & CO. v. WATHEN.

(Filed January 20, 1904—Not to be reported.)

Original opinion ante, 640.

Drury & Drury and Hazelrigg & Chenault for appellants.

G. A. Prentice and W. O. Hayner for appellee.

Appeal from Union Circuit Court.

Judge Nunn delivered the following response to petition for rehearing:

The appellants, by their petition for a rehearing, raise a question that was not presented on the former hearing.

The appellant company was sued in the lower court as a corporation. Appellee alleged, in his petition, "that the Bank of Uniontown, Ky., and Pike, Morgan & Co., are and were corporations, organized under the laws of Kentucky, and that S. Pike was president of both," etc.

The answer reads: "The defendants, the Bank of Uniontown and Pike, Morgan & Co., deny that Pike, Morgan & Co. were ever incorporated, and deny," etc.

Upon the issue of fact as to whether Pike, Morgan & Co. was a corporation there was no proof introduced. So we have the corporation of Pike, Morgan & Co. sued. In the answer a positive denial of any such corporation. No proof on the subject, and judgment for the plaintiff. Under the pleadings the burden was on appellee to prove that appellant was a corporation, and having failed to make the proof he should have failed to recover.

In the case of *Soper v. Clay City Lumber Co.*, 21 Ky. Law Rep., 933, this court, in an opinion by Judge Paynter, said: "First, the appellee not being a corporation, it had no such existence in fact and in law as would enable the plaintiff to sue it in the name of Clay City Lumber Co., and take judgment against it."

If Pike, Morgan & Co. is not a corporation, but is or was a partnership doing business under that name, then the proceeding was defective, for all suits against a partnership must be brought against the members by name. (Parsons on Partnership, section 375; Story on Partnership, section 241; 22 Ky. Law Rep., 1695.)

Appellee, by counsel, objects to the appellant filing this petition for a rehearing or the court's taking action thereon, for the reason, as he claims, that appellant has, since the opinion in this case was rendered and filed, paid and settled the judgment appealed from. This, if true, can not avail appellee, for this court in an opinion reported in 10 Bush, 216, said: "Replevying or satisfying a judgment is not waiver of the right to prosecute an appeal for its reversal."

On the return of this case the court should permit the parties to amend their pleadings if they desire.

For these reasons the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion.

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KENTUCKY COURT OF APPEALS.

CUMBERLAND & OHIO VALLEY R. R. CO. v. SHELBYVILLE,
BLOOMFIELD & OHIO R. R. CO., &c.

(Filed December 16, 1903.)

1. Sale of real estate—Contract to be in writing—A contract for the sale of the roadbed, rolling stock and other corporeal property of a railroad corporation is one regarding the sale of real estate, which is required by the statute of frauds to be in writing to be obligatory upon the parties, or either of them; the adoption of a resolution by the directors of the corporation at a stockholders' meeting, declaring their willingness to sell the corporate property at a certain price, pursuant to a parol agreement between it and the prospective purchaser, and empowering the president to consummate the sale by executing and delivering the necessary deed upon the payment of the purchase money, and the spreading of it upon the record, is not alone a contract of sale, nor does it have the effect to reduce the parol agreement to writing so as to make it binding upon the corporation.

2. Same—An option agreement for the sale of the shares of capital stock of a corporation by the individual stockholders of a corporation must be considered as an entirely independent transaction from a parol agreement by the corporation to sell the property belonging to it, so far as the consideration of the question of whether the latter contract is required under the statute to be in writing is concerned.

W. W. Thum, Gordon & Gordon and Dallas, Farnsley & Means for appellant.

Helm, Bruce & Helm, Chas. H. Burch and L. C. Willis for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge O'Rear.

This is a suit by the Cumberland & Ohio Valley R. R. Co., a railroad corporation, against the Shelbyville, Bloomfield & Ohio R. R. Co. and the Louisville & Nashville R. R. Co. for the specific performance of an alleged contract of sale, by which plaintiff claims that the Shelbyville, Bloomfield & Ohio R. R. Co. undertook to sell to it, the Cumberland & Ohio Valley R. R. Co., the railroad running from Shelbyville to Bloomfield, formerly

known as the Northern Division of the Cumberland & Ohio R. R., and later known as the Shelbyville, Bloomfield & Ohio R. R. The Louisville & Nashville R. R. Co. is made a party defendant because it is now the owner of the property; and plaintiff claims that it purchased same with notice of the existing contract between plaintiff and the Shelbyville, Bloomfield & Ohio R. R. Co. The above-named railroad had recently been purchased at a foreclosure sale by a certain syndicate of its bondholders of whom P. B. Reed, J. Stone Walker, A. L. Schimdt and others were members. The purchasers organized themselves into the corporation, the Shelbyville, Bloomfield & Ohio R. R. Co., and apportioned to themselves shares of stock in proportion to their respective interests as former bondholders. Peter Arlund, a promoter and broker, conceived the scheme of selling this property, or combining it with other properties into a more extensive and profitable railroad system. He, with certain associates, organized a corporation called the Southern Finance and Development Co., which they caused to be incorporated under the laws of West Virginia. This last-named corporation took an option upon the capital stock of about all of the stockholders of the Shelbyville, Bloomfield & Ohio R. R. Co. The option provided that it was to continue for thirty days from its date, July 1, 1901, but that it might be extended fifteen days longer upon the payment of \$5.00 to P. B. Reed for the stockholders, but it must be accepted in writing and signed by the development company within the time allowed by the contract, "otherwise it is considered withdrawn." It provided for the payment of certain claims against the railroad company, and for the payment to the stockholders for their shares of stock at the rate of \$60.00 per share. This made the total consideration a little over \$126,000, which was to be paid in cash upon the acceptance of the option.

Arlund and his associates organized the appellant, Cumberland & Ohio Valley R. R. Co., with a view to ultimately taking over the railroad properties under the option named, when it should be accepted. The option was never accepted. Nor did the Southern Finance and Development Co., or any one else for it, pay or tender to the stockholders of the S., B. & O. R. R. Co., the purchase money or any of it. A few days before the expiration of the option period it was discovered that at least one of the interests represented by the option could not be transferred within the time covered by the option, at least it was so considered by the parties. It was then attempted to execute the agreement by an actual conveyance of the corporeal property, that is the railroad and its rolling stock and other properties instead of the transfer of the capital stock, the consideration to be the same as would have been paid for the capital stock, leaving the purchase price to be distributed among the original stockholders according to their interests. This agreement was in parol.

Arlund's companies had arranged, so he claims, to raise the purchase money upon mortgage bonds to be issued upon the property, and to be negotiated in Philadelphia. The stockholders of the S., B. & O. R. R. Co., at a called meeting adopted a resolution authorizing and empowering their board of directors to execute a deed to all of the company's property to the appellant railroad company upon the payment of \$126,678.67. This resolution was spread upon the records of the company, and signed by the chairman of

the meeting and the secretary. Immediately the board of directors of appellee company adopted a resolution authorizing and empowering their president, P. B. Reed, to execute and deliver the deed referred to the payment in cash of the consideration named. This resolution was adopted at a meeting of the board of directors at which a quorum was present, and was spread upon the minutes of the board's meetings, signed by the president and secretary. The deed was drawn, signed and acknowledged by the president and secretary of the grantor corporation, but retained in the possession of its president, and not delivered. It was so prepared that if the purchase price was paid on the 15th of August, 1901, in Philadelphia, where the representatives of the corporations were to meet, it could be delivered and the transaction closed without delay. The board of directors of appellant, Cumberland & Ohio Valley R. R. Co., by a resolution adopted, authorized the acceptance of the deed mentioned, and empowered its president, Arlund, to negotiate necessary loans to pay the purchase price. Arlund failed in his negotiations. The purchase price was not paid, nor has it ever been tendered.

The question is, whether these resolutions altogether satisfy the requirements of the statute of frauds and perjuries: that a contract respecting the sale of real estate or some memorandum thereof must be in writing, and signed by the parties to be charged.

The court is of the opinion that the option agreement for the sale of the shares of capital stock by the individual stockholders of the S., B. & O. R. R. Co. was an entirely independent transaction from the proposal to sell the railroad, so far as the corporation was concerned. It could have no effect whatever upon the title of the corporation to its property. The subsequent agreement between the president of the railroad company proposing to buy the property in question, that is the roadbed, rolling stock, etc., and the president of the railroad company proposing to sell it, was a proposition in parol regarding the sale of real estate, and not being in writing was not obligatory upon either party. It was, of course competent for the parties to have executed it by writing subsequently signed and delivered. It is claimed for the appellant that this was done in the matter of the making of the entries upon the records of the respective corporations above referred to, and then signing and acknowledging of the deed by the vendor corporation, but which was retained in the possession of its president until such time as the purchase money should be paid.

To constitute a valid contract for the sale of real estate it is essential that the parties to it, the vendor and the vendee, should have agreed upon the terms and the property concerned, that this agreement should have been reduced to writing, and should have been signed by the party to be bound thereby, and that the contract so signed should have been delivered. A resolution adopted on the part of the directory or at a stockholders' meeting of a corporation, declaring their willingness to sell the corporate property at a certain figure, and empowering the president to consummate the sale by executing and delivering the necessary deed, will not alone be a contract of sale. It is so far an unexecuted purpose or intention to sell. It is no more a contract of sale than would have been a power of attorney executed by the owner to an attorney-in-fact, clothing him with authority to make a conveyance of the property upon the satisfaction of certain conditions. It was

only an investiture of the president of the company with legal authority to make a valid contract of sale, which he otherwise did not have. The parties were left in precisely the same attitude, so far as having contracted with each other was concerned, as they were when the presidents of the two companies had respectively agreed with each other in parol upon the terms. There was no time when the S., B & O. R. R. Co. was legally bound to convey its property to the Cumberland & Ohio Valley R. R. Co. All that the parties undertook to do in their effort to close that transaction was voluntary, and fell short of becoming obligatory as a contract, executed or otherwise.

The judgment of the circuit court dismissing appellant's bill for a specific execution of the alleged contract concerning the sale of the property of the appellee corporation, S., B. & O. R. R. Co., must be affirmed.

BALL v. RAMSEY.

(Filed December 16, 1908—Not to be reported.)

Homestead—Abandonment—Where the owner of a homestead moved with his family upon another tract of land recently purchased by him with the purpose of returning to the former after fixing the latter up and reselling it, having left his son-in-law in possession of the homestead and a considerable amount of his household goods, there was not an abandonment of the homestead, which authorized its subjection to the claims of creditors.

Jas. Sparks for appellant.

W. R. Ramsey for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Burnam.

Prior to the 10th day of March, 1900, the appellant, Nicholas Ball, had owned and occupied a tract of about 140 acres of land of less value than \$1,000 as a homestead for more than thirty years. On that day, he contracted to purchase from Gottleib Ryser a house and about twenty acres of land, several miles distant from his home, at the agreed price of \$300, and shortly thereafter he took possession of and occupied the place bought of Ryser with his family. On the 10th day of July, 1900, the appellee, W. R. Ramsey, as surviving partner of Randel & Ramsey, procured the sheriff of Laurel county to levy an execution in his favor on the 140-acre tract of land to satisfy an execution which issued in his favor from the circuit court clerk's office of Laurel county. The sheriff advertised the sale of the 140 acres to satisfy this execution. Thereupon appellant, Ball, instituted this suit both against the plaintiff and L. B. McHargue, the sheriff, for an injunction restraining the sale of the property under the execution upon the ground that it was his homestead and exempt from levy or sale. The circuit judge dismissed plaintiff's petition, and he has appealed.

Appellant testified that he had paid nothing upon the place purchased of Ryser, that he bought it with the idea that he could "fix it up," and in a short time sell it for an advance; but that he had been disappointed in this respect, and after the levy of defendant's execution his trade with Ryser had

been by mutual consent cancelled, and he had taken his property back. He also testified that at the time he left his homestead, it was his intention to return to it in a short time, or as soon as he could disposed of the property purchased from Ryser; that he left his son-in-law in possession, and also a considerable amount of his household goods and personal property. His testimony is corroborated both by Ryser and his son-in-law, and is uncontradicted. In our opinion, these facts do not show that plaintiff had abandoned his homestead. (*Collins v. Gibson*, 21 Ky. Law Rep., 1338; *Summers v. Sprig*, 18 Ky. Law Rep., 206; *Cincinnati Warehouse Tobacco Co. v. Thompson*, 106 Ky., 627.) The facts in this case do not bring it within the decision of *Garreson, &c. v. Penn Bros.*, 21 Ky. Law Rep., 1775, relied on by appellee.

For reason indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

SAVAGE v. BULGER.

(Filed December 16, 1903—Not to be reported.)

Will contest—Instruction—The approval of the court, as expressed in the opinion, of the word "credible" in the instruction given by the lower court to the jury in defining the qualifications necessary to be possessed by the attesting witnesses to the will in contest is withdrawn. The use of the word "credible" in the instruction was, however, not prejudicial error.

Original opinion, ante, 763.

Appeal from Mason Circuit Court.

Judge Settle delivered the following response to petition for rehearing:

Our attention has been called by the petition for rehearing to the fact that in approving the use of the word "credible" in the instruction given by the lower court to the jury in defining the qualifications necessary to be possessed by the attesting witnesses to the will in contest in this case, the opinion of the court is in conflict with *Fuller v. Fuller*, 83 Ky., 345, wherein an instruction which required the jury to believe from the evidence that the witnesses to a will were "credible" persons, is condemned.

The court in that case held that the word "credible," as used in the statute, in reference to the attesting witnesses to a will means "competent." That is to say, the requirement of the statute is that the attesting witnesses to a will must be such persons as are not "disqualified by mental imbecility, interest or crime from giving testimony in a court of justice."

Not desiring that even an apparent conflict shall exist between the opinion in this case and that of *Fuller v. Fuller*, supra, so much of the opinion in this case as expressly approves the use of the word "credible" in the instruction complained of is withdrawn.

In *Fuller v. Fuller* it was, however, further held that instruction which directed the jury to believe that the witnesses to the will in contest in that case were "credible" persons, was not prejudicial to the party complaining of the instruction, as there was nothing in the evidence that tended to show that they were not credible. The same is true of this case. It is contended by counsel for appellant that only one of the attesting witnesses to the will,

Milton Bulger, was incompetent, and the only ground for such a claim as to him is that at the time of the execution of the will he was partially paralyzed. There is not, however, a scintilla of evidence to show that he was not a "credible person," or that he was not "competent." In other words, there was no evidence tending to show that the witness was "disqualified by mental imbecility, interest or crime from giving testimony in a court of justice." So even if it be conceded that the instruction complained of was erroneous because of its use of the word "credible," it is equally true in view of the evidence that it was not prejudicial to the appellant.

We think there was no error in the admission of the testimony of Nellie Bulger, for as said by this court in *King v. King*, 19 Ky. Law Rep., 868, "whatever testimony the propounders may offer after the contestants have rested is in rebuttal, and hence to admit such testimony is not in violation of that provision of the Civil Code, which prohibits a party from testifying in chief for himself after having introduced other testimony in his behalf."

The petition for rehearing is overruled.

CHESAPEAKE & OHIO RY. CO. v. GUNTER, &c.

(Filed December 16, 1903—Not to be reported.)

Personal injuries—Damages—The judgments of \$600 and \$400 in favor of the appellees respectively are sustained by the evidence.

Ira Julian and John T. Shelby for appellant.

Jas. A. Scott and W. C. Marshall for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

These actions were instituted by appellees in the Franklin Circuit Court against appellant to recover damages for injuries received by them by jumping or being thrown from their buggy by reason of their horse becoming frightened at appellant's passenger train at Walcutt's crossing. It being averred that no signal or warning of the approach of the train was given, and that the crossing at which the accident occurred was exceptionally dangerous, by reason of the railroad making a sharp curve there and passing through a cut just before reaching the pike.

The two actions, by agreement of parties, were tried together. The first trial resulted in a verdict and judgment in favor of appellee Mary Gunter for the sum of \$1,000, and for appellee Sallie Gunter for the sum of \$400.

On motion of appellant the lower court set aside the verdict in favor of Sallie and granted a new trial, but refused to set aside the verdict in favor of appellee Mary Gunter. The appellant appealed, and this court reversed that judgment. On a second trial, the cases were heard together, and the jury returned a verdict in favor of appellee Mary Gunter for \$600, and Sallie for \$400. The court refused a new trial and appellant has appealed from both judgments, and by consent they are heard together.

In substance all the facts and circumstances proven on the last trial were presented on the first trial, and this court, in an opinion by Judge DuRelle,

recites them in his opinion, which is reported in 108 Ky., 362. For this reason we deem it unnecessary to again recite them.

After a careful consideration of this record and former opinion referred to, we are of opinion that the lower court gave the parties a trial in conformity with the directions of this court. The evidence as to the extent of the injury received by Sallie Gunter is not very satisfactory, but two juries have heard the testimony, and gave her the same amount by each verdict.

Perceiving no error prejudicial to the substantial rights of appellant the judgment in each of these cases is affirmed.

UNITED STATES FIDELITY AND GUARANTY CO. v. BLACKLEY,
HURST & CO.

(Filed December 16, 1903.)

1. Employer and employee—Indemnifying bond—Surety—An employer who makes representations as to the personal conduct, antecedents and integrity of his employe for the purpose of inducing another to become bound as the surety of the employe for his honesty and integrity in the performance of his duties must use ordinary care to ascertain the truth thereof, and his mere belief that they were true will not avail if they were in fact not true, and he had not used ordinary care to post himself; the question of whether he has exercised ordinary care is one for the jury.

2. Same—Where the employer represented to the surety that the applicant had theretofore, as an employe, "kept his accounts faithfully and without default," and that he knew nothing "concerning his habits or antecedents affecting his title to confidence," and it afterwards appeared that the employe was short in his accounts at that time, the jury should have been permitted to determine the question whether or not the employer used ordinary care in ascertaining the true state of the accounts; and also to determine the question whether the employer prior to the execution of the bond knew that the employe was engaged in any gambling or speculative business, which would have materially increased the risk.

Bodley, Baskin & Flexner for appellant.

Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

On the 17th of November, 1900, C. M. Barnett requested the United States Fidelity and Guaranty Co., of Baltimore, Md., to go security for his honesty and fidelity as bookkeeper and cashier of the firm, Blackley, Hurst & Co., who were engaged in the tobacco business in Louisville, Ky., from the 1st day of December, 1900, to the 1st day of December, 1901. The application was made by Barnett upon one of the printed forms of the guaranty company, which provides for and requires from the employers of the applicant a statement as to the personal conduct, antecedents and integrity of the applicant. In obedience to this requirement, Blackley Hurst & Co., by J. T. Blackley, made this statement: "The replies of the applicant herein are to the best of my knowledge and belief, correct. He has been in the service of the undersigned employer since September 1, 1898, filling the position of

bookkeeper and cashier, and has continuously filled the position for which this bond is required since that date. He has always, to the best of my knowledge and belief, given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited, all accounts of his office were found in every respect correct up to date." (This was followed by the words, "periodically examined by firm.") "He has not been, nor is he at present, so far as I know, or believe, in arrears, default, or with unsettled balance in this or any previous service. I know nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guaranty hereby applied for should not be granted."

In response to this application, the guaranty company executed the bond applied for, which contained the following recitation: "Whereas the employers (Blackley, Hurst & Co.,) have delivered to the United States Fidelity and Guaranty Co. a statement in writing relative to its responsibility, and checks to be used by the employe in said position, and in further consideration of \$25 paid as a premium for the period from December 1, 1900, to December 1, 1901, and upon the faith of said settlement as aforesaid by the employer, it is hereby agreed and declared that subject to the provisions herein contained, which shall be conditions precedent on the part of the employer to recover under this bond, the company shall, within three months next after notice accompanied by satisfactory proof of loss as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all or any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employe, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employe, in connection with the duties of the office or position hereinbefore referred to, occurring during the continuance of this bond."

On the 2d day of April, 1902, the appellees, Blackley, Hurst & Co., brought this suit against the appellant, the United States Fidelity and Guaranty Co., and C. M. Barnett, upon the bond executed by them as surety for Barnett, in which they allege that between December 1, 1900, and September 7, 1901, that the defendant, Barnett, as bookkeeper and cashier of plaintiffs and in the line of his employment had received and fraudulently appropriated to his own use \$811 of their money, which he failed to account for. The petition also contains other formal averments necessary to a recovery on the bond. Appellant, in its answer, denied their liability for the moneys sued for on two grounds. First, because as they allege, Barnett had not kept his accounts faithfully as cashier previous to his application to them to become his security, but was at that time in default to plaintiff in sums aggregating \$625, which he had fraudulently abstracted and converted to his own use subsequent to the 11th day of May, 1900, and prior to November 17, 1900, by means of false entries and footings upon the books of plaintiff, which, if known not to them, could have been known by the exercise of slight care, when the application was made to them, but which were not known to the defendants when they executed the bond sued on. They also charge that they were deceived and overreached by plaintiff's statement that they knew nothing concerning the habits, or antecedents, of the insured affecting his

title to confidence, or any reason why the guaranty should not be granted, when as a matter of fact they well knew that Barnett was at that time, and had been for a considerable time before the bond was applied for, engaged in speculating in tobacco, a highly hazardous and dangerous form of gambling, the credit and money therefor being furnished by plaintiff. Upon the trial appellant introduced a number of expert accountants, who testified that during May, 1900, Barnett's books show three false entries and footings, aggregating \$250; in June, one false entry and footing of \$50; in September, one false entry and footing of \$100; in October, one false entry and footing of \$100, and in November prior to the date of Barnett's application to defendants, false entries and footings amounting to \$185, in all aggregating \$625; that these false entries were cunningly made, and were likely to be overlooked by any one examining the books, who was not an expert accountant, or who was not specially looking for them, but that they would have been discovered by an accurate and careful addition of the various columns of figures by any ordinarily competent person. While, on the other hand, Mr. Blackley, a member of the firm, testifies that the fiscal year of the firm ended on September 1, at which time a tolerably careful examination of the books was made, as much so as the current business would permit a member of the firm, who had daily duties to perform, to make: that this examination was made by adding up the columns of the cash book back to where it had been previously examined, and that the balance in bank, the cash account, and sales notes, which formed the whole cash account, were compared; that this cash account was frequently examined during the year as carefully as his time would permit; and that he thought that the books were correct when these examinations were made, but had been subsequently altered by Barnett; that the last general examination in which a balance sheet was drawn off was made in September, 1900; that they discovered in October, 1901, that the cash account was out of balance; and that this fact lead to the discovery of the shortage sued for in this action. Upon cross-examination Mr. Blackley admitted that whilst he added up all the columns of the cash book and bank book, that he had not gone into the ledger accounts for lack of time; that he was a fairly good bookkeeper. On this state of fact, the court gave the jury the following instructions:

"1st. The court instructs the jury that the application for a bond sued on in this case contained the following statements: 'He (meaning the defendant, Clarence M. Barnett) has always to the best of my knowledge and belief given satisfaction in his personal conduct and performance of duties and kept his accounts faithfully and without default. When last examined or audited, by firm, all accounts of this officer were found in every respect correct up to date. He has not been, nor is he at present, so far as I know or believe, in arrears, default, or with unsettled balance in this or any previous service. I know nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guarantee hereby applied for should not be granted,' and said application was signed by the plaintiffs. Unless the jury shall believe from the evidence that one or more of said statements when made were not true to the best of the knowledge and belief of the plaintiffs, or either of them, the law is for the plaintiffs, and the jury should so find.

"2d. But if the jury shall believe from the evidence that these statements contained in said application and set forth in instruction No 1, or any of them, was, when made, untrue to the best of the knowledge and belief of the plaintiffs, or either of them, the law is for the defendant, and the jury should so find.

"3d. If the jury shall find for the plaintiff, it should be for the sum of \$819, with interest from October 10, 1901.

"4th. If the jury shall find for the defendant, they shall so say by their verdict, and no more."

Under the above instructions the jury found for the plaintiff, and the defendant appeals to this court, and insists that the instructions quoted supra do not define the correct rule for the measurement of appellee's duties and responsibilities growing out of the execution of the bond sued on. In the recent case of the Warren Deposit Bank v. Fidelity and Deposit Co., 25 Ky. Law Rep., 289, it was decided that section 639 of the Kentucky Statutes, which provides that: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations, and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," applied to bonds of the character sued on in this action; but that misrepresentations which were material to the risk in this character of cases, whether fraudulent or not, would invalidate the bond. In *Graves v. Lebanon National Bank*, 73 Ky., 23, the court said: "There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, or other valuables, are intrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting or increasing the obligations of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented. * * * A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose used reasonable diligence to inform himself, as by concealing facts known to exist, which in equity and good conscience ought to have been made."

In the case of the Deposit Bank of Midway v. Hearne, 104 Ky. 819, this court decided that whenever the directors of a bank became aware of the embezzlement of a clerk, or may by the exercise of slight care have become so, they owe to the surety to discharge the clerk, and thus terminate the surety's further risk. In *Bellevue Bl. and L. Ass'n v. Jeckel*, 104 Ky., 159, it was decided: "If a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealments will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." (Quoting Story on Equity Jurisprudence, section 215.)

The law requires of an employer who makes representations material to the risk for the purpose of inducing another to become bound as the surety of one of his employes to him more than the mere belief on his part of the truth of such representations. His duty under such circumstances requires

that before making such representations, that he should use ordinary care to know that they are true. Lawson on Contracts, section 238, on this point, says: "Where persons take it upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they are as responsible as if they had asserted that which they knew to be untrue. Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial. For the affirmation of what he does not know or believe to be true is as unjustifiable as the affirmation of what is known to be false, and the same is true where the party is negligent, or ought to have known or remembered the truth, and did not."

Whether appellees used ordinary care to post himself as to the condition of Barnett's accounts, before he made the statement to appellee, was a question for the jury. For the same reason we think the jury under proper instructions should have been allowed to determine whether the plaintiff prior to the execution of the bond knew that Barnett was engaged in any gambling or speculative business, which would have materially enhanced the hazard of the risk assumed by appellants.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

DIEBOLD v. KENTUCKY TRACTION CO.

(Filed December 17, 1903.)

Railroads—Trunk railway—Definition of—A commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the State, or in different States, and which, under its charter or the general law, has the legal capacity of constructing, purchasing and operating branch lines or feeders, connecting with its main stem or trunk, is a "trunk railway" within the meaning of section 164 of the Constitution which excepts trunk railways from its provisions requiring a city before granting a franchise or privilege within the city limits to sell the same to the highest and best bidder, after duly advertising the sale. The grant of a right of way over the streets of a city to such a trunk railway without previous sale, is, therefore, not violative of the constitutional provision.

C. H. Shield for appellant.

Helm, Bruce & Helm, D. W. Sanders and J. W. Sachs for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The appellant, John Diebold, is a citizen of Louisville, Ky., and owns real property fronting on Sixteenth street, which is one of the highways of that city. The appellee, the Kentucky Traction Co. of Louisville, is a railroad corporation organized under the general statutes of Kentucky, having power and authority, under its charter, to construct and operate an electric line from Louisville, Ky., to Nashville, Tenn., and to be a common carrier of both passengers and freight when in operation.

As a necessary prerequisite to the building of the proposed line, appellee sa.

oured, from the general council of the city of Louisville, an ordinance granting to it a right of way from a point on its southern boundary, along and over parts of certain named streets and alleys, to Center and Jefferson streets. One of the highways over which the franchise granted by the municipality extends, is that part of Sixteenth street upon which appellants' property fronts. Conceiving that the franchise granted to appellee was void, as being violative of the provisions of section 164 of the Constitution, which requires that all franchises included within its language be sold to the highest bidder, appellant instituted this action, for an injunction to prohibit the building of the proposed line along Sixteenth street, in front of his property.

The pleadings in this case aptly raise the one question involved in the record, whether or not the proposed road is a trunk railroad within the meaning of section 164. If it is, appellant has no cause of action; if it is not, the injunction prayed for should have been awarded. Trunk railroads are specifically excepted from the provisions of section 164. The opinion of the learned chancellor below fully meets our views upon the question for adjudication, and it is adopted as the opinion of the court, and is as follows: To decide the questions of law which arise on this motion, two sections of the Constitution of Kentucky have to be considered, to wit, sections 163 and 164. Section 163 is as follows: "No street railway, gas, water, steam heating, telephone or electric light company within a city or town shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus, along, over or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such cities or towns being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith been begun thereunder, the provisions of this section shall not apply."

"Section 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years such municipality shall first after due advertisement receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The question to be decided sharply on this motion is, whether the appellee having its termini in Louisville and Nashville, under its original and amended charter, is a street railway, and, therefore, within the constitutional prohibition against such a grant as that contained in the ordinance referred to, or a trunk railway, and thereby expressly excluded by section 164 from the prohibitory operation of the two sections of the State Constitution above quoted. Whether a railway is a street railway, or a trunk railway. It will not be contended, we apprehend, depends on the motor power employed by it in propelling its rolling stock over and along its tracks. It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather the character of a railroad company is determined by the nature and extent

and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter.

By the original charter of the Louisville & Nashville Railroad, it was authorized and empowered to lay its tracks and propel its cars thereon between Louisville and Nashville, and was authorized and empowered just as the appellee in this case is authorized and empowered, to transport passengers, freight and express matter to all immediate points, towns, cities and counties between Louisville and Nashville, and to erect its depots to accomplish its corporate purposes, just as the appellee here is authorized and empowered to do; the only difference in character, legal or otherwise, between the appellee and the Louisville & Nashville Railroad, under its charter, is that one has steam for a motor power, and the other has electricity; both are interurban and interstate railroad corporations. It is difficult to understand what the phrase "a trunk railway" clearly means, if it does not mean an interurban and an interstate railway for commercial purposes.

Appellant insists that appellee is a street railway within the meaning of section 163 of the State Constitution, above quoted. It will be observed at a glance, that the framers of section 163 of the State Constitution, intended that the restricted character of the street railway, as a strictly local intramural street car company, should be understood as such by the classification and association of the street railway referred to in that section with gas companies, water companies, steam heating companies, telephone companies, and electric light companies, all of which are strictly intramural, and essentially and exclusively local in their scope and operation in cities, towns and other municipalities.

The fact that a railroad company, whether operated by electricity or steam, such as the Chesapeake & Ohio R. R. Co., Illinois Central R. R. Co., the Louisville & Nashville R. R. Co., or an interurban or interstate railroad company, all having the same corporate purposes, and performing the same important public functions for the convenience and good of the public, in transporting passengers, freight and express matter, for the advancement of commerce between towns and cities within a State, or between towns and cities within different States, is obliged, in order to accomplish the corporate purposes of its creation, to have terminal points, as passenger or freight depots, to reach, which it is necessary to lay its tracks along the streets within a city or town, does not make such railroad company a street railway, and impress upon it a local intramural character, such as is possessed by gas, water, steam heating and electric light companies enumerated in section 163 of the State Constitution, above quoted.

If a railroad company, whether operated by steam or electricity as a motor power, lays its tracks and connects in commercial relationship different towns, cities, counties and other municipalities within a State, or cities of different States, be not a trunk railway, then it is difficult to understand what a trunk railway is. We have examined all the recognized authorities upon railroads and railways, and have been unable to find, in any text book, or decision, the phrase "trunk railway," or anything that approaches the same. In *Elizabethtown & Big Sandy R. R. Co. v. Ashland, &c., Street Railway Co.*, 96 Ky., 855, the court said: "It is urged, however, that the appellee (the street railway company) is not a railroad company in the mean-

ing of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse, or other propelling power on said road in the transportation of freight and passengers."

In the case under consideration, the appellee was organized under the general railroad laws of this State, just as a railroad corporation extending its line from the city of Louisville to any distant point in the State of Kentucky, or to any city or point in a distant State, assuming that the foreign States accorded the right or privilege to the Kentucky corporation in or across their territory, would have to be organized. And unless the agency of propulsion adopted by a railroad determines its legal character as a street railway or a railroad trunk line, it is impossible to conceive of any distinction between the two. It seems to us, that it is the charter of a company which places it in the class to which it belongs, whether street railway or trunk railway, and not the character of the motor power which it employs. If, in order to be a trunk railway, the railroad company must have a main line, with branches or feeders, branching off from the main stem to adjacent towns, cities or counties, then the record in this case shows that the defendant electric railroad corporation meets this requirement, because it has branches to Owensboro, Russellville, and other points off from its main line between Louisville and Nashville. We think there can be no doubt that giving the phrase, "a trunk railway," a rational interpretation, it means, and can mean nothing else but a commercial railway, or railroad, connecting different cities within a State, and facilitating commerce between them, or between cities in different States. And to such commercial railroads, of course, it is not pretended that section 163 of the State Constitution applies.

The term "street railway," as used in section 163 of the State Constitution, means, and can only mean, applying to it a common-sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street car tracks, for the use and convenience of the local public in a municipality—those street cars that ran along the streets of a city, picking up passengers here and there, and putting them off at street crossings, and at the termini of the street car companies' tracks within the municipality; they were created and organized and operated, and such was their character, as defined in their charters, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city; they were never organized or intended for commercial purposes between different cities within a State, or between different cities in different States.

In the case of the Louisville and Portland R. R. Co. v. Louisville City Railway Co., 2 Duvall, 175, Judge Robertson, after holding that the amended charter of a railroad company was as efficient in establishing its character, as its original charter, said: "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight—a street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. And we

presume that, in this contradistinctive sense the term 'railroad' was used in the appellant's charter as amended in 1860. A railroad and a street railroad are in both their technical and popular import as distinct and different as a road and a street or as a bridge and a railroad bridge and it has been adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Lewis in his work on Eminent Domain, volume 1, section 110a, says: "Railroads now exist in great variety as regards motors and motive power the size and style of cars and coaches and the methods of operating and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence however, in embracing all railroads in two divisions or classes: First, commercial railroads; second, street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and are operated in the public streets, for the purpose of conveying passengers with their ordinary hand luggage from one point to another on the street."

In the case of *Zehren v. Milwaukee Electric Railway Co.*, 99 Wis., 48, S. C., 67 Am. St. Rep., 850, S. C., 41 Lawyers Rep. Ann., 575, the court said: "A street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalk of foot passengers, and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city conveyance for the use of the city, by people living or stopping therein, and fully under the control of the municipal authorities who have been endowed with ample power for that purpose. This strictly urban character of a street railway remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of improving the street, and rather as a help to the street than as a burden thereon." The learned court, after speaking of the introduction of the new motor power, and the enlargement of street cars, and the extension of distances, for their operation, even connecting separated cities and villages, said: "Thus the urban railway has developed into the interurban railway, and threatens soon to develop (as in the case at bar) into the interstate railway. The small car, which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps of a train which sweeps across the country, from one city to another, bearing its load of passengers, ticketed through with an occasional passenger picked up on the highways. The purely city purposes, which the urban railway subserves, have developed into, and are being supplanted by, an entirely different purpose, namely the transportation of passengers from city to city, over long distances and stretches of intervening country. It is built and operated mainly to obtain through travel from city to city, and only incidentally to pick up a passen-

ger in the country towns. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam road, and would not use the highway at all."

In the case of the Street Railway Co. v. Doyle, 98 Tenn., 747, S. C., 17 Am. State Rep., 939, that distinguished and learned jurist, Judge Lurton, said: "The distinction between the use of the commercial railway, and that by a horse railway, is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case (which was an electric railway) is on a line between the two—the equivalent of neither, but partaking largely of the nature of both."

The electric railway in the case Judge Lurton decided transported passengers only, and this feature, Judge Lurton lays emphasis on as distinguishing it from a commercial railway which carries both passengers and freight, receiving and discharging the same at regular depots or stations established for that purpose. In the case at Marlott v. Collinsville, C. E. Electric Railway Co., 108 Fed. Rep., 313, Judge Grosscup said: "It (referring to the Collinsville Electric Railway Co.) was incorporated under the law of March 1, 1872, relating to the incorporating of railroad companies. Its articles of incorporation are on file in the office of the Secretary of State of Illinois, in the book of railroad records. It took, and unquestionably intended to take, under its charter, the powers of a railroad corporation; and among them the railroad corporation right of eminent domain. The fact that its trains are to be operated by electricity, instead of steam, does not affect its place in the laws of the State as a railroad company. There is nothing in the acts of 1872 and 1899 that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads as they now exist; indeed these electrical roads, in the speed of their trains, in the distance traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. We can not conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purpose of general transportation, nor do their incidental functions as street railways in the towns or cities traveled lift them out of the railroad statute, for it has been held that an elevated road, while intramural in its creation, and in its powers, is within the contemplation of the railroad statute, and exercises its right of eminent domain by virtue of these statutes. (Lieberman v. Railroad Co., 141 Ill., 140.) Indeed, if appellee be not a railroad within the meaning of the act of March 1, 1872, as modified by the act of May 27, 1889, and other acts relating thereto, we can find no authority for its existence as a corporation, or for its exercise of the right of eminent domain. (See, also, to the same effect, the very interesting and instructing case of Mass. Loan and Trust Co. v. Hamilton, 63 Fed. Rep., 639; Williams v. City Electric Street Railway Co., 41 Fed. Rep., 166; Chicago R. R. Co. v. Milwaukee R. R. Co., 60 State Rep., 136, 313.)"

The foregoing authorities conclusively demonstrate that the defendant electric corporation is not a street railway, within the meaning of the sections 163 and 164 of the present Constitution of Kentucky, but that it is an

interurban and interstate commercial railroad, with all the incidental corporate rights and powers of railroad corporations in this State, whether operated by steam or electricity, or any other motive power. For a very thorough examination of the authorities, both text writers and decisions on railroads or railways, while the court has been unable to find a legal definition of the phrase "trunk railway" formulated in any precise words, it is believed that the following is the correct definition of the phrase: "A trunk railway is a commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the State, or in different States, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing and operating branch lines, or feeders, connecting with its main stem or trunk. The main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries."

Under section 842a, Kentucky Statutes, it is provided that interurban electric railroad companies, in order to be under the same responsibilities, and to have the same rights, powers and privileges of railroad corporations existing under the laws of this Commonwealth, must, under its charter, be authorized to construct a railroad ten or more miles in length. The statutory requisite must, of necessity, be incorporated into the above definition of a trunk railway when applied to interurban electric railroad companies in this State. No reason can be suggested, and none in fact exist where the phrase "trunk railway," found in section 164 of the State Constitution, should be applied to steam railroad corporations, and not to electric railroad corporations, or to electric railroad companies, interurban or interstate. Manifestly, it is equally applicable to both. The phrases "trunk railway" and "main line," whether applied to steam railroad corporations, or electric railroad corporations are essentially synonymous, else both phrases are without meaning. It is a misconception of the general statutory railroad law of this State, as embodied in article 5, chapter 32, Kentucky Statutes, to suppose that the grant or regulation contained in the ordinance of the city, defining the streets along and over which the defendant company is authorized to run in order to reach its terminal depot at Green and Center streets of the city of Louisville, is a grant of a franchise or privilege to a street railway, which would be void unless duly advertised for public bids, and accordingly awarded to the highest and best bidder.

The defendant interurban electric railway company was created and organized, as we have seen, under the general statutory railroad law of this State, contained in article 5, chapter 32 of the Kentucky Statutes. It derives its corporate franchises, rights and powers from the State of Kentucky, it does not, and can not, derive any of its corporate rights, franchises and powers from the city of Louisville. By subsection 5 of section 768 of article 5 of the Kentucky Statutes, it is provided that all railroad companies created under that act shall, among other things, have the power to construct its road upon, or across, any water course, private or plank road, highway, street, lane or alley, and across any railroad or canal; * * * and in case the road is constructed upon any street or alley, the same shall be upon such terms and conditions as shall be agreed upon between the cor-

poration and the authorities of any city in which the same may be. Thus it will be seen that the right of the defendant company, to lay its tracks along the streets of the city of Louisville, is granted by the legislature of Kentucky, subject only to the provision, a most reasonable one, that the city shall have the power of regulating the mode or manner in which the defendant railroad corporation may or shall exercise its corporate franchises, privilege and right of constructing its road upon and along the streets of the city.

The city of Louisville has exercised its supervisory power over the mode or manner in which the defendant railroad corporation should exercise its statutory corporate franchise of constructing its road upon and along the public streets of the city, by defining and prescribing the streets and the route along which the defendant may construct its railroad; this is all the city has done in the ordinance. It has granted to the defendant no franchise or privilege, which it did not already possess under section 768, subsection 5 of article 5, chapter 32 of the Kentucky Statutes. The city of Louisville, by said ordinance, has simply exercised its power of regulating the mode and manner in which the defendant corporation may exercise its franchise derived from the State, of entering with its tracks within the limits of the city, and laying the same along the public streets, in order to reach its terminal depot in the city.

The judgment is affirmed.

NOBLE, SUPT. v. WHITE.

(Filed December 17, 1903—Not to be reported.)

1. Common schools—Division of district—Notice—The failure of a county school superintendent to give ten days' notice, in writing, of his intention to divide a school district to the trustees of the districts affected thereby, as required by section 4427 of the Kentucky Statutes, renders his action in dividing the district and in appointing new trustees void and of no effect.

2. Same—Removal of trustee—Notwithstanding the county superintendent may have given notice to a trustee, at a time when he was intoxicated, of his intention to remove him from office, the fact that the trustee continued in the discharge of his duties as such and, together with another trustee, entered into a contract with a teacher to teach the school in the district, who taught the school without objection from any person claiming to be a trustee, entitles the teacher to payment for her services under the contract.

R. F. Peak and John L. Noble for appellant.

J. J. C. Bach, John E. Patrick, Kelly Kash and Pollard & Redwine for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 5th day of July, 1903, the appellee, Hattie Lee White, contracted, in writing, with J. S. Cope and R. J. Fulkerson, alleged trustees of district No. 1 in the county of Breathitt, which at that time embraced the town of Jackson, to teach the common school of the district for the term of five months, beginning on the 14th of July, 1902, in accordance with the common school laws and the rules and regulations prescribed in pursuance thereto by

the State Board of Education for the amount of the public funds allotted to the district. On the 2d day of January, 1903, she brought this action against the appellant, H. B. Noble, the county superintendent, in which she alleged that she had fully complied with her contract with the district trustees in every particular; that the defendant had in his possession the public funds allotted for the payment of the teacher of the public school in that district, amounting to \$1,825.04; and that she had repeatedly demanded of him to pay to her the amount due her, but that he had refused to pay any part thereof, and asked for a mandamus requiring him to perform his duty, and pay the amount coming to her. She also files as exhibits her contract with the trustees, and her monthly report as a teacher made to the county superintendent, and the trustees' certificate of the time she had taught. The defendant, H. B. Noble, in his answer, denies that either J. S. Cope or R. J. Fulkerson were trustees of the district on the 5th of July, 1902, or had any power or authority to contract with plaintiff as teacher of the school district for the school year, or that plaintiff was entitled to a judgment for the public funds set apart to pay the teacher of the district in his hands. He admits that he had in his hands public funds for district No. 1 of Breathitt county to the amount of \$147.48; and alleges that he also had in his hands \$411.82 for district No. 93 of Breathitt county, making in the aggregate \$558.80. He alleges that on the 21st of March, 1902, he divided the district into two districts, numbering one of them district No. 93, and that J. Fulkerson was a resident of district No. 93, and for this reason was disqualified from acting as trustee of district No. 1, and that on the 9th day of June, 1902, he had removed J. S. Cope as trustee, on the grounds of immoral conduct, and asked that the plaintiff's petition be dismissed. The circuit judge, after the pleadings were made up and proof taken, decided that the attempted division by defendant of school district No. 1 in Breathitt county into two districts was illegal and void; and adjudged that defendant should pay to the plaintiff \$558.80, the amount of public funds which he admitted he held for the teacher of the district school for that year, and defendant has appealed.

It appears from the testimony that the defendant, H. B. Noble, was elected county superintendent of public schools for Breathitt county at the November election, 1901; and that his term of office began on the 1st day of January, 1902; that at this time common school district number "one" was co-extensive with the boundary lines of the village of Jackson; and that Thomas Cope, D. B. Cox and J. S. Cope were the duly and regularly acting school trustees for the district. In October, 1901, R. J. Fulkerson was elected trustee for the district to succeed Thomas T. Cope, but his term of office did not begin until July 1, 1902. On the 21st day of March, the defendant, Noble, undertook to divide the district into two districts, making Court street the dividing line, all that part of the town north of this street was to remain in district number one, and all of that part south was to be the new district number 93. By this attempted division, Cox and Fulkerson became residents of district number 93. Appellant testifies that he gave the trustees of the district no notice of his intention to divide it, except that he verbally informed Thomas T. Cope of his purpose; that immediately after the creation of the new district, he appointed Charles Haddon, R. T. Davis and Morton Forbs as trustees of district number 93, and J. E. Lang,

Elbert Hargis, and his brother, John L. Noble, trustees of district number 1, thus attempting to legislate out of office both Cox and Fulkerson. Cox died in April thereafter, and the defendant undertook to appoint J. E. Lang in his place. In the June following the defendant, Noble, as county superintendent, entered an order upon his records removing J. S. Cope from office as trustee, on the ground of immoral conduct. No steps were taken by any of the trustees appointed by defendant in either district to perform any of their duties as trustees. The appellee, Hattie Lee White, took possession of the public schoolhouse, and she and the assistant employed by her taught the public school in strict conformity with law and her contract. After the expiration of the five months, the trustees of district number 93, who had been appointed by the defendant, employed a brother of his to teach the public school in district number 93, but so far as this record shows, the trustees of district number 1 never attempted to furnish a school for that portion of district number 1 north of the river. Under this state of fact, the first question for decision is the power of the defendant to divide school district number 1. Section 4437 of the Kentucky Statutes, provides that "no change in the boundary of any district shall be made to take effect during the current year or the following school year, unless made previous to taking the census for the school year. Nor shall the boundary of any school district be changed unless ten days' notice in writing, shall be first given to the trustees of the districts to be affected thereby."

It was held in *Howard v. Forrester*, 22 Rep., 843, that under this section of the statute, before a county superintendent of schools was authorized to change a boundary of a district, he must give ten days' notice in writing of the proposed change to the trustees of the district to be affected, and unless this requirement of the statute was complied with, his action in establishing a new district by changing the boundaries of the old, was invalid, and ineffectual from any purpose. It, therefore, follows that defendant's action in the creation of district number 93 out of a portion of district number 1 was void, and the appointments of trustees for the new district were ineffectual and also void.

The testimony is conflicting as to whether J. S. Cope was notified of defendant's purpose to remove him from his office as trustee. He testifies positively that no notice of his proposed removal was ever given him. Defendant, on the other hand, proves by a deputy sheriff that he read a notice to Cope, when he was under the influence of liquor, giving him notice of such proposed action. However this may be, it is incontestable from the testimony, that J. S. Cope continued to discharge the duties of his place subsequent to the date of his alleged removal; and that no one assuming or claiming to be trustee of the district objected or interposed any obstacle to plaintiff's discharging her duty under the contract. No one else has any valid or legal claim to the public funds of the district set aside for the payment of the teacher of the school district.

It, therefore, follows that the judgment must be affirmed.

BARRICKMAN'S ADM'R v. BARRICKMAN.

(Filed December 17, 1908—Not to be reported.)

Promissory note—Credits—In this action involving the question of what credits should be allowed on a note the evidence sustains the judgment of the chancellor allowing to the obligor the credits contended for.

Elmer C. Underwood and Wirgman & Underwood for appellant.

R. F. Peak and Barrickman & Crowe for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by appellant, as administrator of William Barrickman, deceased, against the appellees. Thomas Barrickman and wife, on a note for \$400, dated February 25, 1896, secured by a mortgage on real estate. The defendant admits the execution of the note, and alleges that it was given in renewal of a note for \$380.25, dated March 8, 1889; and that this note was given in renewal of two notes, one for \$150, and the other for \$250, which were executed by the defendant to the plaintiff's intestate for borrowed money on the 6th day of March, 1882, and that in addition to the credits endorsed upon the original notes, and the various renewals thereof, which culminated in the note sued on; that he paid to William Barrickman, \$25 on the 6th of September, 1883, and \$74.40 on November 1, 1886, and files with his answer and as part thereof the following exhibits:

“Exhibit No. 1.

“One day after date we or either of us promise to pay to Wm. Barrickman the sum of \$150 for value received of him this the 6th day of March, 1882.

“T. BARRICKMAN,

“ELIJAH BARRICKMAN.

“Cr. by interest up to March 8, 1883.

“Cr. by interest up to March 6, 1886.

“Cr. by interest up to March 6, 1887.

“Cr. by interest up to March 8, 1889.”

“Exhibit No. 2.

“One day after date we or either of us promise to pay to Wm. Barrickman, the sum of \$250 for value received of him. This 6th of March, 1882.

“T. BARRICKMAN,

“ELIJAH BARRICKMAN.

“Cr. by interest up to this date, March 8, 1883.

“Cr. by interest up to this date, March 8, 1886.

“Cr. by the interest up to this date, March 8, 1887.

“Cr. by cash, \$100, March 18, 1887.

“Cr. by cash \$16, March 8, 1889.”

“Exhibit 3.

September 6, 1883.

“Received of James Barrickman \$25 to be Cr. on Thomas Barrickman's two notes which I hold against him.

“WM. BARRICKMAN.”

"Exhibit No. 4.

LaGrange, Ky., Nov. 1, 1886.

"OLDHAM BANK, LAGRANGE, KY.

"Pay to William Barrickman, or order, Seventy-four 40-100 dollars.

"\$74.40.

THOMAS BARRICKMAN.

"Endorsed: WILLIAM BARRICKMAN."

"Pay J. T. Wilson, Cashier, or order, for collection of Farmers and Drovers Bank, of Louisville, Ky., J. W. Nichols, Ca."

"Exhibit No. 5.

February 15, 1891.

"Sold to William Barrickman 10 head of hogs, weight nine hundred and one pounds, 8 cents pr. pound, \$27.08."

"Exhibit No. 6.

1892.

"Five head of hogs, weight 480 pounds, 4 cents pr. pound, \$19.20."

"Exhibit No. 7.

"One day after date we, or either of us, promise to pay to Wm. Barrickman, the sum of \$380.25, for value received, at the rate of 6 per cent. this the 8th day of March, 1889.

"T. BARRICKMAN,

"ELIJAH BARRICKMAN.

"COLE BARRICKMAN, witness.

"Cr. by nineteen dollars and twenty cents this March 5, 1892.

"Cr. by twenty-seven dollars this 1st day of February, 1891."

Plaintiff, in his reply, denied that the defendant was entitled to the additional credits set up in his answer.

Defendant, to support his contention, introduced as a witness, J. T. Wilson, who testified that during the year 1886, the defendant, Thomas Barrickman, and the deceased, Wm. Barrickman, came together to the Peoples Bank in LaGrange, of which he was cashier, and that the defendant handed him the check for \$74.40, dated November 1, 1886, and asked him if the bank books showed that it had been paid to Wm. Barrickman, that he informed him that they did; that Wm. Barrickman also asked about the check and looked at it; and that the defendant then remarked that he ought to have had credit for it on the note in addition to the other credits; and that Wm. Barrickman made no response to this suggestion; that he recognized the endorsement on the check as in the handwriting of Wm. Barrickman. James Barrickman, a brother of the defendant, identified as genuine the receipt signed by Wm. Barrickman to the defendant, Thomas Barrickman for \$25, dated November 8, 1883; and testified that he had paid to their uncle, Wm. Barrickman, the \$25 for this brother. Cole Barrickman, another brother of the defendant, testified that on the 8th of March, 1889, he had been present at the settlement between Wm. Barrickman, deceased, who was his uncle, and the defendant, T. Barrickman, in which the two notes dated the 6th of March, 1882, were given up and a new note for \$380.25 executed; that he calculated the interest at the request of the parties; and that at this settlement neither the check for \$74.40, dated November 1, 1886, nor the receipt for \$25, dated September 6, 1883, were produced by the defendant; and that no separate credits were given these two sums of money in that settlement. It was shown by the defendant that various credits of interest paid on all the preceding notes were in the handwriting of William Barrickman. Plaintiff, by way of rebuttal, took the deposition of D. H. French,

a well known attorney residing in LaGrange, who testified that at the request of William Barrickman he calculated the interest on the note for \$380.25, dated the 8th of March, 1889, on the 25th of February, 1896, and also wrote the note for \$480 sued on and the mortgage made to secure it; and that a settlement was had between the parties on that date of their mutual subsisting demands previous to the execution of the note; and that it was his best impression that the defendant, Thomas Barrickman, had in his possession at that settlement the check for \$74.40, and claimed that he was entitled to a credit therefor on the obligation; and that it was allowed to him; that he also claimed some other credits aggregating about \$100, which were also allowed. The interest credited upon the original notes for \$150 and \$350 in the handwriting of William Barrickman, showed that all the interest was paid up to the execution of the note for \$380, as the last credit for interest in these notes was made on the 8th of March, 1889, which is the exact date of the execution of the \$380 note, and a calculation of the interest on this note to the 25th of February, 1896, when the note for \$480 sued on was executed, will show that the defendant received no credits in that settlement except for \$19.20 as of the 5th of March, 1892, and \$27.08 as of the 1st day of February, 1891, which were endorsed as credits. We think, therefore, that it must be assumed that the appellee was not credited by the items in dispute in the settlement made by Mr. French. Appellant, however, contends that as the credits of interest do not recite the specific sum of money received at these dates by William Barrickman; that it would be fair to assume after the great lapse of time that the credits contended for were really embraced in those given. And the contention is not without plausibility. But in view of the testimony of Wilson that the defendant, after the execution of the note sued on, claimed that he should have been allowed credit for the \$74.40 check; and that deceased did not deny it, and in the absence of any evidence conducing to show that it was given in payment of any other indebtedness due by defendant to appellee, we think the presumption can not be indulged. The course of dealings between the parties and their relationship to each other, indicate that there was more or less negligence by both parties, and we do not, therefore, feel warranted in disturbing the judgment of the chancellor.

Judgment affirmed.

LOUISVILLE & CINCINNATI PACKET CO. v. MULLIGAN.

(Filed December 17, 1903—Not to be reported.)

1. Negligence—Damages—In this action to recover damages for personal injuries resulting from a collision between two steamboats because of the negligence of those in charge thereof, the evidence, though conflicting, is sufficient to authorize a submission to the jury of the question of negligence in the giving of signals and in the management of the boats after they were given.

2. Same—Contributory negligence—The negligence of those in charge of a steamboat on which the injured passenger was traveling is not imputed to the passenger, and he is entitled to recover against the other boat on account of its negligence, although the one on which he was traveling was more negligent and contributed more to the collision.

8. New trial—Newly-discovered evidence—There being no doubt that the appellant was injured in the collision complained of, the refusal of the trial court to grant a new trial on the ground of newly-discovered testimony to the effect that appellant fell from the upper deck of the boat after the collision and hurt himself will not be disturbed, the newly-discovered evidence going merely to the extent of the injuries.

D. H. French and Chas. F. Taylor for appellant.

S. E. DeHaven and R. F. Peake for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Hobson.

The White Dove was a gasoline boat which ran daily from Marble Hill, Ind., to Louisville. It was about sixty-five feet in length and fourteen feet beam. It carried regularly freight and passengers. On the night of December 7, 1901, the appellee, Mulligan, was a passenger on the boat from Westport, Ky., to Louisville, and when the boat reached Beck's Landing, or near there, it collided with the steamer, City of Cincinnati, belonging to appellant. In the collision the cabin of the White Dove was wrecked, and appellee, who was in the cabin, was thrown down and received injuries on his arm, shoulder and head, to recover for which he filed this action against the owners of both boats and recovered judgment for \$250 against each of them. From this judgment the packet company appeals. The owners of the White Dove have not appealed.

It is insisted for appellant that the court should have instructed the jury peremptorily to find for it. The law of the river requires the ascending boat, when within eight hundred yards of the other boat, to signify by one blast of the whistle if it wishes to pass on the right, and by two blasts of the whistle if it wishes to pass on the left, the ascending boat being required first to indicate the side on which it desires to pass. If the descending boat deems it dangerous to take the side indicated, the pilot must at once sound the danger signal of three or more short blasts of the whistle, and it is the duty of the pilot of the ascending boat to answer by a similar signal of three blasts of the whistle. After this the pilot of the descending boat may indicate by his whistle the side on which he desires to pass, and the ascending boat must be governed accordingly, the descending boat being entitled to the right of way. Whenever the danger signal is given, the engines of both boats must be stopped and backed until the signals are understood, and the boats can safely pass each other. The boats are required at night to have a red light and a green light. Floating craft carry a white light. A steamboat must keep out of the way of floating craft, as these simply follow the current, and can not be guided as a steamboat. The White Dove was descending, the City of Cincinnati was ascending the river. The collision occurred a little after 6 o'clock. It was an ordinary winter night. The City of Cincinnati had up the regulation lights, and was perceived by the White Dove when a mile or more from it. The boats were both in the channel, and the White Dove was headed to pass on the Kentucky side of the Cincinnati. The White Dove had no whistle, but contrary to law, was using a bell to give signals. The proof for the plaintiff was to the effect that the White Dove had out its red and green lights at the proper place on each side of the

pilot house. It also appeared from this proof that as they approached the City of Cincinnati the green light was burning dimly and was taken down and a white light hung in the place of it, while the green light was handed to the captain, who was standing at the foot of the ladder, and discovered that the trouble with the lamp was that the wick had been jolted down by the jarring of the boat. He turned the wick up and handed the lamp back at once to the man on the ladder, who replaced it where it belonged. The captain testifies that this occurred when they were a mile from the Cincinnati. There was other evidence tending to show the distance was less, but that the change was made in a few seconds is evident from the proof, and taking the plaintiff's testimony alone, we think in ample time to be seen by the Cincinnati. The Cincinnati did not blow at eight hundred yards to indicate on which side she desired to pass, or give any signal until she was within a very short distance of the White Dove, not more, according to the plaintiff's proof, than seventy-five or one hundred and fifty yards. She then gave one blast of the whistle, indicating that she desired to pass on the right side. The White Dove then changed her course from the Kentucky to the Indiana shore, and there not being room enough, the collision ensued, the White Dove coming in contact with the side of the Cincinnati, which, according to the proof of the plaintiff, was still running at full speed. The proof for the defendant, the packet company, is that the White Dove had up nothing but a white light, which indicated a floating craft, and as soon as the Cincinnati discovered what it was the one blast of the whistle was blown, and this was immediately followed by the danger signal of three blasts, and the engines were stopped on the Cincinnati and the boat backed until the collision occurred, while the engines of the White Dove were still running, driving the boat ahead.

The White Dove was clearly negligent in not following the rules when the Cincinnati failed to give the proper signal when it reached the eight hundred-yard limit. It should then have given the danger signal, as it knew of the presence of the other boat, and the White Dove should have been gotten under control before it was so close to the Cincinnati. Both boats were running ten or twelve miles an hour. There was also some evidence that those in charge of the Cincinnati were negligent, for if the lights on the White Dove were burning, as shown by the plaintiff's evidence they were without excuse in not blowing at the eight hundred-yard limit, and if only the white light was burning, as proven by it, this indicated a floating craft, and the jury were warranted in concluding that more care was demanded of the boat than appears to have been exercised. The two boats passed regularly about this place, and those in charge of the Cincinnati had reason to be on the outlook for the White Dove. We, therefore, conclude that the case was properly submitted to the jury, and while the evidence was very conflicting, it is not such that we ought to disturb the verdict on the facts.

Appellee, being a passenger on the White Dove, and having no control over the boat, may recover of the Cincinnati, although those in charge of the White Dove were more negligent than those in charge of the Cincinnati. For the negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both. (*Danville, &c., Co. v. Stewart*, 59 Ky., 119; *Louisville, &c.,*

R. R. Co. v. Casey's Adm'r, 79 Ky., 738; 7 Am. & Eng. Ency. of Law, 446, and cases cited.) The court, by his instructions, told the jury that both boats were governed by the same rules and regulations; that each owed to the other the same duties; and that appellant owed appellee no higher or greater duty than it did to the boat, White Dove; also that appellant was not liable to appellee unless the plaintiff was injured by reason of the negligence in whole or in part of the officers in charge of the Cincinnati. Negligence was also properly defined as the failure to exercise that degree of care that ordinarily prudent persons usually exercised under similar circumstances. The instructions of the court as a whole clearly presented the law of the case. The instructions asked by appellant, and refused in part, presented the idea that the negligence of the White Dove was to be imputed to the plaintiff. These instructions were properly refused. The other instructions asked by it, in so far as they were proper, were embodied in those given by the court.

In support of the motion for new trial, appellant filed the affidavit of two witnesses to the effect that appellee fell from the upper deck of the White Dove some time after the collision, and thus hurt his arm and shoulder, this testimony having been discovered after the trial. Circuit courts have a wide discretion as to the granting of new trials on account of newly-discovered parol evidence, and this discretion will not be interfered with by this court unless palpably abused. The newly-discovered evidence only went to the extent of the plaintiff's injuries. There was no doubt that the plaintiff was injured in the collision. The question as to the extent of his injuries was not only investigated on the trial, but considerable evidence was taken on the subject. The court will rarely set aside a verdict on newly-discovered parol testimony like this. Were the rule otherwise, the administration of justice would be much more uncertain and delayed than it is, and there would be less incentive to parties to exercise diligence in getting up their witnesses and preparing cases for trial.

On the whole case we see no substantial reason for disturbing the judgment of the circuit court, and it is accordingly affirmed.

SMITH v. BALLARD, &c.

(Filed December 17, 1903.)

Construction of will—Defeasible fee—Where the testator bequeathed to a daughter certain real estate free from the claims of her husband, but in the event of her death "without bodily issue" then over to other persons mentioned in the will, the daughter took a defeasible fee subject to be defeated by her death at any time without bodily issue.

D. H. French for appellant.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Paynter.

This appeal involves the construction of the will of James B. Ballard, deceased.

The second clause of the will reads as follows: "I will and bequeath to my two daughters, Lou Bell Ballard, and Maud Shrader, formerly Maud Bal-

lard, free from the claims of any husbands they now have or may have, the farm on which I now reside, and containing about one hundred and sixty acres." * * *

The third clause reads as follows: "In the event of Lou Bell Ballard's death without bodily issue then her portion of my estate shall be equally divided between Martha Hitt, wife of John Hitt, and Marietta Arvin, wife of Robt. Arvin, free from the claims of their said husbands, and in the event of the death of Martha Hitt and Marietta Arvin before the death of Louis Ballard, my son, then their said portions shall go to Louis Ballard."

The question which lies at the foundation of this case is what estate Lou Bell Ballard takes in the land devised to her. It is provided in the will that "In the event of Lou Bell Ballard dies without bodily issue, then her portion in my estate shall be equally divided between Martha Hitt, etc."

When a devise is made to one person in fee and in case of his death to another in fee, courts interpret the devise over as referring only to death in the testator's lifetime. The courts were led to so interpret such devises, because of the absurdity of speaking of the one event which is sure to occur to every one living as uncertain and contingent. (2 Jarman on Wills, chapter 48.) The rule is different, however, when the death of the testator is coupled with other circumstances which may or may not take place, as for instance, death without children. In such case the devise over takes effect according to the ordinary and literal meaning of the words upon death, under the circumstances indicated at any time, whether before or after the death of the testator. (2 Jarman on Wills, chapter 49; Sale, &c. v. Crutchfield, &c., 8 Bush, 649.) In *Thrackston v. Watson*, 84 Ky., 296, the same doctrine is recognized. The death of Lou Bell Ballard was not uncertain, but the event of her death "without bodily issue" was uncertain, for it might occur with or without bodily issue. So under the plain language of the will, if her death occurred either before or after the death of the testator, then the estate devised to her goes to the persons designated in the will. Our opinion is that Lou Bell Ballard took the fee, subject to be defeated, if she died "without bodily issue" at any time. Counsel for the appellant has not cited any authorities upon the question involved and the case is not briefed for the appellee. We presume the court below was of the opinion that because the devisee survived the testator, she took the fee. This is upon the idea that the testator intended she should take the fee, unless, she died without bodily issue in his lifetime. The court was evidently controlled by the principle announced in *Aultman Co. v. Gibson's Guardian, &c.*, 13 Ky. Law Rep., 2296; *Ferguson v. Thomason, &c.*, 87 Ky., 519; *Dickinson v. Ogden's Ex'or*, 89 Ky., 162; *Pruitt, &c. v. Holand*, 42 Ky., 641; *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky., 451; *Forsythe v. Lansing's Ex'or*, 22 Ky. Law Rep., 1064; *Baxter, &c. v. Isaac, &c.*, 24 Ky. Law Rep., 1618; *Lee, &c. v. Mumford, &c.*, 19 Ky. Law Rep., 1585; *Clements v. Reese*, 25 Ky. Law Rep., 221. In that class of cases the rule is recognized to be, when an estate is given or devised with remainder over, but in the event the remainderman should die without a child or children then to a third person, the general rule of construction is that the words, "dying without children or issue" are restricted to the death of the remaindermen before the termination of the particular estate. This rule is not applicable to the case at bar.

The judgment is reversed for proceedings consistent with this opinion.

KING v. CREEKMORE.

(Filed December 17, 1903.)

1. Lesser and lessee—Personal injury to employe of lessee—Liability of lessor—The lessor of a steam boiler, which is removed from his premises and operated under the exclusive control of the lessee, is not responsible to an employe of the lessee for injuries resulting from the explosion of the boiler, which was defective, where the lessor has made no fraudulent representations as to its condition.

2. Same—The lessor can not be held liable for failure to exercise ordinary care to ascertain a defect in the boiler at the time of the lease in an action for damages for personal injuries by an employe of the lessee, who was neither a party nor a privy to the contract of lease.

Tye & Denham and Sharp & Siler for appellant.

O. H. Waddle and K. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Creekmore, owned a saw mill, and he leased it to Hiram Warren, who operated it as lessee. The appellant was an employe of Warren in running the mill, and while in the line of his duty the boiler exploded inflicting serious injury upon him, and to recover damages this action was brought against Creekmore alone. In addition to the above facts it is averred in the petition that the boiler was defective; and was known by the defendant to be so, or he by the exercise of ordinary care could have known of its dangerous and defective condition, and that it was his duty to inspect the boiler and keep it in a reasonably safe condition. The court sustained a demurrer to the petition. An amended petition was filed in which it is averred that the plaintiff was injured on the 14th day of March, 1902; that the mill was leased to Warren to enable him to at once manufacture lumber; that after the mill was leased to him he moved it from defendant's premises and used it about two weeks before the explosion occurred; that at the time the mill was delivered to Warren defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known it.

The averments in the original petition that defendant knew of the dangerous and defective condition of the boiler, or by the exercise of ordinary care could have known of it; and that it was his duty to inspect and keep it in a reasonably safe condition, did not state a cause of action. The mill was removed from defendants' premises and his control, he had nothing to do with the employment of the plaintiff, nor had he control of him in the performance of his duties. The relation of master and servant did not exist. If it did not, then the defendant certainly was not under a duty to inspect the boiler and keep it in a reasonably safe condition. (Central Coal and Iron Co. v. Grider's Adm'r, 25 Ky. Law Rep., 165.) That was the duty of Warren, the master, who employed the plaintiff. The original petition was based upon the theory that as defendant owned the mill, though he had leased it and given possession and control of it to Warren, he was under the same responsibility as he would have been had he retained, operated it and employed plaintiff. There is no rule of law upon which to base a recovery

on such a state of facts. In some cases a recovery may be had by a servant against one between whom and himself the relation of master and servant does not exist. There is a variety of such cases. It may be profitable to call attention here to some of them. In *Brights Adm'r v. Barnett & Record*, 26 L. R. A., 524, the defendant was engaged in building an elevator for grain and contracted with a fire extinguishing company to construct a fire extinguishing apparatus. The defendant was to furnish the staging that the men employed by the fire extinguishing company would need in performing the work. The staging was defective and it broke, resulting in the death of one of the men engaged in the work. In that case the defendant undertook to furnish the staging necessary to be used by the contractor and employees. A recovery was allowed *inter alia* upon the ground that the defendant had impliedly invited deceased to walk on the staging while he was doing his work. In *Mulchey v. Methodist Religious Society, &c.*, 125 Mass., 487, on an analogous state of facts the court held there could be a recovery, because the society had in effect invited and induced the injured party, an employee of one who had contracted to do certain painting on its church, to go upon dangerous and defective staging which it had procured to be erected for the use of the contractor and his employees in performing the work under the contract. In *Ford v. Crigler, &c.*, 25 Ky. Law Rep., 57, it appeared that the defendant owned a building, the top floor of which was used for storage purposes; an elevator was in use in the building for their customers and their employees in storing and removing property therefrom. It was defective and as a consequence an employee of an expressman, while loading goods in the elevator was injured. The court, in effect, held that defendants were in the possession and control of the building; that the employee was there by defendant's invitation express or implied; that it was their duty to keep the premises in a reasonably safe condition; and if the injury resulted from the failure to exercise such care, they were liable in damages therefor. The principle of law upon which that case rested does not apply to the facts of this case.

The amended petition supplements the original petition with the averment that the defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known of it at the time it was leased. It will be observed that it is not averred that defendant knew (without the alternative statement that by the exercise of ordinary care could have known it) of the defective and dangerous condition of the boiler when leased to Warren, therefore, there is no charge that he was guilty of acting in bad faith. Taking the alternative averments, in the light of the rule that a pleading must be construed strongly against the pleader, the only charge is, that defendant was guilty of negligence in failing to exercise ordinary care to discover the defect in the boiler. Can that averment be the foundation of a cause of action? It would certainly not show a breach of the defendant's contract of lease. He did not guarantee that he had exercised care to discover a defect in the boiler, and that he had failed to find it. If he made no false representations as to the condition of the boiler, no cause of action would exist in favor of the lessee on the contract. If a cause of action could only arise on the contract in favor of the lessee for a breach of it by reason of fraudulent representations as to the condition of the boiler, cer-

tainly nothing less than a fraudulent representation to the lessee could give a cause of action to an employee who was neither a party nor privy to the contract. In *Losee v. Clute*, 51 N. Y., 494, it was held that the manufacturer of a steam boiler is answerable only to his employer for any want of care or skill in the construction thereof; that after the boiler had been completed and accepted by the employer, who had the exclusive ownership, management and conduct of it, the manufacturer is not liable for an injury done to a third person by an explosion occurring in consequence of the defective construction of the boiler. To the same effect are the cases of *Curtin v. Somerset*, 140 Pa. St., 70; *Necker v. Harvey*, 49 Mich., 517. Had there been fraudulent representations as to the condition of the boiler, then the question would have arisen that was involved in *Lewis v. Terry*, 111 Cal., 39. In that case it was held that when one sells or furnishes an article, which is actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from the defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. But the court also held that one who sells an article which he knows to be dangerous, because of concealed defects, without notice of its nature and qualities, commits a wrong independent of the contract, and is liable under the law of torts to any other person who is not himself at fault, though not in privity of contract with him for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom. If the latter doctrine is correct, and we do not express any opinion on the question, the facts of this case do not authorize its application. What the court means by fraudulent representations, are such statements as a party makes with a knowledge that they are not true.

The judgment is affirmed.

DENUNZIO'S RECEIVER v. SCHOLTZ.

(Filed December 17, 1908.)

1. Gifts—Delivery of subject-matter—A declaration by the donor of his intention to give to the donee certain stock in a corporation which had been issued in the name of the latter, accompanied by his tearing up the notes of the donee and his delivery of the certificate of the stock, constituted a delivery of the subject-matter of the gift and was in effect a gift *inter vivos*.

2. Attorney and client—Attorney as witness—The provision of subsection 5 of section 606 of the Civil Code that "no attorney shall testify concerning a communication made to him in his professional character by his client or his advice thereon, without the client's consent" does not prevent the attorney, who had been employed by the client to draw certain articles of incorporation and to draw his will, from testifying after the client's death to statements made to him during the course of the employment that he had given to another a certain amount of the stock of the corporation, the gift having no reference to the subject-matter of the employment and no advice being asked of the attorney concerning it.

3. Defective answer—Cured after verdict—Where the answer in an action to recover on lost notes stated in a general way that the notes had been given to the defendant, without stating in express terms that the gift had

been accepted, the defect, if any, arising from such failure was cured after verdict.

Shackelford Miller and Wallace & Miller for appellant.

Kohn, Baird & Spindle and S. E. Sloss for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Paynter.

Joseph Denunzio died in September, 1894, possessed of a very large estate. In June, 1878, the appellee, Charles Scholtz, who was then quite young was employed by Denunzio and continued in his service until his death. So faithfully did he serve his employer, that he was advanced from time to time until he was practically in charge of the business. In September, 1893, Denunzio was in bad health and contemplated a trip to Hot Springs, Ark. Before going, he conceived the idea of separating his large fruit business, managed by Scholtz, from his other business. So he concluded to organize a corporation and its capital stock was fixed at \$30,000. The stock was paid for by the assets of the fruit business. Previous to that time Scholtz in lieu of a salary, was given one-fourth of the profits of the business. There was issued to Scholtz \$10,000 of the stock of the corporation. At the same time Denunzio took from Scholtz five notes of \$2,000 each, without interest, and retained the stock which had been issued in Scholtz's name as collateral security. The notes which Scholtz gave were not found among the assets of the estate, neither was the certificate of stock. This action was brought by the receiver, as in an action on lost notes. The defense to it is, that the notes and certificate of stock were given by Denunzio to Scholtz *inter vivos*.

The principal question involved is, did Scholtz show that the gift had been consummated? The testimony discloses the general facts as stated, and in addition thereto, that in March, 1894, Denunzio in his place of business spoke of Scholtz's long and valuable services and declared his intention to give him the \$10,000 stock in the corporation, and then delivered the certificate therefor to him, and tore up the notes taken from him for the \$10,000.

It is insisted on behalf of the appellant that these facts did not constitute a delivery of the subject-matter of the gift, and, therefore, the effort to make the gift was ineffectual; that it could only have been done by an assignment or delivery of the notes. Several cases are cited by counsel for appellant showing that there must be a delivery of the subject-matter of the gift and an acceptance of it. This is the general rule. The mere unexecuted intention to give of itself does not discharge an obligation. While the notes in this case were not handed to Scholtz, they were destroyed and the certificate of stock actually delivered to him with the intention that he should have it free from liability for the indebtedness in its purchase. In *Roche v. Jenkins*, 93 Ky., 809, the court upheld a gift where the donor told his physician to tell his son, Joseph that he wanted a certain note collected and the proceeds given to his sister. In *Meriwether v. Morrison*, 78 Ky., 572, the gift was upheld where the donor went to his desk, took out the notes and handed them to a party, telling him to return them to the desk, and at his death deliver them to the party designated as the donee. In *Stevenson v. King*, 81 Ky., 425, it was held that a delivery of an inventory

to certain property in the possession of an agent, was a gift of the property.

In *Southerland v. Southerland's Adm'r*, 5 Bush, 591, it was held that the gift of a note was effectual by a declaration of the gift, the note then being in the hands of the trustee. In some of these cases the court held that the act and declaration of the donor created a trust, and the gifts were effectual. In *Darland v. Taylor*, 53 Iowa, 503, it was held that the destruction of the notes together with the declarations of the donor, that he did not intend for the defendant to pay the debt, constituted a delivery. In *Gardner v. Gardner*, 22 Wend., 522, it was held that the destruction of a bond given as an evidence of the debt and a declaration that the money was his wife's, was held to be a gift. In this case the donor did not only declare his intention to make the gift, but actually delivered the thing of value, to wit, the certificate of stock, which he intended Scholtz to have and to make that effectual he destroyed the evidence of the debt which encumbered the thing given. We think that the gift was effected by the acts proven in the case. The appellee is not only entitled to the presumption that he did accept the gift, because it was beneficial to him to do so, but the evidence shows that he actually accepted it.

On the trial of the case Aaron Kohn was introduced as a witness for the appellee to prove statements made to him by Denunzio concerning the gift to appellee. It is urged that his testimony was not competent, because it was the revelation of a confidential communication from a client to his attorney prohibited by subsection 5 of section 606, Civil Code of Practice, which reads as follows: "No attorney shall testify concerning a communication made to him in his professional character by his client or his advice thereon, without the client's consent."

It is insisted for the appellee that Mr. Kohn was a competent witness: First, because the subject-matter of his testimony did not pertain to any communication made to him in his professional character; second, because if the communication was made to him in his professional character it was not confidential or meant to be kept secret, but, on the contrary, was to be divulged for the purpose of effecting the intention and desire of the client. Kohn was employed to prepare the articles of incorporation of the fruit company. At that time Denunzio told him that he intended to give Scholtz \$10,000 worth of the stock. Kohn prepared Denunzio's will at a subsequent date, at which time he told him that he had given the stock to Scholtz and had torn up the notes and given him the debt. Kohn testified that the information as to the giving of the stock and the destruction of the notes was not a matter upon which Denunzio asked his advice and had nothing to do with their confidential relations. The conversation detailed by Kohn as to the delivery of the certificate of stock and tearing up the notes was in the presence of J. J. Fisher, now deceased, a friend of Denunzio. It was not the subject-matter about which the client was consulting the attorney. The first statement was made when the consultation took place in regard to the articles of incorporation. The employment was to prepare the articles of incorporation, and not to advise with reference to giving away the certificates of stock therein. The second conversation took place in a consultation during an employment to prepare the will of the client. He did not consult the attorney about property which he had previously given away. The client's

purpose was to dispose of the property that he owned, not of that with which he had previously parted. The will did not mention the Scholtz notes. The Code provision referred to is simply a declaration of the common law, as to privileged communications of clients. (*Taylor v. Roulstone*, 22 Ky. Law Rep., 1515.) The policy of the rule makes communications of clients to attorneys with reference to the subject-matter of consultations privileged, so as to encourage full confidence upon the part of the client in order to aid in the administration of the laws by the courts. This is upon the theory that the client will disclose everything within his knowledge in regard to the subject-matter of the employment. This being true, a communication made by a client to an attorney during the course of the employment, but not in regard to the subject-matter of the employment, is not privileged. Instead of the client intending that his statement should be privileged, it would seem that he intended that they should be made public, if necessary, because they were made in the presence of an attorney and another person. It would seem that he wanted his lawyer and his friend to know that he had given the stock to Scholtz and destroyed the notes. To give this information, would seem to be carrying out the desire of Denunzio. In *Blackburn v. Crawford's Lessee*, 70 U. S., 175, the court held an attorney competent to testify to statements made by a deceased client in an action between the heirs and lessee. After recognizing the policy of the rule to be as we have stated, said: "But there is another ground upon which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be expressed or implied. We think it is effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object and in direct conflict with the reasons upon which it is founded."

In *Doheny v. Laoy*, 168 N. Y., 233-234 it is said: "The veil of strict secrecy is thrown over communications between attorney and client when they are presumably of a confidential character, but if the evidence discloses that the circumstances surrounding the transaction were such as not to warrant the presumption that the communications were in confidence, the Code provision is inapplicable. * * * The reason of the rule is in the necessity of secrecy, in order that persons needing professional advice shall be encouraged to disclose freely and without fear the facts upon which that advice shall be given."

In *Hall v. Renfro*, 3 Met., 52, the court said: "We are aware of no statute or rule of practice which excludes or renders incompetent as a witness an attorney in behalf of his client. The Civil Code, section 670, defines with great exactness and precision the classes of persons who shall be incompetent to testify, and attorneys are not embraced in either of the classes enumerated, except the fifth, which excludes an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent. In all other cases an attorney is a competent witness for or against his client. Whether he should or should not testify while the

relation subsists is a question of professional propriety, which he alone is to determine for himself, and with which the court has no concern."

The answer does not in express terms say that Scholtz accepted the gift, but in a general way states the gift was made. Besides it is averred that the notes were destroyed and the stock was delivered to the defendant. The question was tried as to whether the gift was effectual under the facts we have detailed and the jury returned a verdict under proper instructions for appellee. Without entering into a discussion, as to whether the answer was defective, it is sufficient to say the verdict cured it, if the defect existed. In *Insurance Co. v. Reichart*, 99 Ky., 303, the court held that when a defective pleading states facts sufficiently general to comprehend a fair and reasonable intendment, and there is enough in it to show that the plaintiff had a cause of action, the defect in the pleading will be cured by a verdict.

We are unable to find an error in the admission of testimony for the defendant, or any error in rejecting testimony offered by the plaintiff, which was prejudicial to the rights of the appellant.

Denunzio was the master and Scholtz the servant. Denunzio evidently was a man of strong mind, and managed and controlled his business, and there is not the slightest evidence that Scholtz exercised any control of him whatever. The evidence simply shows that he was a faithful servant, and had the esteem and confidence of his employer. He was not acting as trustee for Denunzio, nor did he even have possession of the property when it was given to him. The facts do not create a presumption that undue or improper influence was used to obtain the gift.

The judgment is affirmed.

CUMBERLAND TEL. AND TEL. CO. v. MARTIN'S ADM'R.

(Filed December 18, 1903.)

Original opinion, ante 787.

W. L. Granberry, Humphrey, Burnett & Humphrey and J. W. Alcorn for appellant.

R. C. Warren and W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The distinguished counsel for appellee concedes in the petition for rehearing that the facts of the case are fairly stated in the opinion. He also concedes the soundness of the authorities cited, and that if the telephone company had owned both the house and the wire it would not be responsible for the death of the intestate. But he insists that it does not follow that it is not responsible when it owned only the wire and allowed it to remain on the building after it was requested by the owner of the building to remove it. No authority is cited by the learned counsel sustaining his contention, and he seems to misapprehend the legal principle upon which the opinion rests. This is that there can be no negligence where there is no legal duty. In 1 *Shearman and Redfield on Negligence*, section 8, in defining negligence,

it is said: "The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." (See, also, to same effect, Cooley on Torts, 659-60.)

In Bishop on Noncontract Law, section 446, the rule is thus stated: "To sustain an action for negligence, the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, as explained in the earlier chapters of this volume, there is nothing which the law will redress."

He who handles an agency which is of itself dangerous to human life is responsible for injuries therefrom not caused by extraordinary natural occurrences or the interposition of strangers. (*Thomas v. Winchester*, 6 N. Y., 397; *Norton v. Sewell*, 106 Mass., 148.) But as to things which are not of themselves essentially instruments of danger the rule is different, and for them the negligent party is not responsible to strangers. (*Loop v. Litchfield*, 42 N. Y., 351; *Loose v. Clute*, 51 N. Y., 494; *Blakemore v. Railway Co.*, 8 El. and Bl., 1085.) If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented; but the electricity which killed the intestate came from the clouds, and was the act of God. The current which the telephone company used in its business was harmless. It owed the intestate no duty to furnish him a safe shelter from the rain. When he used the porch as a shelter, he took it as he found it. The wire of the telephone company was not in or of itself an instrumentality dangerous to human life, and there was no duty violated to the public in a matter whereof the intestate had the right to avail himself.

Section 969 of Thompson on Negligence has reference to defects in premises which are in themselves dangerous. Section 807 refers to the liability of the company owning the wire to the owner of the house.

Petition overruled.

HAYS, &c. v. EARLS, &c.

(Filed December 18, 1908—Not to be reported.)

1. Land grants—A patent for lands issued by the Commonwealth is void in so far as it embraces lands previously patented to another.

2. Adverse possession—In a controversy between one who claims title to a tract of land under the original grantee from the Commonwealth and those who claim under a grantee by a subsequent patent, in which possession by the latter is shown, the failure to show that possession was held for fifteen years defeats their claim; possession by tenant of an adjoining survey without claim to the possession of the tract in dispute on the part of the tenant does not amount to an adverse holding.

3. Action—Persons not parties not affected—The senior patentee is not affected in any respect by an action to subject the lands embraced in his patent to the debts of the junior patentee to which he was not made a party;

nor is he affected by an agreement whereby certain claimants agreed to hold certain lands, including his own, in partnership, where he was no party to the agreement.

J. Smith Hays and James M. Hays for appellants.

Jas Sparks for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hobson.

On September 14, 1824, a patent was issued by the Commonwealth to William F. Sexton for fifty acres of land on Fall Branch in Whitley county. Sexton left the State about the year 1830, and has not returned to it since. On September 4, 1841, a patent was issued on a survey of date March 12, 1835, to Benjamin F. Herndon, Samuel Hogan and Richardson Herndon for seven hundred and fifty acres of land in Whitley county. The metes and bounds of this patent include the fifty acre survey patented to Sexton in 1824, although it is not excepted out of the grant. M. M. Wyatt, now seventy-six years of age, says that, when he was twelve or fourteen years old, his father lived on the fifty-acre survey under Ben Herndon and Sam Hogan; that Bill Fred Sexton had lived there and after him Whitman, and after this his father came in under Herndon, and when his father moved away, Bob Sanders took possession, also under Herndon. A written agreement is also produced, made on March 7, 1835, between Richardson Herndon, Martin Beatty and Benjamin F. Herndon, by which they agreed to hold a lot of land entered by them in partnership, each to own one-third of it. Among other descriptions of the property referred to in this paper is the following: "The said Benjamin F. Herndon agrees on his part that a tract of land of fifty acres purchased of Whitman and fifty acres entered adjoining the same and also five hundred acres entered adjoining the above, all shall come into the firm equally as above stated."

On May 29, 1845, James T. Curd filed a bill in equity in the Whitney Circuit Court against Benjamin Herndon to subject to a judgment for \$500 and costs the interest of Herndon in certain land owned by him. Among other lands described in the bill is the following: "One tract of fifty acres of land, the equitable title has passed through one William Sexton to William Whitman, and he sold to Benjamin Herndon who holds only an equitable title, the legal title being in one Archibald Sexton, which William Sexton is a nonresident of this Commonwealth."

Archibald Sexton and William Sexton, as well as William Whitman, were made defendants to this bill, also George Sears. In his answer to the bill, Sears, among other things, said: "As to the Whitman tract or Fed place, he states that said tract contains, to his best recollection, fifty acres, and was entered in the name of William Sexton, and sold by him to William Whitman and by him to Herndon; and William Sexton, to the best of respondent's recollection, gave his bond after the aforesaid sales to co-defendants, Benjamin F. Herndon."

Richardson Herndon filed an answer in which he showed that by a writing executed on September 17, 1839, Benjamin Herndon had transferred to him all his interest and title to the land referred to. In 1851, Hogan's one-third interest in the land was conveyed to Herndon. About the year 1872, those

claiming under Richardson Herndon had a tenant living on the land by the name of Thomps Logan. Logan did not live on the fifty-acre tract, but lived on an adjoining survey owned by the Herndons, claiming to the extent of their boundaries. It does not appear that anybody has lived on the Sexton fifty-acre survey since Bob Saunders about the year 1844. Appellants claim under the Herndons, having obtained deeds from them conveying their title. Appellees claim under Jane Sears, and produced a deed made to her by William F. Sexton on August 8, 1874. Sextons' mark is made to this deed, and it is certified by the clerk to have been acknowledged before him by William F. Sexton; but the clerk testifies that the man who signed the deed was not the William F. Sexton to whom the patent was issued in 1824. The proof leaves no doubt that William F. Sexton lived in Terre Haute, Ind., and was not in Kentucky in 1874. The deed was made by a man named Hart, who made the mark to it in Sexton's name and acknowledged it. The proof is that Hart did this pursuant to a letter which he had received from Sexton, but is not produced, and was not recorded. Jane Sears was a sister of William F. Sexton. Before he left Kentucky, according to the proof, he gave her the original patent, and said he would make her a deed as soon as he came back, she paying him for the land twenty-five yards of jeans and a \$25 rifle gun; but he never came back, and in 1874 he authorized Peter Hart, by letter, to make the deed and sign his name to it by making his mark, Peter Hart being a brother-in-law of Jane Sears, who was the wife of George Sears. After Thomps Logan, his son Joe Logan or Jop Logan, lived in the same house, holding the land as Herndon's tenants continuously until this controversy arose, but the proof for the appellees is to the effect that Thomps Logan did not claim to be in possession of the fifty-acre Sexton survey.

The statements made by James T. Curd, George Sears and Richardson Herndon in their pleadings in the old chancery suit in the Whitley Circuit Court, are not evidence against Jane Sears, or those claiming under her. No judgment is shown to have been rendered in the action, and William Sexton is not concluded by what was alleged in that action by the parties in their pleading; nor is he affected in any manner thereby, as it does not appear that he appeared in the action at any time. The written agreement made on March 7, 1859, between Richardson Herndon, Martin Beatty and Benjamin F. Herndon does not show that Whitman had any title to the fifty acres of land from W. F. Sexton; and Sexton is not a party to the contract. The proof that Wyatt lived on the land about the year 1840 as the tenant of Herndon and after him Saunders is insufficient to show any title in Herndon to the land, for the reason that the proof does not show that the possession was held for fifteen years. The proof is that Saunders lived there for two or three years, and that Wyatt made two crops there. There is no proof of any possession by Herndon or his tenants after this until Thomps Logan entered, and he lived on a different tract, and the preponderance of the evidence shows he did not claim to be in possession of the fifty-acre Sexton tract. The title passed out of the Commonwealth to Sexton to the fifty acres by the patent granted in 1821, and the subsequent patent to Herndon and his associates in 1841 was void as to the fifty acres. Appellants not connecting themselves with the patentee, Sexton, and not making out a pos-

sessory title by an adverse holding for fifteen years, showed no title in them to the fifty-acre Sexton tract. The rule that a person in possession may maintain an action against a trespasser without color of title has no application to the facts of the case. For the plaintiffs have, under the evidence, no such possession as this rule requires, and the defendants had color of title, and also claimed to be in possession. They were not, therefore, bare trespassers.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SULLIVAN'S ADM'R.

(Filed December 18, 1903—Not to be reported.)

Original opinion, ante, 864.

B. D. Warfield for appellant.

C. J. Waddill and Jonson & Wickliffe for appellee.

Appeal from Hopkins Circuit Court.

Judge Hobson delivered the following response to petition for modification of opinion:

On the return of the case to the circuit court, the defendant may be allowed to amend its answer, if it desires to do so.

Petition for modification overruled.

RAMSEY v. KEITH'S ADM'R, &c.

(Filed December 18, 1903—Not to be reported.)

Waiver of irregularity—After a case has been submitted on a motion by the appellee to affirm as a delay case and on the merits it is too late to raise the question that the infant appellant has no capacity to sue and that the appeal is prosecuted in his individual name instead of that of his guardian ad litem.

Original opinion, ante, 562.

Z. Gibbons and O. B. Ambrose for appellant.

L. J. Moore for appellees.

Appeal from Fayette Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The appeal in this case was prosecuted by the infant, L. J. Ramsey in his individual name only. By section 85 of the Code the appeal should have been prosecuted in the name of the infant by his guardian ad litem. If objection had been made before submission, the irregularity might have been corrected; for ordinarily the court will not dismiss an infant's case because of an irregularity such as this, but will allow the proper correction to be made. But no objection was made before submission of the motion to affirm as a delay case, and the case was heard on the merits on this motion. The fact that appellant had no capacity to sue was under the Code only matter of abatement (Civil Code, section 92, 118), and this was waived by submit-

sion on the merits. After trying his fortunes on the motion to affirm as a delay case, and there losing, appellee can not raise the question that appellant has not capacity to sue. Such defenses must be presented at the threshold, or are waived (*Warfield v. Gardner*, 79 Ky., 583).

The petition is overruled.

ASHCRAFT. &c. v. COX.

(Filed December 18, 1902—Not to be reported.)

Original opinion, ante, 545.

Hazelrigg & Chenault and J. B. White for appellants.

O. H. Pollard, H. L. Wheeler and Sutton & Harris for appellee.

Appeal from Lee Circuit Court.

Judge Hobson delivered the following extended opinion:

It was decided by this court on the former appeal that appellee's line under his deed should run with the cliff to the pine at 3 on the plat of Tarrvin, and thence to the forks of the creek at 7 on the plat, thence northward a straight line to the cliff at 9. The construction of a deed is a question of law for the court where there is no latent ambiguity. This construction of the deed is the law of the case, and settles the rights of the parties. The verdict of the jury must be read in connection with the former opinion of this court defining their rights, and is in legal effect a finding of \$10 for the timber cut within the boundary so settled. The evidence sustains this finding of the jury in this view. The judgment is not reversed because we so interpret the verdict and judgment of the court below.

The opinion heretofore delivered is extended to this extent.

LOUISVILLE & NASHVILLE R. R. CO. v. CARTER.

(Filed December 18, 1903—Not to be reported.)

Obstruction of passway—Measure of damages—The measure of damages for the obstruction of a passway to the house and land of another is the diminution, if any, of the value of the use of the house and land during the time the obstruction of the passway continued.

Original opinion, ante, 750.

C. R. McDowell for appellant.

Robt. Harding and John W. Rawlings for appellee.

Appeal from Boyle Circuit Court.

Judge Settle delivered the following response to petition for rehearing.

The court is asked in the petition for rehearing to extend the opinion in this case, by defining the measure of damages applicable to the facts upon which the appellee rests her right to a recovery.

In our recent consideration of the case, and in writing the opinion which followed, we were of opinion that the instruction given by the lower court on the last trial upon the question of damages substantially presented to the

jury all that was necessary to be said to them on that subject. But as the case has been twice reversed by this court on account of excessive verdicts, we think it proper to comply with the request contained in the petition for rehearing.

Counsel for appellant insists that the rule for the ascertainment of damages in a case like this, is the difference in the rental value of the real property during the time of the continuance of the obstruction of the passway, and what such rental value would have been during that time if the passway had not been obstructed, and several cases are cited which apparently sustain this contention. But we think that an examination of those cases will show that the rule asserted will apply only where the property is rented. The only Kentucky authority applicable to this case that we have been able to find, is the case of *Bannon v. Rohmeiser*, 17 Ky. Law Rep., 1879, the facts of which are very similar to those of the case at bar. Rohmeiser owned two lots in Louisville. Bannon erected a house across, and thereby obstructed an alley, by which one or both of her lots were reached from an adjacent street. She recovered damages against him. Bannon appealed, and the judgment in favor of Rohmeiser was reversed by this court because the verdict was excessive. In its response to the petition for rehearing, the court said: * * * "The measure of damages in this case is the diminution of the value of the use (of the property) during the time the nuisance was continued, and the instruction given by the lower court properly presented that question to the jury."

The rule thus stated should control the jury in the retrial of this case, and it will be the duty of the trial judge to instruct the jury that if they find for the appellee, the measure of damages is the diminution, if any, of the value of the use of her house and land during the time the obstruction of the passway in controversy was continued by the appellant.

HALL v. HALL.

(Filed December 18, 1903—Not to be reported.)

Divorce and alimony—Where a husband, without fault on the part of the wife, sends her away from his home and avows that he will not in the future live with her, or recognize her as his wife, such conduct amounts to an abandonment of her within the legal contemplation, and entitles her to a divorce after the expiration of one year; she is also entitled to the custody of their infant child, and to alimony and maintenance.

J. G. & J. S. Forrester for appellant.

W. A. Brock for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Sallie Hall, brought this suit against her husband, the appellee, Wm. Hall, for a divorce, upon the ground that he had abandoned her without fault on her part; and that she had been living apart from him for more than one year. She also alleges that as a result of their marriage there had been born to them a girl baby, named Edna Hall, and she asked

that the custody of the baby should be awarded to her; and that the defendant should be required to contribute a sufficient sum to enable her to maintain, educate and provide for the child; and that she be adjudged a reasonable sum by way of alimony. In support of the prayer of her petition, she introduced as witnesses J. C. Clem and Robert Farley, who testified that they were well acquainted with both the plaintiff and defendant; that they were married in Harlan county, Kentucky, about three years before; that they had been living separate and apart for more than one year; that they had on several occasions heard the defendant, Wm. Hall, say that he had sent plaintiff away from his home, and that he would not live with her any more. Both testify that plaintiff was entirely without fault. The circuit judge dismissed plaintiff's petition, and she has appealed.

Abandonment, by the husband of his wife for one year without fault on her part, is ground for divorce. (Section 2117 of the Kentucky Statutes.) And where a husband, without fault on the part of the wife, sent her away from his home and avows that he will not in the future live with or recognize her as his wife, this is abandonment in legal contemplation. (Evans v. Evans, 99 Ky., 510.) Under the testimony plaintiff is clearly entitled to a decree divorcing her from the bonds of matrimony with the defendant, and should be adjudged the custody of their infant daughter, and a sufficient sum to enable her to maintain, educate and provide for the infant, and, in addition to this, the defendant should be adjudged to pay her such a sum by way of alimony as his pecuniary circumstances and their condition in life seem to justify.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MORAN v. VICKROY.

(Filed December 18, 1903.)

Judgment in bar—The judgment of the court in an action for trespass, alleging that on three separate occasions the defendant had torn down the fence which plaintiff had erected on his own land, and in which the title to the land in question was put in issue by the answer of the defendant, in favor of the plaintiff may be successfully pleaded as *res adjudicata* by the plaintiff in an equitable action instituted by him to enjoin the defendant from removing his fencing and from interfering with his use and occupation of the land in controversy.

J. L. Chamberlain, W. B. Cochran and E. L. Worthington for appellant.
Thos. R. Phister for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant and appellee were the owners of adjoining farms, and for several years a controversy has existed between them as to the ownership of a strip of land about ten or twelve feet wide and seventy-three poles long. On August 2, 1898, the appellee, Vickroy, brought an action against the appellant, alleging in three separate paragraphs that appellant had on three separate occasions torn down the division fence which he had erected upon his

own land between their respective farms for the protection of his stock. The appellant filed an answer to each paragraph of the petition, denying that appellee was the owner or in possession of the land on which the alleged trespass was committed. In a second paragraph, he alleged that he was the owner and in possession of the land at the places at which the alleged trespasses were committed. On the same day that appellee brought his action of trespass, he brought this action in equity, reciting the same acts of trespass, and alleging that unless the defendant was restrained he would continue to repeat his trespasses upon the land and against his rights and property, and would inflict other wrongs upon him to his great and irreparable injury; and prayed that appellant should be restrained from removing his fence or landmarks, or from interfering with his use and occupation of his property. Appellant's answer in this suit was also a plea of *liberum tenementum*. The common law case was tried out before a jury, who found a verdict for the appellee, Vickroy, fixing his damages at one cent. Thereupon, appellee, by amended petition, plead the judgment in the common-law action as an estoppel against appellee's claim to any part of the strip of land on which the alleged trespasses were committed. The appellant demurred to this plea, which the court overruled. He thereupon filed a rejoinder, in which he denied that the verdict rendered in the common-law action was upon the issue joined as to the first and third of the alleged trespasses. The circuit judge sustained appellee's demurrer to this rejoinder, and on appellant's declining to plead further, rendered a judgment in favor of appellee, enjoining appellant from trespassing on any portion of the strip of land claimed by appellee. From this judgment appellant prosecutes this appeal.

The only question upon this appeal is the sufficiency of appellant's rejoinder, as a defense to the plea of *res adjudicata*. Appellant insists that as the appellee in his common law suit sought to recover upon several distinct causes of action, on any of which the jury might have found in his favor, that the general judgment rendered pursuant thereto was not an estoppel against him in a subsequent action, unless it be shown by extrinsic evidence that each separate cause of action was decided in his favor by the jury; and in support of this contention, refers to several authorities. Among others, to the case of *Stillwell v. Duncan*, 23 Ky. Law Rep. 261. In that case, Stillwell brought a suit for trespass, alleging that he was the owner and in possession, at the time of Duncan's enclosure. This was denied by Duncan, and a jury trial resulted in a verdict in favor of Stillwell, which was not appealed from. Stillwell then retook possession of the land, and rebuilt his fence, but, as Duncan claims, extended it beyond the line where the original fence stood, taking in some of his land. Duncan brought his suit for trespass. Upon the trial of that case Stillwell asked an instruction to the effect that if the jury believed that the last fence was within the line of the original fence, the law was for him. This was refused, and upon appeal it was decided that the exact position of the old fence did not absolutely determine whether the erection of Stillwell's new fence was a trespass upon Duncan's land, as the proof showed that it had been extended beyond the point where the old fence stood.

There is no uncertainty in this case of what was the issue in the common-

law action, or what was decided by the verdict of the jury. There is no contention that the fence torn down by appellant was not the identical fence and upon the identical line as that sued for in the common-law action. The only real question which was involved in the common-law suit, and also in this suit, is the title to the strip of land in controversy. And as it was decided in the common-law suit that appellee was the owner of the land, and as the question of title to the same land is involved in this case, we are of the opinion that the judgment in the former case is conclusive of the issue in this case. The rule is well settled that a judgment of a court of competent jurisdiction upon the merits of a cause is final and conclusive between the parties in a subsequent action upon the same cause not only as to the matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein. This rule is applied both in law and equity. (Carlyle v. Howse, 19 Ky. Law Rep., 1242, and 24 A. & E. En. of Law, 2 edition, page 730.)

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BROOKS.

(Filed December 18, 1908—Not to be reported.)

1. Railroad crossing—Adverse user—Restoration—Where a railroad company, pursuant to the requirement of its charter, constructed a crossing over its road for the purpose of connecting the parts of a farm divided by the road, and after the death of the owner of the farm and the division of it between his children one of them used the crossing under a claim of right for a period of thirty-five years, it was proper for the court to adjudge a restoration of the crossing after its removal by the company, the plaintiff's remedy not being limited to a suit for damages.

2. Same—Right of action in life tenant—It being alleged and not denied that the plaintiffs were the owners of the land from which the crossing was removed, and it appearing from the proof that one of the plaintiffs was the owner in fee and the other of a life estate, the owner of the life estate was entitled to a judgment for the restoration of the crossing.

Fairleigh, Straus & Eagles for appellant.

Chapeze & Halstead for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Nunn.

Appellant owns and operates a line of railway running through Bullitt county. The road passes through a tract of land, which at the time of its construction, 1853, was owned by W. S. Brooks, the father of appellees, and contained about 450 acres. In accordance with the requirements of appellants' charter, a farm crossing was made to connect the tracts thus divided.

W. S. Brooks died in the year 1854, and this 450 acres of land was divided between his two sons and a daughter. The northern tract fell to W. W. Brooks, the middle tract to appellee Joseph Brooks, and the southern tract fell to appellee Anna B. Johnson. This crossing made by appellant was situated near the line between W. W. Brooks and appellee Joseph Brooks, appellant claiming that it was on the land of W. W. Brooks, and appellees.

contended that it was on the land of appellees. Upon this issue much proof was heard, and the lower court decided that appellees' contention was correct. The appellant, in the year 1889, constructed another track, making a double track through Bullitt county, and at that time it took up or removed this farm crossing, without the consent, and over the objection of appellees, thereby preventing them from passing from their lands on the west side of the roads to the lands on the east side, except at times that they were permitted to pass through the farms of adjoining land owners, when they could do so without injury to crops or the lands. This condition of affairs continued until March, 1901, when appellees brought this action to compel appellant to restore their crossing and to maintain same, and for \$1,500 damages for the length of time they were deprived of the use and benefit of it.

The lower court granted the prayer of the petition, and directed appellant to replace this crossing, fixing a time in the future by which the crossing was to be completed and also adjudging that appellees recover \$300 in damages for the injury in being deprived of the use of this crossing from 1889 to the beginning of their action.

Appellant asks a reversal for several reasons:

1st. Because the crossing removed by it was not on the lands of appellees.

2d The court should not have entertained jurisdiction of the case, for it had no power to adjudge a restoration of the crossing; that appellees' only remedy was a suit for damages.

3d. That appellee, Joseph Brooks, had no right to a judgment for the restoration of the crossing because he was only a tenant from year to year of his co-appellee, and was only entitled to sue for damages done to his right of possession for the first year.

Considering appellant's reasons for reversal in the order named: The evidence was very conflicting on the question as to whether or not the crossing was on the land of appellees or W. W. Brooks. There was sufficient evidence to sustain the court's finding that it was on the land of appellees. The court was right under the evidence in this case in entertaining jurisdiction and adjudging a restoration of the crossing. To deny this power would have left appellees without complete and adequate relief.

The proof shows that this crossing was made and maintained by the appellant for thirty five years, not as an act of grace, but because its charter directed it, and that appellees from the year 1854 to the time of its removal in 1889 had used this crossing, not by permission, but under a claim of right. Elliott in Railroads, volume 3, section 1140, says: "It seems to be well settled that a land owner may acquire a private crossing over a railroad right of way by adverse user. The right to acquire a crossing in this way has been declared in a number of cases thus: Where a crossing was used continuously for forty-nine years and no effort was made by the railroad to discontinue it, it was held that the railroad was liable for its maintenance. Twenty years user has been held sufficient to acquire the right of a private crossing," etc.

Many decisions of this court hold that fifteen years' uninterrupted use of a passway, under a claim of right, raises the presumption of a grant. Under the facts of this case, this right of passway or crossing belonged to appellees. It was appurtenant to their land, and was indispensable to their enjoyment

and beneficial use of their lands. They can not derive any enjoyment or benefit from that which is absolutely theirs except by the restoration of this crossing. It is true the appellees might waive their right to the crossing, and sue for the damage, as authorized by appellant's charter. But certainly this provision of the charter does not deprive the appellees of the right to elect, sue for and recover that which belongs to them.

The appellant is not in a position to receive any benefit from its third objection to the action of the lower court, for the reasons that appellees alleged in their petition that they were the owners of this land, describing it, and appellant did not deny same. But even if it had done so, the proof shows that they did own it, appellee Johnson the fee, and Joseph Brooks a life estate, they both swear to this. She has the legal title of record, and he testifies without any contradiction that he held a writing given him by his sister and co-appellee, giving to him the possession and the use of this land during his life.

For these reasons the judgment of the lower court is affirmed.

CITY OF LOUISVILLE v. BOARD OF PARK COMMISSIONERS, &c.

(Filed December 18, 1903—Not to be reported.)

Validity of bond issue—Returns of election—Where it was charged in an action to test the validity of a municipal bond issue that the election board had not canvassed all the returns of the election held to determine the question, and that the uncanvassed returns, if counted, would show that the proposition had been defeated, which charge was denied by allegation and proof, and where it appears that the ballots and everything connected with the election, except the stub-books and officers' certificates, were destroyed at the expiration of six months after the election, as required by statute, and that the election board, if re-convened, could not find any returns that are countable, other than those counted previously, the court will not disturb the count as returned by the board showing that the proposition had carried by a legal majority.

H. L. Stone for appellant.

Bennett H. Young, Pottle & Trabue & Cox, Kohn, Baird & Spindle and Marion W. Ripey for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This is the second appeal of this case.

In appellant's petition, among other necessary allegations, it was stated, that the board of election commissioners for Jefferson county, composed of Martin, Lucas and Stout, failed and refused to examine and canvass the returns and count the vote of eighteen precincts of the city, on the question of issuing bonds for the purpose of purchasing a park, and for the construction of sewers in the city of Louisville.

The court was asked to require the election commissioners to reconvene and recanvass the vote for and against this bond proposition, and that they include in the canvass the returns furnished and filed with their codefendant, W. P. Johnson, the clerk of the Jefferson County Court, from the eight-

een precincts named, and that Johnson, as such clerk, be required to furnish them, the board of election commissioners, the returns of the election from these precincts, including the contents of the ballot boxes returned on that election by the precinct election officers in order that the canvass might be properly and lawfully made on the question of issual of the aforesaid bonds. It was also alleged in the petition that the vote cast in the eighteen precincts named, when added to the other vote cast at the election, would show that the proposition for the issual of bonds was lost, that this bond issue proposition did not obtain two-thirds of the legal votes cast at that election on that question; in other words, more than one-third of the votes cast on that question voted against the proposition. To this petition a demurrer was filed and sustained, and appellant appealed to this court. This court, in an opinion by Judge DuRelle, 24 Ky. Law Rep., 38, decided that as it was admitted by the demurrer to the petition that this board of election commissioners failed and refused to examine, canvass and count the vote pro and con on the bond issue in the eighteen precincts named, that mandamus was the proper remedy to compel them to reconvene and perform this duty. And in this connection, the court said: "Undoubtedly it was the duty of the county election commissioners to canvass all the returns. It was their duty to canvass the returns from the eighteen precincts in which it is admitted votes were cast for and against this proposition, and the returns from which were not canvassed at all. It may be possible that the returns in those precincts were in such shape that they could not be counted, but it was none the less the duty of the board to canvass them, and, if found countable, to count and certify them."

Upon the return of the case to the lower court, the appellees filed an answer denying that the board of election commissioners failed or refused to canvass the returns from the eighteen precincts named, or any precinct, but averred that they fairly, honestly and carefully examined, canvassed and counted all the votes cast at that election upon the proposition named, and that the bond proposition carried at that election, and with their answer filed a copy of their certificate, made at the time. On this question proof by depositions was taken, and it is shown that in five or six of the eighteen precincts named, no vote was cast, or at least none certified by the precinct election officers as having been cast at that election on the bond question. It is shown in the proof that on the back of the stub-book there appears a certificate of the election officers pasted over the blank certificates, or rather over the blank that ought to have been used by the officers in making their certificate of the vote, showing several hundred votes cast pro and con on the bond question, and if these votes were counted the proposition would be lost by a few votes. The proof clearly shows that one of the certificates was made and pasted in this stub-book a year or more after the election. Some of these precincts show a majority for the bonds, one of them more than three votes to one in favor of the proposition; the others showed a majority against the question.

The proof also shows that the county court clerk, at the expiration of six months after the election, in performance of his duty as required by statute, destroyed all the returns, legal ballots, questioned ballots, and spoiled ballots, in fact, everything connected therewith, except the stub-books and

these certificates mentioned. It is also shown by the deposition of Martin and Stout, two of the election commissioners, the others, Lucas, deposition was not taken, that they did, in accordance with the statute, examine and canvass all the returns from every precinct in the city of Louisville at that election, including the eighteen precincts named, and that they honestly, fairly and in good faith performed this duty without prejudice or partiality for or against the bond proposition, and that they counted every vote for or against this proposition, as shown by the official returns presented to them; that while they could not remember at the time of giving thier deposition, which was two or three years after the election, the particular reasons why the precincts named were not counted, they knew they had at that time what they considered a valid reason for not counting same. The stenographer of the board, who was present at the canvass and count, corroborates them in these statements. There is no evidence in the record contradicting these statements, except the proven contents of the certificates in the stub-books.

The lower court upon this evidence dismissed plaintiff's petition. While this court adheres to the legal propositions announced in the former opinion with reference to the control of election commissioners, yet in view of the conflict of the evidence on the question of fact involved herein, and giving some weight to the conclusion of the chancellor who tried this case, we are not prepared to say that if the present election board was now convened and a recanvass and recount made, the board could find any returns that are "countable." other than those found and counted by the former board.

Therefore, the judgment of the lower court is affirmed.

BOYD, &c. v. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

(Filed December 18, 1908.)

1. City ordinance—Validity of—Arbitrary power over property—An ordinance of a city of the third class which provides that if any structure or building within the city limits when used for the purpose which it is designed or intended "would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of life of adjacent residents the same shall be deemed to be and constitute a nuisance," and that any persons erecting such a structure without the consent of the common council shall be guilty of an offense and be punished by a fine is violative of the fourteenth amendment of the Constitution of the United States and of section 2 of the Constitution of this State in that it confers upon the common council the absolute and arbitrary power of determining whether or not a building may be erected without fixing any standard by which it is to be controlled.

2. Same—Nuisance—The term "nuisance" has a well-defined legal meaning, and a thing can not be declared a nuisance, which is not a nuisance. Hence, the common council of a city has no authority to declare, and the police judge has no power to hold that a church building to be constructed of brick, with a slate roof, and as nearly fireproof as practicable, to be used by persons of the negro race, is a nuisance, or to withhold a building permit for its construction.

8. Void ordinance—Injunction of prosecutions under—The trustees of a church who had been refused a building permit under a void ordinance conferring arbitrary power upon the common council to grant or refuse such permit, have the right to maintain an action to enjoin the illegal use of such power and to prevent prosecutions under such ordinance for its violation by the plaintiff.

4. Same—Where the main purpose of the action was to attack the validity and constitutionality of the ordinance and the enjoining of a judgment of the police court upholding the validity of it and imposing fines upon the plaintiffs was only an incident, the contention that the action could be brought only in the court which rendered the judgment can not avail, especially in view of the fact that the police judge has no civil jurisdiction.

5. Res adjudicata—A judgment of the circuit court dismissing the petition in an action to enjoin the city from enforcing an ordinance, the question of the validity of which was then under submission before the police judge, is not a bar to an action in the circuit court by the same parties and others to test the validity of an ordinance subsequently passed.

Hazelrigg & Chenault and Jas. A. Scott for appellants.

Ira Julian for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted and an injunction obtained by the appellants for the purpose of preventing the enforcement by the appellees, city of Frankfort, its officers and agents, of an alleged void ordinance, and incidentally for the further purpose of restraining certain prosecutions then pending in the police court against the appellants, as well as others of a like kind with which they were threatened, all for alleged violations of the ordinance in question.

It is in substance averred in the petition that the appellants are residents and citizens of the State of Kentucky, and of the United States, and belong to the negro race; that they are trustees of the First (colored) Baptist Church in the city of Frankfort, which church is a voluntary association, composed of a congregation of the negro race, whose purpose has been, and is, to engage in the worship of Almighty God according to the dictates of their own consciences; that there are several hundred members of this church, all having a common interest with the appellants, for which reason, and because of its being impracticable to make them all parties, the action was instituted by the appellants for themselves and the other members of the church, and also as trustees of and for the church.

That the appellants are owners, as trustees of the First Baptist Church, of a certain lot of ground in the city of Frankfort, situated on the northeast corner of Clinton and High streets, of which lot they became the owners for the purpose of erecting a church thereon, for the use of the First (colored) Baptist Church, which was and is to be of brick, with slate roof, and as nearly fireproof as practicable.

That after purchasing the necessary materials and entering into the necessary contracts with certain persons for the erection of the church building, but before beginning its erection, the appellants acting upon advice, and according to custom, applied to the common council of the city of Frankfort

for permission to erect their church building, but were arbitrarily and illegally refused the right to do so, and when appellants, through their contractors and employes went upon the lot where the church building was to be erected, and were about to tear down an old building thereon, preparatory to the erection of the church, and were engaged in the work of constructing the foundation therefor, the appellee city, through its mayor, swore out a warrant of arrest for the appellants, its contractors and employes, which warrant when issued by the police judge, was executed by a police officer of the appellee city, by arresting the appellants and their workmen, and taking them before the police judge, who tried them under the warrant upon the charge of violating an alleged ordinance of the city which required them and all others to obtain a building permit before erecting any building in the city of Frankfort. It is further averred that after the trial of appellants and their workmen by the police judge, he, without then rendering his decision, took the case under advisement, but subsequently rendered a judgment to the effect that it was not a valid or enforceable ordinance; consequently, the appellants, and other defendants in that prosecution, were held not guilty, and were, therefore, discharged. It is also averred that during the time the police judge had the case mentioned under consideration, and before its decision by him, the following ordinance was enacted by the common council, and approved by the mayor, viz:

"An ordinance to provide for the punishment of persons erecting or maintaining nuisances, and for the removal of same.

"Be it enacted by the Common Council of the City of Frankfort:

"Section 1. That if any person or persons shall proceed to erect any structure or building within the city limits, without the consent of the common council, and said structure or building (where used for the purpose for which it is designed and intended) would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of life of adjacent residents, the same shall be deemed to be and constitute a nuisance, and they shall be punished by a fine not less than \$5, nor more than \$20, and each day they may proceed with the erection of said structure or building, shall be deemed a separate offense, and upon conviction, it shall be the duty of the police officers to remove said structure, or any part thereof, at the expense of the owner.

"Sec. 2. This ordinance to take effect and be in force from and after its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

The further averment is made in the petition that the appellants and their employes were, by the procurement of the appellees, again arrested under warrants issued by the same police judge and served by the same police officers, upon the charge of violating the ordinance *supra*, because they were attempting to proceed with the work of erecting their church building, and upon being tried therefor they were fined \$5 each, and each adjudged to pay \$3.80 costs; that they are threatened with further prosecutions from the same source, and for the same cause, and as the maximum fine prescribed by the ordinance is \$20, which is less than an amount from which an appeal is allowable under the law, their only remedy is the writ of injunction.

It is also averred by the appellants that the ordinance complained of was adopted by the common council of the appellee city pending the decision of the police judge in the cases arising out of the warrants first issued, and that it was adopted for the express purpose of preventing the appellants from erecting their church building, and solely because the church membership is composed of negroes; that by its enforcement the appellants and their co-church members are and will be deprived of the equal protection of the laws, and are being discriminated against in the enjoyment of their civil and religious rights under the Constitution of the State and United States, and that the ordinance if upheld will deprive them of their liberty and property, and the use of the latter, without due process of law, and will deny them equal protection under the law, contrary to the fourteenth amendment of the Constitution of the United States, and especially to the Bill of Rights, section 2 of the Constitution of this State, wherein it is declared that "absolute and arbitrary power over the lives, liberty and property of freeman exist nowhere in a republic, not even in the largest majority."

The additional averment is made in the petition that the ordinance in question is inadequate, uncertain of meaning and ambiguous; that it is likewise oppressive, unreasonable, arbitrary and void. The appellees, board of councilmen, filed separate answer to the petition, in which they fail to deny the arrests and trials of the appellants set forth in the petition, or that they have been interfered with as alleged in the work of erecting their church building, nor do they deny that the ordinance complained of was adopted by them after the arrest and trial of appellants under the first warrants, and before the judgment of the police judge was rendered, acquitting them of the charge in those warrants. But the answer does deny all the averments of the petition in regard to the alleged purpose of the enactment of the ordinance, or that it is open to the constitutional or other objections urged against its validity by the appellants. It also denies that the refusal of the common council to grant appellants permission to erect the church was arbitrary, and avers that the refusal was made in the exercise of a sound discretion, and because appellants did not have the written consent of a majority, or, in fact, of any, of the citizens and property owners residing within 200 yards of the place of the proposed building to its erection, as required by an ordinance of the city, and further that the church proposed to be erected by the appellees will constitute a nuisance, because the mode of worship practiced by its members is and will be so boisterous, loud and unseemly as to interfere with the peace and quietude of the citizens and property owners residing adjacent to the church.

The answer also interposes the plea of *res judicata*, as it is therein averred that the same matters and issues involved in this action were litigated and tried in a previous suit between the same parties, before a special judge, whose decision was adverse to the appellants, and the judgment in the alleged former action is pleaded in bar of this one.

The appellees, mayor, police judge, chief of police and city marshal also filed an answer to the petition, in which they adopted the averments of the answer of the board of councilmen, and in addition set out the facts with reference to the second arrest and trial of the appellants. Demurrers were filed by the appellants to the answers, and each paragraph thereof, which

were overruled by the lower court. Thereupon the appellants filed reply controverting the material averments of the answers. By mutual consent of the parties, the evidence was all taken in the form of affidavits, and the cause having been submitted upon the pleadings and affidavits, judgment was rendered by the lower court dismissing the petition, and allowing the appellees their costs, the temporary restraining order having theretofore been dissolved by the court on appellees' motion.

The case being before this court on the appeal we will consider first the objection urged to the constitutionality of the ordinance by virtue of which it is contended by the appellees that the common council of the city of Frankfort had the right to refuse appellants permission to erect the church upon the lot owned by them. A careful reading of the ordinance will show that it fixes no standard by which the action of the city council in granting or refusing its consent is to be controlled. The consent of the council can be given or withheld at its own arbitrary pleasure. This ordinance, though far more arbitrary, is very similar to those mentioned in the case of *Yick Wo v. Hopkins, &c.*, 118 U. S., 356. The ordinance in that case contained provisions to the effect that it shall be unlawful for any person or persons to carry on a laundry within the limits of the city of San Francisco, without first having obtained the consent of the municipal authorities, except the same be located in a building constructed either of brick or stone, and unlawful to erect scaffolding over or upon the roof of any building without first obtaining such consent. In commenting upon the arbitrary provisions indicated, the Supreme Court said: "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give, or withhold, consent, not only as to places, but as to persons. So that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent, without reason, and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. * * * No reason for it is shown, and the conclusion can not be resisted, that no reason for it existed except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

The very fact that the ordinance complained of in this case confers upon the council the absolute right to refuse its consent to the erection of any building, no matter out of what material it is to be constructed, where it is

to be erected, or how necessary and useful to the public, it might be, demonstrates the danger of entrusting any body of men with such arbitrary and despotic power. The circumstances surrounding its adoption by the council, and the fact that its aid was immediately invoked to justify the refusal of a building permit to the appellants, would seem to indicate that the enactment of the ordinance was and is a mere pretext for the arbitrary and unreasonable refusal of appellees to permit this building to be erected. If such was the purpose of its enactment, as well said by counsel for appellants, their imprisonment in satisfaction of the fines imposed upon them for the violation of its provisions, would be as arbitrary and unjust as was the arrest of the Chinamen in the Yick Wo-Hopkins case.

It must not be overlooked that even if the ordinance on its face is valid, a discriminatory execution of it would be violative of both the Federal and State Constitutions, and subversive of justice as well. The refusal of the common council of a building permit to the appellants in this case, is attempted to be justified upon the ground that the erection of the church, and the holding of worship therein by the congregation, would constitute a nuisance, and, therefore, that the council under the "police power" that may lawfully be exercised by the municipality for the welfare of the public, has the legal right to abate or prevent nuisances.

The only provisions of the charter of cities of the third class on the subject of buildings are found in subsections 24, 25, 26 of section 3290, Kentucky Statutes. These confer the following powers:

"24. Wooden buildings—to prevent erecting and provide for removal of. To regulate or prohibit and prevent the erection of wooden buildings in such parts of said city as may be deemed proper, and to provide for the removal of the same at the cost of the owners, when erected or continued contrary to ordinance.

"25. Buildings—Regulating construction of—To regulate the construction of all buildings in the city, to prohibit and prevent the construction of unsafe buildings, or buildings without adequate means of escape in case of fire, and to provide for the inspection of buildings and the construction of fire escapes.

"26. Removal of dangerous structures—To impose penalties upon the owner, occupant or agent of any house, wall, sidewalk, or other structures which may be considered dangerous or detrimental to the public, unless, after due notice, to be fixed by ordinance, same to be remedied or repaired; and to remove or repair same at the owner's expense when suffered to remain contrary to ordinance."

It will hardly be claimed that a church building to be constructed of brick, with a slate roof, and as nearly fire-proof as practicable, like that of the appellants, can be dangerous or detrimental to the public health or safety.

The powers conferred on cities of the third class on the subject of nuisances are found in subsections 14 and 16, section 3290 of the statute, *supra*, which read as follows:

"14. Nuisances, restraining and preventing—To regulate, restrain or prevent the establishment or continuance in or near said city of any trade or occupation, business or manufacturing, offensive to the public, or dangerous

to health, or in causing or producing fire; and to regulate the sale of fire arms, and to prevent the carrying of concealed deadly weapons.

"16. Police regulations, health, comfort and safety—To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety, of the public; and to define, declare, prevent, suppress and remove nuisances, either within the city or within one mile thereof."

The term "nuisance" has a well-defined legal meaning. A thing can not be declared a nuisance, which is in fact not a nuisance.

In Brannon's Treatise on the Fourteenth Amendment, it is said that "a municipal corporation can not treat as a business that which can not be such (page 174), and that a city or town can not, by its mere declaration that a thing is a public nuisance, make a nuisance of that which is not essentially such. The question of nuisance or no nuisance is one for judicial review."

In the case at bar it is contended for appellees that the ordinance which manifestly was passed to prevent the erecting of the appellants church building, confers upon the common council the power to declare that a church building not yet erected, and which, when erected, will not be a nuisance, is a nuisance. If it be possible that the colored Baptist people can hold their church services in an orderly way, then the building of their church can not be held to be a nuisance.

In Pfingst v. Senn, 94 Ky., 556, this court held that "injunction against a threatened nuisance will not be granted when the thing complained of is not per se a nuisance, but may or not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury.

"The opening of a beer garden, dancing hall and bowling alley in a city will not be enjoined, although the same place of amusement as formerly conducted may have been a nuisance."

It would be strange, indeed, to find it announced in the law books, or authoritatively declared by any court of final resort, that a beer garden or dancing hall may exist in a city, yet, a brick, fireproof church may not be erected or maintained therein, and, as argued by counsel, is the fact that the members of the First (colored) Baptist Church sang louder in their old and dilapidated building than was agreeable to some of the contiguous residents any evidence that such would be their manner of singing in the new one?

In Albany Christian Church v. Wilburn, 28 Ky. Law Rep., 1820, this court, in discussing whether a stable was a nuisance, quoted with approval from St. James Church v. Arrington, 36 Ala., 546, wherein it is said: "Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect by injunction the party injured thereby. But as in the present case it is yet uncertain and remains to be ascertained from future events whether or not the erection will become a nuisance, there is no ground for injunction, arresting the further progress of the building, or its appropriation to the use intended."

In view of these authorities, the police judge was without power to hold, and the common council of the city of Frankfort in rejecting appellants' request for a permit to erect the church building, was without authority to declare

a house to be erected and dedicated to the worship of God, a nuisance. There can be no doubt of the right of appellants to maintain this action. The law authorizing it has been repeatedly declared by this court.

Thus in *City of Newport v. Newport, &c., Bridge Co.*, 90 Ky., 193, it was held that "if a city ordinance is invalid, one who is affected by it has the right, in order to prevent irreparable injury, and a multiplicity of prosecutions, to go into a court of equity for relief."

The court also said, in the same case: "The chancellor often interferes to prevent an illegal use of power by municipal authorities; and where such consequences follow the enforcement of an ordinance, as will result in this instance, a proper case is presented for equitable relief, if the ordinance be invalid." To the same effect is the rule announced in *South Covington, &c. v. Barry, &c.*, 93 Ky., 48, wherein the court said: "The appellees, the mayor and chief of police of the city, being about to enforce an ordinance by having the company's officers arrested and its cars returned to the stable, this action was brought enjoining it. If the ordinance was invalid, then, to prevent a multiplicity of prosecutions, and such consequences as would necessarily result from its enforcement, the company had the right to ask the preventive equitable relief. This is often done to prevent the illegal exercise of power by municipal authorities."

It is, however, contended for appellees that this action is only to enjoin a judgment of the police court, and such an action under the Civil Code can be brought only in the court which rendered the judgment sought to be enjoined. Manifestly that rule can not apply here, as the police judge in cities of the third class is wholly without jurisdiction. But in any event, the main purpose of this action is to attack the validity and constitutionality of the ordinance under which the appellants' property rights have been arbitrarily interfered with, in fact, denied them, in contravention of both the Federal and State Constitutions. The enjoining of the judgment of the police court is, therefore, only an incident, a side issue growing out of the principal transaction complained of in the petition. It is further insisted for appellees that the issues presented in this action are *res adjudicata*; that is, that they were determined in the first suit tried by the special judge.

It is averred in the reply, which does not appear to be controverted, that the first or old suit which was brought by Buckley, contractor to erect the church building, and others, to enjoin the city from enforcing in ordinance of older date than the one now complained of, was tried by the special judge, who seems to have dismissed that action upon demurrer to the petition, and because he assumed that the police judge before whom were then pending the prosecutions against Buckley and others, involving the validity of that ordinance, would determine that question. It appears, however, that the first suit did not embrace some of the parties to this action. It also involved the validity of a different ordinance, and the police court had not then passed on the validity of the old ordinance. That court did subsequently hold it invalid. In the meantime, the present ordinance, the validity of which is attacked, in this action, was adopted by the council pending the decision of the police judge on the validity of the old one. We are of the opinion, therefore, that the defense of *res adjudicata* is not available.

We have reached the conclusion that permission to erect the church building was denied the appellants for no other reason than that the worship therein, and thereafter to be conducted, was and is objectionable to the immediate neighbors, and the further fact is not to be disguised that this objection to the erection of the building is largely based upon race prejudice. However natural this prejudice may be, when it superinduces unjust discrimination in the adjustment of mere legal rights, it becomes obnoxious to the law.

The questions arising upon this record present no disturbing social problem; the matters to be adjudicated are purely legal in character. Undoubtedly, it can be shown that the presence in a neighborhood of a church for colored people is not desirable to the surrounding property holders of the white race, but it can not be more disagreeable than the near presence to one's residence of a noisy manufactory, beer garden, dancing hall, or other obnoxious trades, which are so generally tolerated in all cities.

"One living in a city must necessarily submit to the annoyances which are incidental to city life. It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirement of the law is that each shall so exercise and enjoy them as to do no injury in that enjoyment to others, or the rights of others." (*Pfingst v. Senn, &c.*, 94 Ky., 563.)

Being of the opinion that the ordinance complained of is unconstitutional for the reasons hereinbefore stated, and that the prosecution of the appellants in the police court, as well as the refusal of the council to permit them to erect their church building attempted to be justified under such ordinance, were unauthorized by law, the judgment of the lower court is reversed, and cause remanded, with directions to that court to grant appellants the relief asked, to perpetuate the injunction, and for such other proceedings as may not be inconsistent with this opinion.

Whole court sitting.

SALT LICK, ESCULAPIA AND MT. CARMEL TURNPIKE ROAD CO., &c. v. GILFILLIN, SR.

(Filed January 6, 1904.)

1. Turnpikes—Stockholders—Taxation—Where a turnpike company was incorporated by an act of the legislature, and was empowered to construct a macadam toll road, the work of construction to begin as soon as \$5,000 should be subscribed by the incorporators and the county in which the road was to be constructed subscribed and delivered its bonds to the extent of \$1,000 a mile, and the work of building the road was begun, but abandoned for a long period of time, and it appearing that the taxpayers and the county paid enough, or more than enough to discharge the total cost of construction, a suit on the part of taxpayers of the district to enjoin the further collection of the tax on the ground that the purpose for which the tax had been authorized had been fulfilled, will be maintained because the taxpayers of the taxing district became in a sense involuntary subscribers to the stock

of the company, becoming stockholders upon the payment of their taxes, and their liability was only to the extent of their subscription.

2. Estoppel.—In a suit by taxpayers to enjoin the further collection of taxes in aid of a turnpike company, the company will not be heard to say that it failed to perform a condition precedent to its right to collect the taxes in its aid, and yet insist on the payment of such taxes.

Allan D. Cole for appellant.

E. L. Worthington and W. C. Halbert for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant turnpike company was incorporated by an act of legislature approved December 18, 1867, volume 2, Acts 1867, 5391.

It was empowered to construct a macadam toll road in Lewis county, this State. So soon as \$5,000 should be subscribed by the corporators the company was authorized to organize, to condemn right of way where necessary, and the county of Lewis was required to subscribe and deliver its bonds to the amount of \$1,000 per mile for each mile of road built by the company, in addition to \$1,000 for a bridge over Salt Lick creek. A taxing district was created, within which there was required to be levied an ad valorem tax of \$1 on the \$100 of taxable property in the territory constituting the district. The provision of the act on this point reads: "The said shall tax be levied and collected for the purpose of assisting in building said road; and the taxpayers shall be stockholders in said company to the extent that they pay taxes under this act; said tax to be collected until said road is completed fifteen miles of its distance from Vanceburg."

The first mile of the road was built by the company in 1871, for which it received the bond of Lewis county for \$1,000.

The bridge was built about 1873. The county issued to the company a \$1,000 bond for that. Work on the road seems to have been abandoned then till about 1892, when the corporation, electing new officers, resumed the project of building the road. It let the contract for the remaining five miles of road. The work was completed. It is admitted that Lewis county issued to the company, and that it received, the bonds of the county to the amount of \$1,000 for each mile of the road. Beginning in 1892, and continuing each year till 1898, inclusive, there was levied on the taxable property in the taxing district the special tax of \$1 on the \$100, which was listed with the sheriff for collection. The assessed valuation of the district was about \$54,000 per year on an average. The same rate of tax was also assessed for the years 1870, 1871, 1872, 1873 and 1874. In 1899 this suit was brought by appellees, sixty-two of the taxpayers of the district, to enjoin the collection of the tax for that year and further years, on the ground that the purpose for which the tax had been authorized had been fulfilled; and, furthermore, they alleged that the acts under which it was levied were unconstitutional for various reasons.

The last-named feature of the case we will not discuss, having found a controlling reason in the facts shown by the record for affirming the circuit court's judgment granting a perpetual injunction against the further collection of the tax. The record discloses that the first mile and one-half (includ-

ing the bridge) originally constructed cost not exceeding \$2,800, of which Lewis county paid \$2,000. What sum was collected from the taxpayers of the district under the assessments from 1870 to 1874 is not shown. The remaining five miles, built subsequent to 1892, cost, contract price, according to appellee's version, \$7,615, and according to appellant about \$8,200. Of this sum it is admitted the county paid \$5,000 in her bonds as has been stated. The tax assessed against the district would not be less than \$470 net per annum, realizing in the seven years not in dispute \$3,290. So that it appears that the taxpayers and the county have paid in fully enough, or more than enough, to discharge the total cost of construction. It is claimed that some of the taxpayers did not pay for certain years, were delinquent, and that in consequence the company did not get all that was due to it on that score.

It is also claimed that owing to the lack of repair the first mile and a half of road became almost worthless, and had to be rebuilt. Counsel for appellant observe here: "If the company had at the start pushed the work to completion the amount originally expended would not have been thrown away. This is the whole trouble in this case."

The company's present indebtedness is alleged to be about \$2,700. The taxpayers of the taxing district, who became stockholders upon the payment of their taxes, became in a sense involuntary subscribers to the stock of the company. Like other stockholders their liability was only to the extent of their subscription. Each one was liable only for his own, not for default of others. By the terms of the act they were to pay only so much as was required in "assisting to build the road," not to operate it, nor to keep it in repair. When they had paid a sum sufficient to build it their liability was at an end, notwithstanding the company might have become insolvent through bad management. The tax levied was a lien as other taxes against the land in the district, collectible by distraint. If the company failed to collect any one's taxes it must be presumed, in the absence of showing to the contrary, in view of the lien and means of collection, that it voluntarily failed to do so, or by neglect failed. In either event it will not be permitted to collect the amount from other taxpayers not in default.

As to the first mile and a half it will be conclusively presumed against the corporation, claiming a right to exercise the extraordinary function of taxation in its behalf, that it had subscribed in good faith the minimum amount of capital stock which authorized it to become a corporation, with the right to enjoy the extremely liberal provisions of the act in its behalf. At least it won't be heard, in the suit of the taxpayers, to say that it failed to perform a condition precedent to its right to collect taxes at all in its aid, yet insist on the payment of such taxes. Therefore, the court must assume that the \$5,000 of stock required before the company could be organized was subscribed. This sum, the \$2,000 paid by Lewis county and the taxes collected during the early seventies, would more than pay for the building of that first mile and a half road. The taxpayers were required only to assist in building the road, therefore, the private subscription that was solvent, and the county aid above alluded to, must be taken into account in measuring the maximum liability of the taxpaying stockholders. This done, we find that they have fully discharged that liability, so far as complainants

and others similarly situated are concerned, and their liability can not be enhanced either by losses incurred after the road was built or damage to any part after its completion; nor to cost of management, nor to a mere failure to collect taxes from delinquents.

Wherefore, the judgment is affirmed.

CRAVENS v. SHIPPEN.

(Filed January 8, 1904—Not to be reported.)

1. Dower—Estoppel—The assignee in bankruptcy sold the land of the husband paying him \$1,000 of the proceeds in lieu of a homestead. There being nothing in the record to show that the wife received any part of the proceeds, or that any other sum was paid her in satisfaction of her potential right of dower, she never parted with it and is not estopped from claiming it.

2. Same—The right of dower can not be barred, forfeited or relinquished except by the voluntary act of the dowress.

Mather & Creel for appellant.

Williams & Haudlen for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Settle.

By this action the appellant sought to recover dower in 724¼ acres of land lying in the counties of Larue and Marion, of which her late husband, John Cravens, became seized in fee simple after their marriage, but which he, by deed in which appellant did not join, conveyed in the year 1878 to one Thos. J. Miller, his assignee in bankruptcy.

Appellant's husband died May 14, 1889, and her petition in this case was filed in the Larue Circuit Court November 1, 1902. The land was sold by Miller, assignee in bankruptcy, shortly after it was conveyed him for \$1,780, and the money thus received, together with the proceeds of the residue of the bankrupt's estate, was duly distributed by the assignee among his creditors, after first paying to the bankrupt out of the proceeds of the land \$1,000 in lieu of his homestead. After passing through the hands of several persons the land finally became the property of the appellee, W. H. Shippen, who is yet the owner and in the possession thereof. The appellee filed a general demurrer to the petition and at the same time an answer. By the answer the appellant's right to dower in the land is denied, and the further defense interposed that her action therefor is barred by the fifteen years' statute of limitation; and further, that appellant was compensated for her dower by the assignee, who likewise paid her husband \$1,000 for his homestead, and, besides, that there was existing on the land at the time of its sale by the assignee a lien for unpaid purchase money, and that the amount for which the land sold was not more than sufficient to satisfy this lien. The affirmative matter in the answer was controverted by reply, to which rejoinder was filed, and the cause having been submitted upon the pleadings and proof, judgment was rendered by the chancellor dismissing appellant's petition and allowing appellee his costs, and from that judgment this appeal was taken.

It is conceded by counsel for appellee that the action is not barred by the statute of limitations. It will not, therefore, be necessary to notice that ground of defense. A careful examination of the record convinces us that the other grounds of defense are equally untenable. There is no competent evidence tending to support any of them. That the husband did receive \$1,000 of the proceeds of the land in lieu of a homestead is satisfactorily shown by the receipts given by him for the money, found among the papers of the assignee after his death. But the husband was entitled to the homestead, and he alone received the money therefor. There is nothing in the record to show that she received any part of the \$1,000 for which the husband gave the receipts, or that any other sum was ever paid her in satisfaction of her potential right of dower in the land. There is likewise no competent evidence in the record tending in the least degree to prove that there was a lien for purchase money existing on the land at the time of its sale by the assignee.

It is true that the deed from Miller to appellant's husband, filed as an exhibit with the petition, recites the fact that something over \$2,900 of the consideration for the land was unpaid, and that for this sum two notes were given by the purchaser, payable in one and two years respectively, for which a lien was retained in the deed. But the deed conveying the land to the assignee in bankruptcy was not made until eight years later, and it is unreasonable to suppose that the holder of the notes for the unpaid purchase money would have allowed them to run all that time without taking some step to enforce their payment. Besides, no such notes were ever filed with the assignee for payment in the bankruptcy proceedings.

It may also be remarked that the notes for unpaid purchase money, if presented to the assignee for payment, would doubtless have consumed the entire proceeds realized by the sale of the land as it only brought \$1,780, and there would have been nothing left to satisfy the bankrupt's claim of homestead; so the fact that he was paid the value of his homestead refutes the contention that any part of the purchase money on the land was unpaid at the time of its sale by the assignee. This contention is further disposed of by the copy made from the records of the bankruptcy proceeding filed with the petition, which shows that the assignee in his schedule of assets reported the land of the assignee as free of liens; and, independently of all that has been mentioned, the appellant in giving her deposition unequivocally stated that the purchase money for the land had all been paid by her husband before the execution of the deed to his assignee.

The only evidence that tends to contradict this idea is found in the deposition of one Clark, who testified that on one occasion he heard some of the creditors of appellant's husband during the pendency of the bankruptcy proceedings express the opinion that there was a lien for unpaid purchase money on the land, and that he made some sort of a calculation to arrive at the amount of it, but none of the creditors then present claimed to own the notes for purchase money, or to know who held them. The statement of the witness was incompetent because based upon the statements of others who spoke from hearsay, and whose information upon the subject under discussion was no better than that of the witness himself. Besides, if his testimony were competent, it would not be sufficient to overthrow the great

weight of the opposing evidence. There was some effort to prove by appellant that the \$1,000 received by her husband as the value of his homestead, or that other moneys of his were received by her, or were invested by the husband in lands to which she took the title. Nothing on this point was, however, testified to by her that would militate against her right to the dower claimed by her. But if it had been conclusively shown that the value of the husband's homestead was thus applied to her use, he had the right to do as he pleased with it, and it can not be charged to her in determining her right to dower in the land in controversy.

The right of dower can not be barred, forfeited or relinquished except by the voluntary act of the doweress. In *Lee v. Campbell*, 8 Ky. Law Rep., 421, this court said, in discussing facts similar to those in the case at bar: "Her husband received the homestead money and reinvested it. The fact that she (the wife) ultimately got the benefit of it upon his death does not bar her right to dower. When the land was aliened she had a potential right in it which, upon her husband's death, became an absolute one. She has never parted with it, nor is she estopped by anything disclosed in the record from claiming it."

We are of opinion, therefore, that the chancellor erred in dismissing the petition, as the appellant is clearly entitled to the dower claimed by her. She is also entitled to the rents claimed by her, and the proof shows \$300 per annum to be the fair rental value of the entire tract. She should, therefore, receive one-third of this sum per year from the time of the institution of her action until dower is assigned her.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & CINCINNATI PACKET CO. v. BOTTORFF, &c.

(Filed January 6, 1904—Not to be reported.)

1. Delay in shipment—Peremptory instruction—Where a shipment of freight was received July 3, but did not reach the consignee until the expiration of about a month, the distance being reasonable, the ruling of the trial court in refusing a peremptory instruction asked by the carrier was proper.

2. Evidence—Damages—In an action for damages where the evidence is conflicting it is the province of the jury to determine its weight and effect.

3. Exceptions—Bill of evidence—Where particular questions or answers are objected to they must be excepted to specifically, and it must so appear in the bill of evidence, otherwise they can not be considered.

4. Damages—Where the delay in shipment of a "self-feeder" resulted in additional expense in employing and boarding extra hands, and in the failure to thresh 8,000 bushels of wheat, a verdict of \$250 is not unreasonable.

D. H. French for appellant.

Morris & Morris for appellees.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a judgment of \$250 against the appellant, recovered

by appellees in the Oldham Circuit Court, for damages sustained by reason of the alleged negligent failure of the former as a common carrier to transport and deliver to the latter within a reasonable time a machine made by the Huber Manufacturing Co., of Marion O., known as a "self-feeder," and intended for use in operating a wheat thresher owned by the appellees.

The facts presented by the record are as follows: The appellees in the latter part of June, 1901, through one Stoll, ordered of the Huber Manufacturing Co. a "feeder," which was shipped by the company June 26, 1901, over the Erie Railroad from Marion to Cincinnati, O., to be transported by the appellant on one of its steamboats from that city down the Ohio river to Tarleton's landing, in Oldham county, Kentucky, where it was to be received by the appellees. Upon its reaching Cincinnati, the feeder was delivered to Robert Little, transfer agent, who on July 3, 1901, delivered it to the agent of the appellant, to be shipped upon one of its steamboats to its final destination. But appellant's agent refused to ship the feeder without the prepayment of the freight charges therefor, which fact was made known to Little, and by him communicated to the Erie R. R. Co., which in turn communicated it to the Huber Manufacturing Co., at Marion, and that company, upon being authorized by appellees through its Lexington agent, then paid the demanded charges to the agent of the Erie R. R. Co., who directed Little to pay them to the appellant, which he did not later than July 15, 1901, but the feeder was not transported by appellant to Tarleton's landing, or delivered to the appellees, until July 31, 1901.

It is admitted by the appellant that the "feeder" was not delivered at Tarleton's landing until July 31, 1901, and also admitted that it refused to ship it without prepayment of the freight, and there seems to be little doubt from the evidence that the "feeder" was received by it July 3. It is, however, claimed by appellant, and such was the testimony of its several witnesses, that the freight was not paid by Little until July 30, only one day before the delivery of the feeder to appellees.

The issue made by the pleading on this point was whether or not the appellant failed to deliver the feeder at Tarleton's landing within a reasonable time after the prepayment of the freight, and as Little testified that the freight was in any event paid appellant by July 15, and the feeder was not delivered to appellees until July 31, if his testimony was accepted by the jury they evidently came to the conclusion that the interval of sixteen days constituted unreasonable and inexcusable delay on the part of appellant, for which it ought to account to the appellee. The evidence furnished by the witnesses introduced by the appellees strongly conduces to prove that the "feeder" was received by appellant's Cincinnati agent July 3, at which time prepayment of the freight was demanded. On the same day the amount of the freight was paid by Dumbaugh, of the Huber Co., to the Erie R. R. Co., correction of the way bill was then commenced, and by direction of the Erie R. R. Co. Little paid the freight to the appellant as soon as the correction was completed, which he says was not later than July 15.

It doubtless appeared to the jury unreasonable that the Huber Co., railroad company, Little and appellees, after receiving on July 3 notice of the appellant's demand for prepayment of the freight, should have allowed practically a whole month to pass without seeing it paid, and equally unreason-

able that the appellant would have permitted itself to be put to the trouble of storing and caring for the machine for a month without knowing whether or not the charges would be paid. At any rate the trial court was unable to say that there was no evidence whatever to support the appellees' cause of action, therefore, the peremptory instruction asked for by appellant was properly refused.

It can not be denied that the evidence was conflicting, but in that state of case it was the province of the jury, and not of the court, to determine its weight and effect. It is insisted for the appellant that the depositions of Dumbaugh, Sand, Agnew and Little were incompetent, and should have been excluded by the court. It will be found that the only exceptions shown by the record are to each of these depositions as a whole, consequently they only go to the competency of the witnesses. If particular questions or answers in a deposition are objected to, they and each of them must be excepted to specifically, and such exceptions must appear in the bill of evidence, otherwise they can not be considered by this court. The witnesses whose depositions are complained of all appear to have been competent to testify, and the lower court did not err in permitting their depositions to be read to the jury.

On the question of damages there was no conflict of evidence. It is clearly shown that the "self-feeder" was not received by the appellees until about the close of the wheat threshing season. They had contracted in the beginning of the season to thresh sundry crops of wheat for their neighbors and customers upon the faith of being able to procure the self feeder in time to do so, and the proof shows that with the help of the feeder, if it had been received in reasonable time after being ordered, they could have threshed every crop engaged to them, but that by reason of the delay in its delivery they lost and were compelled to abandon many of these crops.

It also appears that in attempting to operate their wheat thresher without the assistance of the self-feeder appellees were put to additional expense in employing extra hands, and in boarding them; that with the self-feeder from 200 to 400 bushels more of wheat per day could be threshed than without it, and that appellees during the season of 1901, by reason of not having the use of the self-feeder ordered by them, lost the threshing of not less than 8,000 bushels of wheat from the crops contracted to them for which they would have received 5 cents per bushel. In view of this evidence we are unable to say that \$250, the amount allowed appellees by the verdict of the jury, is unreasonable or excessive, although, according to their own evidence, they lost the use of the self-feeder only sixteen days. Consequently we are unable to sustain the contention of counsel for appellant that the verdict is flagrantly against the evidence. We have been unable to find any error in the instructions. They recognize the right of appellant to require of appellees under the facts of this case the prepayment of the freight for transporting the self-feeder, and make it responsible for damages only upon the ground of unreasonable delay in delivering it after the prepayment of the freight, if it was prepaid and there was such delay.

They also told the jury that it was the duty of the appellees to use ordinary care to ascertain the cause of the delay in the transportation of the feeder, and to use such care in removing such cause, or in obtaining another

feeder; and further, if they found for appellees that the measure of damages was such a sum as was the natural and proximate result of appellant's failure to transport the feeder to its destination in a reasonable time after receiving payment therefor, if it did so fail, and for such time only as intervened between the date the feeder should have been delivered at Tarleton's landing and such time as, by the use of ordinary care, the appellees could have removed the cause of delay or have obtained another feeder, and in this connection that they might consider the increased cost of labor, if any, in operating the thresher, and the loss of time or profits on the contracts made by appellees, caused by the failure, if any, of appellant to transport the feeder to its destination in a reasonable time after prepayment of freight, if there was any such delay.

Finding no error in the record whereby the substantial rights of the appellant have been prejudiced the judgment is affirmed.

THE WASHINGTON LIFE INSURANCE CO. v. GLOVER.

(Filed January 7, 1904—Not to be reported.)

1. Insurance—Nonpayment of premiums—Where by the terms of an insurance policy it should lapse upon default of any payment, but after three annual payments, upon demand within six months with the surrender of the policy, a nonparticipating paid-up policy for a certain part of the policy will be issued, time is not of the essence of a contract, and if the insured surrenders the policy within a reasonable time and makes demand, he will be entitled to receive a paid-up policy.

2. Constitutional law—A failure of the trial court to adopt the construction of the New York courts in such cases is not a refusal to give full faith and credit to the judicial proceedings of another State within the meaning of the Constitution. The statute referred to not purporting to have an extra-territorial force, the statute being only intended to regulate insurance business in the State of New York.

3. Place of contract—Presumption—The contract having been made in Kentucky, the presumption is in favor of the law of the place of contract.

Hazellrigg & Chenault and Grubbs & Grubbs for appellant.

Leopold & Pennybaker for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

On the 13th day of July, 1896, the appellant issued to appellee, in Louisville, Ky., a policy on his life for the sum of \$7,000. Among other things this contract contained the following: "This policy is issued and accepted by the assured upon the conditions and agreements printed by the company on the inside of this policy, and such conditions and agreements are referred to and accepted by the assured as part of this contract, and it is agreed that they shall have the same force and effect as if printed in full over the signature hereto."

One of the stipulations thus agreed to is this:

"3d. Notwithstanding this policy shall lapse and become forfeited for the nonpayment of any premium upon the day which it falls due, according to

the terms thereof as hereinbefore contained, yet after the payment of three annual premiums, and upon demand made with surrender of this policy within six months after such lapse by such nonpayment, this company will issue a nonparticipating paid-up policy for as many twentieth (20th) parts of the original amount hereby insured as there shall have been complete annual premiums paid; and the paid-up insurance purchased by such surrender of this policy shall be payable at the same time, and under the same conditions, except as to payment of premiums, and the return of premiums, and the guarantee of the full reserve as a cash value, as the original policy.

"The above is determined and agreed by the company and the assured as full compliance with the terms of chapter 690 of the laws of New York of 1892."

In addition to the foregoing there was printed on the inside of the policy what purported to be a part of the statutes of New York concerning the surrender value of lapsed or forfeited policies, containing provisions materially variant from the agreement made between the contracting parties, the terms of which are as follows:

"Section 88. Surrender value of lapsed or forfeited policies—Whenever any policy of life insurance issued after January 1, 1848, by any domestic life insurance corporation, after being in force three full years, shall, by its terms, lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed at the rate of four and one-half per cent. per annum shall, on demand made with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payment of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy."

Appellee paid three annual premiums, and then made default. About two years after default of payment appellee instituted this action in equity to enforce the issuance to him, by appellant, of a paid-up policy for three-twentieths of the full amount of the stipulated insurance, or \$1,150, notwithstanding he had not complied with the terms of the contract to surrender the policy within six months after the default in payment.

The appellant filed an answer in four paragraphs:

1st. It denies that demand for paid-up insurance was made within a reasonable time, and alleged that the demand made was unreasonable.

2d. Treating time as of the essence of the contract, it urges the failure to surrender the policy and make demand within six months after the lapse, in bar of the action.

3d. It alleges that under its charter and contract appellant must annually set a reserve fund out of its income, ascertain its net profits, determine who of the policy holders are entitled to share in its profits, and to distribute profits among its persistent policy holders; that appellee did not present his policy and make demand for a paid-up policy until long after the fund with which such paid up policy was to have been carried had been distributed among the persistent policy holders; that by these laches on the part of appellee, appellant had been put in a position to be injured by having to issue and carry the paid-up policy in question, and, therefore, time was of the essence of the contract.

4th. That appellant is a New York corporation, organized under its laws, and necessarily conducting its business with reference to its charter and the statutes of its home State, and setting forth the statute of the State of New York in reference to forfeited and lapsed policies before alluded to as governing the contract in question.

The trial court sustained a general demurrer to all of these paragraphs, and appellant declining to plead further, judgment was rendered as prayed in the petition. From this judgment this appeal is prosecuted. This court has often construed the particular provisions of the policy involved in this action, uniformly holding that time is not of the essence of the contract, and that, after a failure to make payment of the stipulated premiums, if the insured surrenders his policy, and makes demand within a reasonable time fixed by the court to be five years, he will be entitled to receive a paid-up policy. The last adjudications on this question are the *Mutual Life Insurance Co. of Kentucky v. O'Neal*, ante, 983; *Equitable Life Assurance Society of the United States v. Warren Deposit Bank*, ante, 889, wherein all the cases on the subject are collated.

The question raised by the third paragraph of the answer arose, and was decided adversely to appellant, in the case of the *Washington Life Insurance Co. v. Miles*, 23 Ky. Law Rep., 1705, where the identical contract in this case was involved and construed. We adhere to the ruling in that case. We are unable to agree with counsel for appellant that the refusal of this court to adopt the construction of the New York courts, as to the six months' contract under discussion, is a failure to give full faith and credit to the laws of New York within the meaning of the Constitution, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

The New York Statute, printed on the back of the policy, does not purport to have any extra-territorial force; it simply regulates the subject-matter of the value of lapsed and forfeited insurance policies in the State of New York. The contract in question is a Kentucky contract, and, as said by the Supreme Court in the case of *Mutual Life Insurance Co. of New York v. Cohen*, 170 U. S., 282, on the question as to whether the statute of New York, or the law of the State where the contract was to be enforced, should prevail, "the presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter; on the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine

the conditions, the meaning and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the State."

So it may be said of the statute relied upon by appellant in the case before us, it clearly is intended to regulate insurance business within the State of New York, and not that done in other States. But it is said the New York statute is made a part of the contract by being printed on the policy, and adopted in the language of the stipulations of the parties. Conceding that this end may be accomplished in the manner indicated, that question is not here. A part of the New York statute has indeed been printed on the policy, and it is, perhaps, included in the general language of the contract over the signatures of the parties; but section 3 of the stipulations, which constitutes the basis of this action, is agreed by the express language of the parties to be entered into as a full compliance of the statutes. This clearly means that, in lieu of the provisions of the statutes, section 3 is adopted. Section 3 and the statute are essentially different, and the former supersedes the latter; we conclude, therefore, that by the express language of the parties the operation of the statute on the contract is excluded.

Perceiving no error in the record the judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. CUMNOCK, &c.

(Filed January 7, 1901—Not to be reported.)

1. Railroads—Obstruction—A rock wall, eight feet wide and fifteen feet high, in a street sixty-five feet wide, over which a railroad operates one of its line, is obviously of great injury to abutting property, and a verdict for \$800 is not beyond the actual damage suffered in consequence of it.

2. Former action—Bar—A former judgment of \$600, in 1885, is not a bar to a subsequent action where the city council by ordinance authorized the building of a wall, as section 242, Kentucky Statutes, radically changed the rule in this class of cases, for the reason that under this section a change in the width or grade of a street could not be made where abutting owners are affected without making compensation for damages inflicted.

Yeaman & Yeaman for appellant.

Clay & Clay for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

In the year 1885 the appellees and their father were the owners and in possession of a lot of ground 100 front by 208 feet deep, situated on the northeast corner of Fourth and Main streets in Henderson, Ky. The dwelling house upon the lot fronted, then as now, upon Fourth street. At that time the Henderson Bridge Co. had constructed and was operating a railroad bridge across the Ohio river, from the Indiana to the Kentucky shore, and in order to permit appellant to connect its track with that of the bridge company on Main street it was authorized to lay and operate certain railroad tracks along Fourth street in front of appellees' property.

Claiming that the maintenance of the railroad tracks, and the operation of a railroad along Fourth street, by reason of the noise, smoke, and the

occupation of the street by the railroad injured the value of their property, the appellees and their father in 1885 instituted an action for damages against appellant, in which a judgment was rendered in their favor for the sum of \$500, which was thereafter paid. So far as this record shows the situation between appellants and appellees remained unchanged until the year 1901. Fourth street, in front of appellees' property, and for several squares beyond, is exceedingly steep, making a heavy grade, which can be surmounted only with great difficulty, and by the expenditure of great force.

In order to obviate this difficulty appellant obtained from the common council of the city of Henderson an ordinance, authorizing it to erect along the center line of Fourth street, in front of appellees' property, and for several squares beyond, a rock wall, about eight feet wide and fifteen feet high, over which it operates one of its lines at a much more convenient, if not level, grade. This wall divides Fourth street, so far as appellees' property is concerned, into two narrow thoroughfares, and in the one next to appellees' property appellant constructed and is operating an additional railroad track upon the natural grade of the street. Contending that this change in the situation materially damages their property, appellees instituted this action against appellant.

In bar of appellees' claim appellant denied that their property was damaged, pleaded the permission of the council to make the improvement, and also pleaded the former judgment obtained by appellees and their father in 1885. A trial resulted in a judgment in favor of appellees for \$800, from which judgment this appeal is prosecuted. The testimony as to whether or not appellees' property was damaged by the change in the situation herein described was variant.

Some twelve or fifteen witnesses for the appellees estimated the damages largely in excess of the verdict rendered. An equal number testified in favor of appellant that the property was not damaged at all. In this state of case we would not feel at liberty to disturb the finding of the jury, whose peculiar province it is to settle questions of fact. But it is obvious that the erection of the wall in question must have injured appellees' property greatly. The record does not show the width of Fourth street, but, assuming it to be of the ordinary width of sixty feet, with a carriageway of thirty-six feet, it can be readily seen that the wall reduces what was an ordinarily convenient thoroughfare into a mere alley. When the tracks were laid and operated upon the natural grade of the street the public could use the whole thoroughfare as a highway, except when the trains were actually passing along, readily driving from one side of the street to the other, across and over the rails.

This can not now be done, and, as said before, appellees' property fronts upon a mere alley, which has upon it a railroad track between the property line and the rock wall. It is apparent that it would be nearly as dangerous to drive a vehicle into this narrow alley, and incur the risk of meeting, or being overtaken, by a train as it would be to drive into a railroad tunnel. The wall in question must also materially obstruct and shut off the view from appellees' property on the Fourth street side, as well as to seriously interfere with the free circulation of the air. For these reasons we feel convinced that the verdict is not beyond the actual damage suffered. This

action has no reference to that instituted in 1865; it only purports to recover damages for a new cause of action, which is entirely distinct, and in addition to that involved in the first suit, and the instructions of the court fully restricted the jury to this view of the case.

Appellant relies upon the principle announced by this court in the case of the Louisville & Frankfort R. R. Co. v. Brown, 17 B. Morroe, 768. Conceding that prior to the adoption of the present Constitution appellees could not have recovered for the consequential damages sustained by the acts of appellant complained of, this court, in the cases of the City of Henderson v. McClain, 19 Ky. Law Rep., 1450, and City of Ludlow v. Detweiler, 20 Ky. Law Rep., 894, construed section 242 of the present Constitution as radically changing the rule existing prior thereto on the subject at hand; and the case relied upon by appellant is especially mentioned as being among those whose authority has been affected by the change in the organic law.

Under the provisions of section 242 neither the city of Henderson, appellant, nor any other corporation possessing the right of eminent domain, could lawfully make a change in the grade, width or use of the street injuriously affecting the abutting property owners, without making compensation for the damages inflicted. Appellant complains of the criterion of damages fixed by the instructions given by the court, which is as follows: "If you find for the plaintiffs under this instruction, the criterion of their relief must be the difference between the market value of said property just before it was generally known that said work would be done, and its market value since the completion of said work."

This instruction was approved by this court in the case of the City of Louisville v. Hegan, 20 Ky. Law Rep., 1532. The instructions of the court, as a whole, contain a correct exposition of the law of this case.

Perceiving no error in the record the judgment is affirmed.

GIBSON v. DRAFFIN, GD'N, &c.

(Filed January 7, 1904—Not to be reported.)

Bequests—Trustee of express trust—G. removed from this State to Texas where he died leaving a paper directing that his property be turned over to his brother "to sell and dispose of as he sees fit, to pay my indebtedness, and take my two children to Kentucky and look after them and raise them." In action by one of the children by his guardian to recover his part of his father's estate against his uncle the latter interposed the plea of limitation, and that he had paid large amounts for the boy and in expenses to Texas. Held—That he was the trustee of an express trust; that the statute of limitation did not run against the infant, and that as such trustee of an express trust he may be sued by the cestui que trust.

Reed & Oliver, Oliver & Oliver and Oliver & Reed for appellant.

Fisher & Edwards and Lovett & Holland for appellees.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Hobson.

B. H. Gibson moved from this State to Texas, where he owned a tract of 820 acres of land on which he resided, and he also held some cattle, hogs and

other personal property. About the year 1884 his wife died, leaving two little children, one four and the other less than two years old. Soon after this B. H. Gibson himself was taken sick, and appellant, G. S. Gibson, who was his brother, in response to some letters from Texas, went there to see after him and the children. When G. S. Gibson reached Texas his brother was dead and had left this paper: "I, B. H. Gibson, give and turn my property over to G. S. Gibson to sell and to dispose of as he sees fit, to pay my indebtedness and take my two children to Kentucky and look after them and raise them." G. S. Gibson did not have the paper probated as a will, but took charge of the personal property and sold it and brought the children and proceeds with him back to Kentucky. The grandmother took charge of the children. G. S. Gibson paying her \$40 a year for both of them or \$20 each. When the boy, who was the younger of the children, was about eight years old his grandmother was taken sick and he then lived with his uncle something over a year, but at his grandmother's request returned to her house and lived with her until her death, G. S. Gibson paying her nothing for taking care of the boy after his return. After the boy was about fifteen, and after his grandmother's death, he returned to his uncle's house and stayed there some time, but then went off to work for himself. When he was about nineteen he filed this suit by his guardian against his uncle to recover his part of his father's estate in the hands of his uncle. The uncle pleaded limitation. He also denied receiving as much as alleged, and claimed to have paid out for the boy large amounts.

He also claimed that he should be allowed \$200 for his services in going to Texas and bringing the children home with him. The court gave judgment against him for \$325, with interest from the date of the judgment, and from this judgment he appeals. The first question made in this court is that the boy has no cause of action on the ground that G. S. Gibson was executor de son tort of his brother's estate, and that he is liable to the true executor, but not to the distributee. It is also insisted that the paper above quoted gave G. S. Gibson the property referred to therein. The rule of law relied on as to an executor de son tort seems to us to have no application. The paper does not give the property to G. S. Gibson individually, but as trustee for the children to bring them to Kentucky and look after them and to raise them, after paying the decedent's indebtedness. The payment of the indebtedness and the taking care of the children are equally provided for by the paper, and G. S. Gibson can no more claim the fund individually against the children than he could against the creditors of the decedent. He did not receive the property as executor de son tort and does not hold the proceeds as such, but held as trustee for the children after the debts were paid. He is the trustee of an express trust, and as such may be sued by the cestuis que trusts. The statute of limitation does not run against the infant. Besides, it was an express continuing trust. The trustee has furnished no itemized statement of his sales in Texas. When he returned to Kentucky with the children he was very vague in his statements as to what was in his hands.

He did not qualify as their guardian or file in the county court any statement showing the amount in his hands. He did not communicate to the relatives of the children, who inquired of him, any exact data as to what he had done or what he had; and his statements then made on these subjects

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are more or less conflicting with his testimony in the action. On all the proof we conclude that the judgment of the court below is as favorable to him as the law warrants.

Judgment affirmed.

BANK OF COMMERCE'S RECEIVERS v. WINDMULLER, &c.

(Filed January 7, 1904—Not to be reported.)

Fraudulent conveyance—Conflict of laws—Preference of creditor—Where upon a former appeal in an action where a debtor residing in the State of New York, but who owned lands in this State, with a view of securing appellant in an indebtedness executed to it a mortgage on the land, and appellees undertook to have the mortgage set aside as fraudulent and to operate as an assignment for the benefit of all creditors alike, and it was held upon the appeal that the evidence fails to show actual fraud upon the creditors, but was sufficient to operate as an assignment under the act of 1856, on behalf of an only creditor resident in this State, and that he may invoke the aid of the chancellor if he establishes his claim, upon a return of the action to the lower court it was error to assume that if the conveyance could be held to be a fraudulent preference, under the statute of 1856, New York creditors of the mortgagee could participate in the assignment which would follow the judgment, and that it would only be necessary to find a creditor of the mortgagee in this State who might proceed under that statute. What the court decided was where all of the parties reside in a State where a preference among creditors is valid, creditors who have not been included in the preference can not come to Kentucky and set in force the act of 1856 against their debtor, and that a Kentucky creditor can not do it for them.

Norris Morey and E. B. Wilhoit for appellants.

Theobald & Theobald for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Barker.

This action is here on appeal for the second time. The material facts upon which the litigation is based are set forth in the opinion on the first appeal (20 Ky. Law Rep., 1951), to which reference is now made for the purpose of obviating the necessity of a restatement.

So far as the appellees are concerned there has been no change made in the record since its return after reversal to the circuit court; their rights, therefore, are circumscribed by the opinion heretofore delivered. Appellees and the judge of the circuit court seem to have labored under the belief that if the conveyance from Andrew Brown to the Bank of Commerce of Buffalo, New York, could be held to be a fraudulent preference, under the statute of 1856, they, although New York creditors of Brown, could participate in the assignment which would follow the judgment, and that all that was necessary, in order to reach this desired end, and was to find a Kentucky creditor of Brown, at whose suit such a judgment might be had under the statute.

This is a mistaken view as to the effect of the former opinion. After holding that the transaction between Brown and the Bank of Commerce was a fraudulent preference under the statute of 1856, it is said: "But it does not follow that the appellees are entitled to the relief they sought. It must first be ascertained whether they have debts against Brown; and, sec-

ond, whether the transaction in New York operates as an assignment for their benefit. Waiving, for the purposes of this opinion, the question of the sufficiency on demurrer of the petitions, and assuming that there is no contest over the claim of any appellee but Gregory, the question arises, whether the Kentucky act of 1856 affects the New York transaction, so as to make it operate as an assignment for the benefit of the New York creditors. All the appellees but Gregory are nonresidents of this State. The transaction must be assumed to be valid according to the laws of New York, for preferences were lawful at common law, and the common law is presumed to prevail in States where the contrary does not appear. It follows, that the transfers will be treated by this court as valid, so far as the citizens of other States are concerned. All the appellees, except Gregory, being confessedly citizens of other States, it follows, therefore, that in the present state of the record, the statute can not be held to operate in their favor. The validity of the claim of Gregory is in dispute, and the judgment makes no mention of his claim. As to his claim, therefore, there is nothing for us to act upon. The judgment is reversed, with directions for further proceedings consistent herewith, allowing appellees to amend, if desired, both as to the New York law, and as to demand and protest upon the bills of exchange sued on."

Upon the return of the case to the court below, Gregory, who was the only Kentucky creditor of Brown, dismissed his action, whereupon the case having been again submitted, the circuit judge again decided in favor of appellees, that the conveyance from Brown to the Bank of Commerce was a fraudulent preference, under the act of 1856, and operated as a general assignment of his property for the benefit of all his creditors. So far as this record shows, the creditors, at the time the judgment below was rendered, and the debtors, were citizens of New York. The opinion on the first appeal holds that if the common-law rule prevails in New York, then, the assignment of Brown to the Bank of Commerce is valid, as to appellees, and they could not participate in the Kentucky estate of Brown, even if the conveyance was set aside, as a fraudulent preference, at the suit of a Kentucky creditor.

Certainly, this court would not decide that appellees have a valid and subsisting claim, which they could not enforce, and that their right to have their claims paid by a sale of the Kentucky property depends upon the adventitious contingency of being able to find a Kentucky creditor at whose suit the conveyance might be set aside. From such a conclusion, it would follow, that there might be a valid legal claim without a legal remedy. What the court meant to decide, and did decide, is, that where, as in this case, all of the parties reside in a State where a preference among creditors is valid, those creditors who have not been included in the preference can not come to Kentucky, and set in force the act of 1856, as against their debtor; and, as they can not do this for themselves, a Kentucky creditor can not do it for them. Had Gregory not dismissed his case, any judgment rendered in his favor would only have redounded to his interest, and not to the interest of appellees. They were not, therefore, prejudiced by the dismissal of his action. As appellees failed to amend their pleadings, or to take any proof to show that in the State of New York a debtor can not lawfully prefer one creditor over another, it must be conclusively presumed

that the common-law rule prevails therein, and such being the fact, appellees' petition should have been dismissed.

Wherefore, the judgment is reversed for proceedings consistent herewith.

MAGRUDER v. POTTER, &c.

(Filed January 7, 1904—Not to be reported.)

1. Private passway—Easement—Prescription—Where a private passway has existed for forty or fifty years leading to a public road and which has been used by the public for that length of time, the owners of the land on either side of it recognized the right of the public to travel upon it, in action for damages for its obstruction and to open the passway, it was error to sustain a demurrer to the petition upon the idea that there was no allegation of a dedication to the public or acceptance by it of the road as a private passway.

2. Same—Presumption—Where the continued use of a passway was for something like half a century it is unnecessary to show by positive testimony that the same was claimed as a matter of right, and after such a great length of time the burden is on the defendant to show that its use was only permissive.

W. F. Bradshaw for appellant.

Wheeler & Hughes for appellees, C. St. & M. O. R. R. Co.

Bloomfield & Crice for appellee Potter.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

This appeal is prosecuted from a judgment of the circuit court sustaining a general demurrer to the plaintiffs' petition, in which it is alleged that the plaintiff owns seventy acres of land in McCracken county on which he resides; that the defendant, R. L. Potter, is the owner of an adjoining tract of land recently acquired by him by purchase from T. E. Haddox, which lies north of the plaintiff's land and between it and the public road, the distance being about four hundred yards; that Potter also owns another tract of one hundred and sixty acres lying east of this tract and adjoining it; that between these two tracts and running from the county road down to plaintiff's land, and alongside of it out to another county road, there has existed for forty or fifty years a lane which is a road or passway by which the plaintiff can get out from his land to the public road; that the traveling public have used this road for more than forty years, not as a matter of permission, but as a matter of right; that this way has been recognized and used as a right on substantially the same ground it now occupies for more than forty years; that the land owners on each side of it have, for that length of time, conceded and recognized the right of the public to travel upon the road by leaving a lane from twelve to eighteen feet in width; that the passway was an easement belonging to the plaintiffs' farm and was so recognized and regarded by his vendor, Theodore Bradshaw, for more than twenty years during which period he owned the land and resided on it; that the said vendor and others, and the traveling public, have continuously used and traveled over this passage way as a matter of right for a period of

more than fifty years past and this right was conceded by the land owners on each side by setting their fences back so as to leave the lane; that twenty-five or thirty years ago the land was owned by the plaintiff and the defendant, Potter, all lay in one body, and was one farm owned by Shelby Bradshaw and the said passway extended north and south along the east boundary of said farm; that recently the defendant, Potter, has built a fence across the passway and his co-defendant has made a cut across it so as to obstruct it and prevent its use, destroying plaintiff's way of reaching the county road. The plaintiff prayed judgment opening the road and damages for its obstruction. The court sustained the demurrer it seems upon the idea that there is no allegation of a great dedication to the public or acceptance by it and that the allegations of the petition are not sufficient to show a continuous holding by adverse possession of the land as a private passway.

In *Riley v. Buchanan*, 25 Ky. Law Rep., 863, and *Bohne v. Blankenship*, decided January 6, 1904, this court considered at length the question whether a dedication by the owner and acceptance by the proper authorities will be presumed where a passway has been used by the public continuously for more than fifteen years without let or hindrance from the owner, and under the rule laid down in those cases, the allegations of the petition are sufficient to show prima facie that the road is a public way. In *Butt v. Napier*, 14 Bush, 46; *Talbert v. Thorne*, 91 Ky., 417; *Newcome v. Crews*, 98 Ky., 39; *Potts v. Clark*, 23 Ky. Law Rep., 332; *Bowen v. Cooper*, 23 Ky. Law Rep., 2065; *Clay v. Kennedy*, 24 Ky. Law Rep., 2084; it was held that the continued use of a passway as a matter of right for fifteen years unexplained, will create a presumption of grant and that when the passway has been used for something like a half century it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such a great length of time the burden is on the defendant to show that the use was only permissive. Under these principles the facts stated in the petition are sufficient to raise a presumption of a grant of a private passway if no public right is established. The court, therefore, erred in sustaining the demurrer. Wherefore, the judgment is reversed and cause remanded for further proceedings consistent herewith.

TOWN OF LONDON v. BOYD.

(Filed January 7, 1904—Not to be reported.)

1. Taxation—Situs of property—Where the evidence showed that appellee's place of residence was on his farm, five miles from L—, in which town he kept his notes, bonds, etc., in a safe in an office occupied by his nephew, and which he occupied as an office when in L., the ruling of the trial court, in an action on the part of the town to subject the notes and bonds to taxation, against the appellant will not be disturbed, the court holding that the situs of personal property for taxation is the residence of the owner and not necessarily the place where it is situated.

H. C. Hazelwood and Cook & Jones for appellant.

D. K. Rawlings and J. W. Alcorn for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted by the appellee against the appellant to enjoin the collection of city taxes for the year 1902, upon certain personal property owned by him, aggregating about \$85,000, which consisted of promissory notes, bonds, and cash on deposit in one of the banks of the town, upon the ground that he was not a resident thereof. The defendant in its answer claimed that the property was liable for taxes for two reasons: First, because the notes, bonds and cash were actually within the town of London on the 15th of September, 1901; and, second, because the appellee, Boyd, was an actual resident of the town domiciled therein.

Section 8678 of the Kentucky Statutes, which is one of the provisions in the charters of towns of the sixth class, to which the defendant belonged, reads as follows: "All real and personal estate within the city, and all personal estate, except such tangible personal property as has an actual and bona fide situs without the city, of persons domiciled or actually residing in the city on the 15th of September, in the year in which the assessment shall be made, * * * shall be assessed, etc."

It is the contention of appellant that under this section of the statute as the notes and bonds belonging to appellee were usually kept by him in an iron safe in his law office in London, Ky., and were there on the 15th of September, 1901, and the cash was deposited in a bank in London on that date, that the property had an actual situs in London for taxation under the statute regardless of the residence of the owner. This court held, in construing similar statutory provisions in numerous decisions, that the situs of personal property for purposes of taxation was the domicile of the owner, and not the actual situs of the property itself. (*City of Louisville v. Shirley*, 80 Ky., 71; *Baldwin v. Shine*, 84 Ky., 502; *City of Newport v. Ringo*, 87 Ky., 686; *Hartley's Ex'or v. City of Lexington*, 19 Ky. Law Rep., 1826; *City of Lexington v. Fishback's Trustee*, 22 Ky. Law Rep., 1392; *Boske, Sheriff v. Security Trust and Safety Vault Co.*, 22 Ky. Law Rep., 182.)

There is nothing in the statute relied on by appellant which indicates an intention on the part of the general assembly to confer upon the authorities of sixth class towns the power to tax for local purposes the personal property of nonresidents which happened to be located within the city limits on the day fixed for assessment, and it is fair to presume that if the general assembly had intended to make so radical a departure in its policy with respect to the taxation of this class of property as contended for, that they could have made their intention clear by unequivocal language.

The further contention that appellee was an actual resident of London on the 15th of September, 1901, is not supported by the testimony. He testifies that his legal residence and home was at his farm five miles from the town of London; and that he resided there on the 15th of September, 1901, and had done so for several years previous to that date when in Kentucky; and that he voted in the country precinct which included his farm; that during the greater part of the year for many years he had been absent from Kentucky on account of his health; that the notes and bonds had been left in a safe in an office which belonged to him in the town of London, and which was occupied by one of his nephews, for convenience and safety alone. And whilst a num-

ber of witnesses introduced by appellant testified that appellee was frequently seen about his office and on the streets of London, and took his meals at one of the local hotels, and often spent the night there, this testimony was not sufficient to rebut the positive unequivocal statements of appellant as to his actual residence. We, therefore, conclude that the trial court properly found against appellant on both contentions.

Judgment affirmed.

CINCINNATI SOUTHERN RY. CO.'S TRUSTEE, &c. v. SOCIETY OF SHAKER'S TRUSTEES, &c.

(Filed January 8, 1904—Not to be reported.)

Land—Disputed boundary—In an action to recover possession of about two acres of ground where it is difficult to determine the location of a call line because of its position on a cliff, the possession of appellees will not be disturbed where it is conclusively shown that they have exercised control over the land, a narrow strip, since 1875, by the erection of houses, stables, etc., and where they have been in continuous, adverse and uninterrupted possession for more than fifteen years.

W. L. Bronaugh for appellants.

Ben P. Campbell for appellees.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Burnam.

The trustees of the Cincinnati Southern Railway Co. brought this suit against the appellees, the Society of Shakers, to recover the possession of about two acres of ground embraced in a narrow strip fronting the turnpike road near High Bridge, Ky., which they allege constitutes a part of a tract of 14.6 acres of land which was conveyed by Joseph Curd in 1857 to the Lexington & Danville R. R. Co., and subsequently by his vendees to them. The solution of the controversy between the parties depends on the proper location of the line shown in the first two calls in the deed from Curd to the Lexington & Danville R. R. Co., which are as follows: "Beginning at a white oak (marked) on the top of the cliff; thence up the river on the top of the cliff with its meanders south 52 degrees east 35 poles, south 66¼ degrees east 28.8 poles to an oak and cedar on the top of the cliff."

In 1859, Curd conveyed the adjacent tract of land bordering on the line in controversy to W. I. Moberly, and through successive grantors, the Society of Shakers obtained possession thereof. The corresponding call in the deed from Curd to Moberly is as follows: "Thence along the cliff with their line 52 degrees east 35 poles, south 66¼ degrees east 28.8 poles to an oak on the top of the cliff."

It appears from the testimony and from the maps filed in the record, that a perpendicular cliff two hundred and fifty feet high raises from the base of the mountain, and then by a more gradual ascent the top of the cliff or mountain is reached about 200 feet away. Appellees contend that the call "beginning at a white oak (marked) at the top of the cliff, thence up the river on top of the cliff with its meanders to an oak and cedar on top of the cliff," is on top of the highest point of the cliff or mountain. While appel-

Plaintiffs contend that these lines are run along the rocky face of the vertical cliff. The land in dispute lies between the top of the vertical cliff and the top of the cliff or mountain, which varies from one hundred to two hundred feet in width. If this line is run on top of the cliff, the land belongs to appellee. If it runs at the top of the perpendicular precipice, it is included within the boundary of appellants. The appellants point to the fact that the dictionary defines the word cliff as a precipice, and, therefore, it could not apply to the top of the mountain or hill. In answer to this contention, it is proven by a number of witnesses that from the top of the vertical precipice to the top of the cliff, several cliffs intervene, which, however, are not so high as the one contended for by appellant; and that the whole topography of the soil is rugged and uneven. They also rely upon the testimony of Mr. W. A. Gunn, an eminent engineer, who claims to have made the survey for the railway company in 1857. On the other hand, the contention of appellees as to the true location of the call is supported by the testimony of quite a number of witnesses, who definitely locate the "marked white oak," called for as the beginning corner, and the "oak and cedar on the top of the cliff," as being on the top of the cliff, and not upon the top of the vertical precipice. They also point to the fact that it is physically impossible to run these calls, if the beginning corner is taken on the top of the vertical cliff; and show by several surveys that appellants have the full amount of 14.6 acres covered by their boundary, stopping the line at the top of the cliff. In addition to these facts, it is conclusively shown that appellees have exercised acts of ownership over this narrow strip of land since 1875, by the erection of houses, stables, etc., which they have rented out. The house in which the post office is kept at High Bridge was erected by appellees on this strip of land, and has been rented from them for this purpose for many years.

We have reached the conclusion that the land in dispute is covered by the deed of appellee, and that they have been in the continuous, adverse and uninterrupted possession thereof, claiming same as their own, for more than fifteen years before the institution of this suit and the judgment is, therefore, affirmed.

CRAYCRAFT, &c. v. NATIONAL BUILDING AND LOAN ASS'N.

(Filed January 8, 1901.)

1. Building and loan association—Dissolution of corporation—Specific performance—The appellee building and loan association desiring to go into liquidation conceived a plan of disposing of its real estate at its book value in payment of the stock of its stockholders, and at a meeting of the stockholders the plan was ratified by the holders of a bare majority of the stock. Appellant made a proposition to exchange his stock for a certain lot owned by the corporation on condition that it convey to him by a good merchantable, indefeasible, fee-simple title. The proposition was accepted and the deed drawn and tendered which appellant declined to accept. Suit was then brought by appellee for the specific performance of that contract. Held—Appellant would not get an indefeasible title, for upon a failure of any of the nonconcurring stockholders to receive an equal sum on final distribution, appellant would be compelled to surrender to them the surplus in value in the lot over his pro rata of the corporation assets.

2. Same—Where a corporation is voluntarily dissolved its assets after payment of its indebtedness must be distributed pro rata among its stockholders according to interest, each stockholder being entitled as a matter of right to participate in the distribution on that basis.

Strother, Hardin & Strother and H. M. Johnson for appellants.

Woolfolk & Klein for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

Appellee is a building and loan association, organized and operating under the laws of Kentucky, and subject to the provisions of the present Constitution and statutes. Appellee found it was unable to prosecute its business with success, and in the course of its business, by investment in real estate and the purchase of real estate for debts, it acquired real property of the value of about \$140,000 at its book value, that is at the price which the property cost appellee.

It had a large number of stockholders holding a large amount of its capital stock which at its book value, that is the aggregate of dues paid on stock and of the dividends which had been declared and credited to the stock, to a sum much in excess of the value of the real estate. Its assets consisting of notes secured by mortgages and by pledges of stock together with the book value of the real estate, practically balanced the liabilities of the company to its stockholders. The pleadings claim, and proof in this case indicates that this real estate could not be sold in the ordinary and usual way of selling for as much as \$140,000 by practically one-third of that amount, that is the real estate could not have been sold in the usual way for more than \$48,000 or \$94,000. To sell this property, therefore, in this way would have made the company unable to pay its stockholders in full by the sum of \$46,000 if the result should be as anticipated. Taking into account depreciations in value and losses which must necessarily result in collecting its personal assets, the company, in the usual way of winding up, is probably insolvent. With this condition confronting them the directors, through a committee while in process of liquidation, conceived a plan of disposing of this real estate to its stockholders by adding to the cost value of the real estate, arbitrary amounts not exceeding 8 per cent. of any one piece of property, and accepting in payment therefor stock of the stockholders at its book value, with the stipulation that in the event the assets upon final distribution were sufficient to pay to the stockholders who did not purchase real estate, more than was received by the stockholders who exchanged stock for real estate, that such surplus should be distributed to all of the stockholders alike. It will be observed that there was no final surrender of the stock or of the rights of stockholder upon the exchange of stock for real estate. In order to ratify this plan a meeting of the stockholders was called and was attended by the holders of a bare majority of stock, a bare quorum, and the plan was ratified by a bare majority, and of this bare majority of the stock twenty-six shares attending the meeting voted against approving the plan.

Under the plan adopted offers for the property by stockholders to be paid in stock was authorized to be made up to the 1st of February, 1903, at which

time the right of stockholders to make such exchange expired under the terms of the plan. After such approval as was made by the stockholders of the proposed plan for disposing of the real estate, printed propositions containing the substance of the above plan and a list of real estate of the appellee with its price was mailed to each of the stockholders. Prior to the first of February, 1903, the company received propositions under the plan for about \$30,000 worth of its real estate, and no more. About the time this plan was adopted by the directors a resolution was adopted by the corporation in substance that it would proceed to dispose of its assets, pay its liabilities and wind up the business. This did not legally put the company in liquidation. (*Economy, &c., Association v. Paris Ice Co.*, 24 Ky. Law Rep., 107.) In the meantime, however, a consent such as is required by section 561, Kentucky Statutes, was signed by the necessary number of stockholders and lodged with the directors in the latter part of January, 1903, and between that time and the 1st of February, at which time the plan above mentioned expired, the appellant Craycraft made a proposition to exchange stock of appellee of the book value of \$648 for the lot described in the petition, upon condition that the corporation would convey the property to him by a good merchantable, indefeasible fee-simple title. This proposition was accepted by the appellee and a deed was drawn and tendered to appellee which he declined to accept.

This suit was brought for the specific performance of that contract. The question involved here is, whether the plan for disposing of its real estate is legal, whether appellant at this stage of the winding up of appellee would obtain by the deed tendered a good, merchantable, indefeasible, fee-simple title to the property described in the petition. These propositions involve the question whether the transaction above set forth is a sale of the lot described in the petition such as they can lawfully make, or whether it is a mere distribution of assets to the stockholders receiving the property, and whether the property itself remaining in the hands of the stockholders, at the suit of dissenting or non-consenting stockholders, would be brought in for the purpose of procuring an equal distribution of the assets of the corporation among all of its stockholders alike. It will be observed that only about \$30,000 worth of this \$140,000 worth of real estate was bargained for on the plan above described before the expiration of the plan, which leaves \$110,000 worth as to which there is no assurance that it can be sold in the same way or upon the terms under renewal or extension of the plan, and if not sold, its sale in the ordinary way of winding up a corporation may make the corporation so insolvent as to result in other stockholders receiving a much less pro rata from the assets of the corporation than those who get real estate for their stock.

That appellant was entitled to receive not only a deed with covenant of general warranty, conveying the fee-simple title, but was to receive an indefeasible title, is admitted. If the scheme evolved by the majority stockholders, and above set forth, did not enable the corporation to pass such title to the stockholders whose bids might be accepted, then the specific execution of the contract between appellant and the association should not be adjudged. It should be borne in mind that the corporation is not indebted. Its sole liability is to its stockholders. The argument is made that in the

course of a voluntary liquidation upon a statutory dissolution of a corporation the will of the majority in interest, at the time and method of procedure, so long as it does not produce a substantial inequality in the result, must be allowed to control. The argument is utilitarian, and is opposed by the characterizing principles of the common law, which regard the rights of the individual in private property in preference to the will or welfare of any greater contending number.

The question of the rights of the stockholders as among themselves is one of implied contract. It is, that upon a dissolution of the joint enterprise for which they formed the corporation, its assets, after paying its indebtedness, will be distributed pro rata among the stockholders, according to interest. It may be that if these assets were of a quality capable of an exact partition in the proportion represented by each shareholder's interest, they might be distributed in specie. But that can rarely happen. The only dividend which can ordinarily receive the divisor of share interests is money. The basis of contribution, of reckoning liability, and of apportioning the final results, is money. To liquidate, in law, is to make certain or exact, in units of money, and in the sense in which the word is used in winding up a corporation, to discharge, in lawful money, the liabilities so ascertained.

Each stockholder is entitled, as a matter of right, and as an incident of his contract, to participate in the distribution on that basis. Although the majority in interest and numbers may conceive their interest to be, and although it may be a fact that their interest is, to hold the assets of the corporation for future enhancement of value, or for other uses, the dissident members are not bound to yield their right to a legal liquidation to the welfare of the others. To make them do so, would be compelling them, against their wills, to enter into a different contract from the one originally made. The doctrine being discussed is thus stated by Cook on Stock and Stockholders (1st edition), 636: "When the regular business of a corporation has been brought to a close, the shareholders have a right to an immediate distribution of the corporate assets. They can not, therefore, be compelled to accept other property or rights in lieu of cash." The authorities cited by the author support the text. Using the instant case as an illustration, it may be, and probably is, that among the nonconsenting or dissenting stockholders there are some who hold but a few shares, possibly some who hold only a single share of stock. It is not likely that any of them would be able to find a piece of real estate on the list of the same value as his share, or shares. He may not be able, or willing, to invest money in addition in the real estate offered, and especially at the price offered.

He would then be compelled to yield absolutely to other stockholders his claim as stockholder upon \$140,000 of real estate of the corporation, and to take the chances of realizing an equal proportion from the remaining assets of the company. It might be advisable for him to adopt that plan. But the question is, does the law compel him to relinquish a present valuable interest for a chance. It is not true, strictly, that every stockholder has an equal chance in the proposed plan, even if an even chance in anything except money would satisfy his right. For there are about \$200,000 worth of shares, at book value, while only about \$140,000 of real estate at book value. Some

of these shares must necessarily fail to participate in this partition of the real estate, and, therefore, be compelled to take whatever chance there may be in realizing an equivalent sum, proportionately, from the other assets of the company. If they should fail to that extent there would be an unequal distribution of the assets of the corporation among shareholders of the same rank, if the scheme here involved should be adjudged by the court. Such a distribution would never be decreed nor sanctioned by a court of chancery. Nor are we aware of either principle or precedent that would allow a minority stockholder to be bound against his will by a resolution of the majority that would or could produce such result.

It is suggested that this scheme is particularly desirable and beneficial to all stockholders because thereby extraordinary costs of winding up by proceedings in the courts are averted. Under 561, Kentucky Statutes, the board of directors of corporation in voluntary liquidation, are given ample power to do all that is necessary to pass title to its real estate by sales and conveyances, by public or private sales. Indeed it is made their duty to expeditiously take these steps to reduce the assets into condition for distribution. The suggestion of costs and court expenses is probably more a bug-a boo than a danger.

We do not mean to say that the plan submitted to the stockholders was not a judicious one. If all the stockholders had agreed to it, it is altogether probable it would have worked out satisfactorily. But even if that were clearer than is made to appear, we know of no legal way to compel them to enter into the agreement, for at last any deviation from the legal enforcement of the stockholders' rights is a matter of agreement among the parties. All the assets of the corporation in liquidation are a trust fund which must be ratably distributed among all the stockholders of the same rank. If any of them are permitted to withdraw a greater proportion than others, i. e., any part of it that they were not entitled to, the former would be compelled to restore at least the surplus, that the others might be made equal. (*William Doodrich v. City L. and B. Ass'n*, 54 Ga., 98; *Allen v. Russell*, 78 Ky., 105; *Endlich on Building Associations*, 526.)

From this it follows that appellant would not get an indefeasible title to the lot contracted by him, for upon a failure of any of the nonconcurring stockholders to receive an equal sum or value on final distribution, he could be compelled at the suit of such stockholders, to surrender to them at least the surplus in value in the lot over his pro rata of all the corporation assets.

The judgment of the circuit court decreeing the specific performance of the contract of exchange of the lot for the seven shares of stock is reversed, and cause remanded, with directions to dismiss the petition.

HERMANN v. PARSONS, &c.

(Filed January 8, 1904.)

Wills—Inheritance—Parties to action—In an action by the executors and heirs of a devisee to sell real estate devised to widow for life, for a division of proceeds under the will, it appearing that appellant had derived title to property from the vendees of the purchaser of the land at commissioner's sale, in an action to sell it to enforce a lien, and where appellees were not

made parties, it was error for the lower court to hold that they should be made parties, because under the will devising the property they merely held a contingent remainder, and the grandmother who held the life estate and the father who held the fee, provided he outlived his mother, were both made parties, the rule being that it is sufficient to bring before the court those whose several interests combined make up the first estate of inheritance. It was, therefore, unnecessary to make appellees parties as they were only contingent remaindermen because they were bound by the representation of their father and grandmother.

P. G. Hermann and E. L. McDonald for appellant.

Hargis & Duncan and J. C. Strother & Gordon for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

In the year 1871 C. B. Parsons died in Jefferson county, Kentucky, leaving a will which was duly probated, by which he made devises to each of his seven children, H. B. Parsons, the father of these appellees, being one of them. He also by the 8th item of his will, made a bequest to his wife, Emily C. Parsons. We quote so much of this item as will aid in elucidating the question to be considered. After giving her the property for life, he used this language: "At the death of my wife, in her widowhood, all of my property reserved to her in this item, both real and personal, shall be sold by my executors, and the proceeds equally divided among my heirs. My wife shall have power for good and sufficient cause to disinherit from the interests embraced in this item, any of my children, but in the event of her doing so, the interest so retained shall not be devised or given to another, but shall be embraced in the general fund to be divided with the rest among my remaining heirs. Should my widow marry, it is my will that she shall have no power whatever to disinherit any one of my children so far as the property devised to her is concerned, but they shall take the property as my heirs under this will. She shall not have power to alienate, sell or encumber any of the real estate whatever, but shall keep the same intact. Should any of my children die and by heirs (I mean children) leaving issue (lawful) of their own, such issue shall stand in the place of their dead parent, and take in equal division among them what would have been under this my last will, their parent's share in my estate."

H. B. Parsons, one of testator's children, and father of these appellees, died in the year 1879. The widow of the testator died in the year 1898, and after her death the executor and heirs of C. B. Parsons brought an action in the chancery court to sell the real estate, so devised to his widow for life, for the purpose of a division of the proceeds among his heirs, as directed by the will. The appellees, as children of H. B. Parsons, were made defendants, and they answered and made their answer a cross petition against appellant P. G. Hermann, alleging that a certain parcel of real estate, situated in Louisville, Ky., on the corner of 83d and Bank streets, describing it, belonged to C. B. Parsons, and was by him devised to his widow for life under the 8th item above referred to in this opinion, and that their father, H. B. Parsons, died in the year 1879, and before his mother died, and by reason thereof, and under the provisions of the will of C. B. Parsons, they

took a fee-simple interest in this real estate, and that appellant P. G. Hermann was in the possession of this piece of property on the corner of 33d and Bank streets, and was setting up some claim thereto, and asked that he be summoned to answer, and they be adjudged the owners of one-seventh interest therein, and that their interests be sold and the proceeds be divided between them.

The appellant answered and alleged that he was the sole owner of this piece of real estate; that he derived his title in the following manner: That on the 12th day of September, 1874, there was instituted in the Chancery Court of Louisville an action by one T. Hensley against the widow of C. B. Parsons, and his seven children, all of whom were served with process, in which action Hensley sought to enforce a lien held by him upon the property described in that and in this action, which lien existed for the cost of improving 33d street. The court in that action enforced the lien, directed a sale of the property which was sold in satisfaction of the lien debt. Mary Parsons became the purchaser, and a deed to the property was made to her by the court's commissioner, and that he has obtained a fee simple title to this property from the vendees of Mary Parsons. The parties filed other pleadings which we deem unnecessary to explain. It is sufficient to say that the only question necessary to be determined on this appeal is, whether or not on the facts already stated, the appellant or appellees own this one-seventh interest in this lot on corner of 33d and Bank streets. It is agreed that these appellees were not parties to the Hensley suit, but that their father, H. B. Parsons, and his mother, the widow of C. B. Parsons, were parties to that action.

It is contended by the appellees, and they agreed with them, that they had a remainder interest in this property under the will of their grandfather, and before they could be deprived of their interest in this property, it was necessary that they should have been made parties to that action, and as they were not parties thereto they still owned their interest. We are of the opinion that the lower court erred.

These appellees, under this will, merely held contingent remainder interests. Their grandmother held the life estate, and their father the fee subject to be defeated by his death before his mother's death. The general rule is that it is sufficient to bring before the court the persons whose several interests combined make up the first estate of inheritance. As these appellees' grandmother and their father were parties to that action, and they owned together the first estate under the will at that time, it was unnecessary to have made appellees parties as they were only contingent remaindermen, and were bound by representation. (Calvert on Parties, page 251; Freeman on Judgments, section 172.)

The reason for this rule is stated in *Faulkner v. Davis*, 18 Grattan, 690, where the court said: "This rule of representation often applies to living persons who are allowed to be made parties by representation, for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self interest and affection to make such defense, and they, therefore, consider it unnecessary to make such persons parties, and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them."

Their father, who held the first estate subject to the life estate of his mother, was a party, he had a motive of self interest and affection to cause him to make defense. We have not been able to find a case in point, decided by this court, but there are several cases which appear to recognize the correctness of the rule stated. A distinction has been pointed out, however, in Kentucky, between cases where contingent remaindermen's rights are affected by a judgment obtained by one in privity with his estate, and by a stranger to the instrument by which such contingent remainder has been created. This distinction has been clearly pointed out in the case of *Johnson v. Jacob*, 11 Bush, 646. In that case, the court said: "It has frequently been held that a stranger to the instrument, by which contingent limitations upon the title to real property are created, may, by a judgment regularly obtained against the life tenant in possession, bar the contingent remaindermen. The reason for this rule is obvious. If such was not the rule, the deed or will of a grantor or testator might so limit the title passed as to leave the holder of an outstanding and paramount title without remedy, because of his not being able, until after the happening of some remote event, to ascertain the persons against whom to institute his action. * * * Our attention has been particularly called to the case of *Gifford v. Hart*, 18 Grattan, 684. In each of these cases the complaint was a stranger to the title under and through which the contingent remaindermen claimed title."

In the case of *Fritsch v. Klausing*, 11 Ky. Law Rep., 790, the court said: "All the parties having a vested interest were represented and had their day in court. The sale was made and A. S. Klausing became the purchaser, and we presume complied with the terms of the sale. It was not necessary to make those who might be heirs of Anderson, parties to the action. Their interests, if any they had, were of so remote a character as not to be estimated or defined." (19 Ky. Law Rep., 1771; 17 B. Mon., 374; 20 Ky. Law Rep., 879.)

T. Hensley, who enforced this improvement lien on this lot, was a stranger to the instrument or will by which the contingent limitations upon the title to this real estate were created, and by reason of his judgment regularly obtained against the life tenant in possession and H. B. Parsons who held the first estate in remainder. Consequently under the authorities referred to, we are constrained to hold that appellees have no interest in the lot described.

Therefore, the judgment of the lower court is reversed and cause is remanded for further proceedings consistent with this opinion.

WATTS v. NATIONAL CASH REGISTER CO.

(Filed January 8, 1904—Not to be reported.)

1. Conditional sales—Appellee contracted to sell appellant a cash register conditioned upon a writing that if after thirty days appellant should decide it was not the machine for his business he should be permitted to exchange it for another, or ship it back to appellee. Appellant, after the expiration of the thirty days, wrote appellee stating that "the register was not satisfactory to him," but did not offer to exchange it for another, nor offer to ship it back, but merely asked appellee what he should do with it. He used the

register for six months. Upon a suit by appellee on the contract an instruction by the trial court telling the jury "that it was appellant's duty, after thirty days trial, if he decided that it was not the machine for his business, to, within a reasonable time, notify the vendor company that the machine was not suitable for his business, and demand an exchange for another register, or to ship that one back to said company, and that if he failed after a reasonable length of time to do either of these things, they must find for the company," was proper.

2. Same—"Where an article is sold on trial, the sale is not complete until approval is given, either expressly or by implication," and the sale becomes absolute if it is retained an unreasonable length of time.

Montgomery & Lee for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee contracted to sell to appellant one of its cash registering machines for \$325, payable in installments. The contract was reduced to writing, and signed by appellant, but appellee's agent, who negotiated the sale, gave to appellant at the same time the following writing, which we hold constituted a part of the contract between the parties: "In consideration of the contract given us to-day, we hereby agree that should you, after thirty days use of the register, decide that it is not the machine for your business, to allow you to exchange same for any other register we make, or ship the register back to us, thereby closing the account in full."

The register was shipped to appellant, and received by him. The thirty days' trial expired about the 1st of July. On the 12th of July appellant wrote a letter to appellees at their principal office at Dayton, Ohio, stating that the register was not satisfactory to him, but he did not offer to exchange it for another, nor did he ship the register back to them. He merely asked appellee what he should do with it. Appellee responded that they would hold him to the sale, evidenced by the written contract, which he had signed and delivered to them. Appellant retained possession of the machine for about six months, and continued to use it as a cash drawer, but says he did not use it "for the purpose for which it was made."

The trial court, instructing the jury, told them that it was appellants' duty, after thirty days' trial, if he decided that it was not the machine for his business, to, within a reasonable time, notify the vendor company that the machine was not suitable for his business, and to demand an exchange for another register, or to ship that one back to said company, and that if he failed after a reasonable length of time to do either of these things, they must find for the company. We are of opinion that this instruction was right, and that the verdict of the jury finding against appellant was authorized by the evidence and by the law.

Where an article is sold on trial, the sale is not complete until approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed by the agreement for trial. If the goods should be retained for an unreasonable length of time after the period allowed for trial, the sale becomes absolute. (Benjamin on Sales, 595-6; McCormick Harvesting Machine Co. v. Arnold, 25 Ky. Law Rep., 662.) It was appel-

lant's duty, if he would reject the conditional sale of the register to him, to have returned it to appellee as by the terms of the contract it was stipulated that he might do. Having failed for an unreasonable length of time to do so, although the company was insisting that he was bound to take the machine anyhow, he impliedly ratified the sale under the contract.

Therefore, the judgment is affirmed, with damages.

ROGERS v. COSTIGAN.

(Filed January 8, 1904—Not to be reported.)

Decedent's estate—claims against—Evidence—Plea of non est factum—Where appellant claims that she loaned her deceased uncle \$600, taking his promissory note, it appearing from the evidence that the appellant had saved up that amount of money, that the uncle owed that much at the time of the loan with which to pay an assessment for street improvements, that appellant was seen to deliver the money to the uncle, that he had attempted to borrow the money from another for the same purpose and had failed, and where several witnesses, though not experts, testified that they were acquainted with the handwriting of deceased and that in their opinion the note was written by him; it was error for the trial court to reject the claim in an action against the estate for its payment, such evidence supporting its genuineness.

H. M. Dumont for appellant.

E. W. Hawkins, Jr., for W. J. Costigan.

Thos. Healey for executrix.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Delia Rogers, claims that on January 13, 1897, she loaned to Phelim Rogers \$600, and that he on that date executed to her the following promissory note:

"I promise to pay to the order of Della Rogers \$600 at any time as she wants to force her claim. Signed in duplicate. January 13, 1897.

"PHELM ROGERS."

The maker of the note was appellant's uncle, and lived with her and her sister for several years just before his death. He left their home and took up his residence elsewhere a few months before his death. A few days before his death, appellant sued him upon the note, but he died before answering the suit. In the suit brought by a creditor to settle Phelim Rogers' estate, appellant filed the note as a claim. The defense of the executrix is that the note is not the act and deed of Phelim Rogers, because it is alleged that it has been raised from \$60 to \$600 by the unauthorized addition of the figure naught to the \$60 after it was signed and delivered by Phelim. The commissioner, upon the proof heard before him, reported, allowing the claim. Upon the trial of the exceptions the circuit court rejected the claim.

The only question is, whether the action of the circuit court is sustained by the evidence. It is shown that appellant, Delia Rogers, was a single woman, and has worked for a number of years in manufacturing establish-

ments in Cincinnati, receiving \$8 or \$9 a week. Her sister, with whom she lives, is also a single woman, and works as an embosser, receiving about the same wages. For a time she also conducted a retail grocery in Newport. They each testify that appellant Della had saved up through a number of years more than \$600; that Phelim Rogers, their uncle, who owned several small pieces of real estate, worth probably \$2,000 or \$3,000, sought to borrow \$600 from appellant with which to pay an assessment for street improvement he was owing to the city of Newport. They each testify that the money was in the house, and the sister, Kate Rogers, testifies that she delivered the cash, being currency and gold coin, to her sister Della, and saw Della deliver it to Phelim Rogers, and saw Phelim execute the note in question. Another witness, who had married a niece of Phelim Rogers, testifies that on several occasions the decedent had told him that he had borrowed \$600 from Della Rogers and had executed his note for it. Another witness, a working girl, testified that she had some money saved up, and that Phelim Rogers, about the time of the execution of this note, applied to her to borrow several hundred dollars to pay a debt that he was owing the city for street improvements. A sister of this last witness testified that she heard Phelim Rogers tell her father shortly after the conversation last referred to, that he had borrowed the money he needed from Della Rogers; that he had borrowed several hundred dollars. Another witness, a young man, testified that he had gone to the house of Della Rogers and her sister to pay a call, when Phelim Rogers drove him away, stating that he was satisfied that this caller had "designs upon his \$600 note that Della held." It was shown that Phelim Rogers at that time did owe the city of Newport about \$600 for street improvement assessment, but that he did not pay it, and it was not paid at his death. Several of these witnesses, who, however, do not qualify themselves as experts, say that in their opinion the handwriting of the note is Phelim Rogers' handwriting, that they are acquainted with it, and that all of it is in his handwriting.

The only witness against appellant was an expert in handwriting, who testified that, in his opinion, the last cipher to the \$600 in the note had been added by a different pen in somewhat different ink, and by a person making a different stroke from the other figures. This was all the evidence. We are of the opinion that the trial court erred in rejecting the claim. The preponderance of the evidence clearly supports the genuineness of the note and of the indebtedness of its maker to appellant in the sum of \$600.

The judgment is reversed and cause remanded, with directions to enter a judgment in favor of appellant against Phelim Rogers' executrix for the amount of the note sued on and its interest.

PENNSYLVANIA FIRE INSURANCE CO. v. YOUNG, &c.

(Filed January 8, 1904—Not to be reported.)

1. Insurance—Invoice—Proof of loss—In an action on a policy of insurance where a default judgment was rendered, it was not error to set the judgment aside during the term and after the expiration of three days there being no question of fact nor a verdict of a jury and, therefore, sections 340 and 342 of the Civil Code do not apply, the question being governed by the com-

mon-law rule, by which courts have control over their judgments during the term at which they are rendered.

2. Same—Instructions—Failure of the trial court to instruct the jury as to the plea that appellee failed to take an invoice of its stock can not be complained of where appellant offered no proof in support of this allegation.

H. J. Webb for appellant.

D. G. Park for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted in the Graves Circuit Court on February 16, 1903, by appellees C. D. Young & Co. against appellant, to recover losses sustained by fire on an insurance policy issued June 18, 1902, on their stock of goods and fixtures at Boss Station in Graves county.

A total loss was alleged and they sought to recover \$700 on the stock and \$100 on fixtures, the full amount of the policy, \$800. The fire occurred November 10, 1902, and no proof of loss was ever furnished, though immediate notice in writing of the loss was given.

In the petition, after setting forth the terms and amount of the policy, and the loss and value of the property, it was alleged: "That by the terms of the policy the defendant (appellant) agreed to pay to them the full amount of insurance on the stock of merchandise, furniture and fixtures, aggregating \$800, but it has failed and refused, and still refuses, to pay plaintiff any part of such loss, and has denied and still denies any liability whatever on such policy; that the defendant company was immediately notified by plaintiffs in writing of a loss by fire, and defendant, through its agents, induced plaintiffs to believe an adjuster would be sent to adjust the loss from time to time, until the sixty days had expired for making proof of loss within the terms of the policy; but has since failed and refused to send an adjuster to settle or adjust the loss in any manner, and denies liability as aforesaid, and refuses to pay any part of such loss."

Process was served on the insurance commissioner, and on March 3, 1903, judgment was rendered by default against appellant for \$806, with interest from that date, and the costs of the action. On March 10, 1903, and during the same term of court at which the default judgment was rendered, the appellant, by its attorney, moved the court to set aside this judgment and permit it to file its answer to the petition of appellee. The court heard evidence on the trial of this motion and set aside the default judgment, and permitted appellant to file its answer, to which appellees excepted. This is the first question to be settled on this appeal.

This was not a case in which a motion to set aside a judgment should have been made within three days after the judgment was rendered. There was no issue of fact tried and decided by the court, nor a verdict of a jury, as a basis for this judgment, and, therefore, sections 340 and 342 of the Civil Code do not apply, and this question is governed by the common-law rule, by which courts have control over their judgments during the term at which they are rendered, and motions to set aside such judgments may be made at any time during the term at which they are rendered. (*Rigsburger v. Bailey*, 103 Ky., 809.) It was within the power and discretion of the court.

upon the facts as shown in the record, to set aside the judgment and permit appellant to file its answer, and in our opinion the lower court did not abuse its discretion to such an extent as would authorize this court to interfere.

Appellant, in its answer, filed March 16, 1903, did not controvert the allegations of appellees' petition as to proof of loss and denial of any liability whatever and its refusal to pay or adjust the loss, but alleged: "That it was part of the contract of insurance that plaintiff, being the assured under the policy, would take an inventory of stock on hand at least once in each calendar year, and unless such inventory had been taken within twelve months prior to the date of the policy, one should be taken in detail within thirty days thereof, or the policy should then be null and void, and upon demand of the assured any unearned premium from that date should be returned; that defendant denies that such inventory was taken by the plaintiffs at the time of the issuance of the policy, and none was taken within thirty days after the issuance thereof, which time it says expired before the time of the alleged destruction of plaintiff's property, and that by reason of plaintiffs' failure to comply with this condition of the policy, that the policy was forfeited and became null and void, and no action can be maintained thereon."

It was also denied by the answer that the stock insured was of the value alleged in the petition, but averred that \$300 was its full value at the time it was destroyed by fire, and that the appellant, if liable for any part of the loss, was only responsible for three-fourths of the value of this stock, to wit, \$225. Appellees filed their reply to this answer, to which appellant filed a rejoinder.

On the 1st day of April, 1903, on the day this case was tried, but before entering the trial, appellant presented and offered to file an amended answer, to the filing of which the court sustained an objection, and refused to allow it to be filed, to which appellant excepted. A trial was had, and the jury returned a verdict for appellee, for the sum of \$750. The appellant filed reasons and moved the court to grant it a new trial, which the court refused. The court gave to the jury only one instruction, which, in substance, is as follows: To find for the appellee three-fourths of what they might believe from the evidence was the reasonable cash value of their stock of goods and of their fixtures destroyed by fire on the 10th day of November, 1902, not to exceed \$700 for stock and \$100 for fixtures, and in no event more than \$800. The appellant complains because the court refused to instruct on its plea that appellees failed to take an invoice of its stock, as required by its policy. Even though this had been a defense to the action, which it is not necessary to here decide, the court was right in this, as appellant failed to introduce any proof to sustain this allegation; but, on the other hand, appellee proved that the invoice was taken, and produced it on the trial, with the original bills of all purchases of goods made by them after the date of the policy, together with a report of the daily sales made by the firm. With this uncontradicted proof, and the condition of the pleadings, the court had nothing to submit to the jury except the value of the property at the time it was destroyed, and upon this question the testimony sustained the verdict of the jury.

The only remaining question to be determined is: Did the court err in refusing to allow appellant to file its amended answer in which it denied that

it had waived by any act the proof of loss as required by the contract, or that it had denied its liability thereon, and also alleged that there was a provision in the policy as follows: "This entire policy, unless otherwise provided by agreement endorsed thereon, or added thereto, shall be void if the interest of the insured be other than unconditional and sole ownership; or if the said insurance be personal property, and be or become encumbered by chattel mortgage," and then averred that appellee C. D. Young on the 27th day of June, 1902, the day before the property was insured, executed and delivered a mortgage to Beulah Young on his half interest in the stock of goods and fixtures, to secure her in the payment of \$300 owing by him to her, and then used this language: "Defendant says that in negotiating and procuring said policy of insurance the plaintiff wrongfully and fraudulently concealed the existence of said mortgage from it and from its agent from whom it was procured; and it nor its agent did not know the existence of said encumbrance; that the same was material to the risk, and that it would not have issued the policy if it had known of the encumbrance."

With reference to the first proposition contained in the amended answer, it is sufficient to say, that by its original answer it admitted a waiver of proof of loss by its denial of any liability whatever on the policy, and a refusal to adjust or pay the loss in any manner, before the action was instituted, and in addition to these admissions, it denied any liability whatever on the policy, and insisted on the policy being void for the alleged failure to comply with the "inventory clause," and again in its proposed amended answer it again asserts that it is not liable for any part of the sum claimed by reason of the destruction of this property for the additional reason, as it claims, that C. D. Young's interest in the property was mortgaged to secure \$300.

We are of the opinion that under the facts of this case there was a waiver of the preliminary proofs of loss.

In the case of Home Insurance Co. v. Gaddis, 3 Ky. Law Rep., 161, the court said: "By the terms of the policy the assured could not maintain action thereon without making the required preliminary proofs, but when the company deny their liability and refuse to pay upon other grounds which would not have been removed by such proofs, then the proofs would have been vain and futile, and, therefore, need not be made."

In the case of Insurance Co. v. Monroe Jefferson, &c., 101 Ky., 16, the court in discussing a demurrer to a petition on a fire policy which failed to allege that the preliminary proofs had been made, or to state any reason why they had not been made, said: "And again we must say that good pleading required such averment or a statement of facts showing a waiver by the company of the notice and proof required by the terms of the policy. The company, however, did not stand by its demurrer, and looking to the answer we find that its real defense to the action, besides the issue as to value, is that the existence of certain mortgages on the property was concealed from the company and its agents, by reason of which the policy is claimed to be void from the beginning. The question of notice and proof of loss, therefore, becomes unimportant, as the giving of the notice and the production of the proof must have been unavailing to the policy holders in the face of the contention that the policy was void in any event."

The lower court had discretion in the matter of allowing the amended an-

swer to be filed. The only question to be determined is, did the lower court abuse the discretion to such an extent as this court ought to interfere. We think not. The fire occurred November 10, 1902; the suit was brought February 16, 1903; summons served and default judgment rendered March 3, 1903. On motion of defendant this judgment was set aside March 16, and on that day it filed its answer, alleging the policy was void because assured failed to comply with the "invoice clause." On that day appellee filed reply, and on the 26th of March filed invoices and bills of purchases of goods bought after the date of the policy. On the 1st of April, when the case was called for trial, then this amended answer was offered. The only reason presented why it was not offered before, was as follows: "Defendant would beg leave to amend its original answer herein and say that the original answer in this case was written by their attorney who was not at the time in possession of all the facts constituting their defense herein."

There was no statement made why the attorney was not in possession of all the facts at the time; whether it was by mistake, or oversight, or inadvertence. From the language used, the court had reason to believe that appellant at the time of the filing of its original answer knew of the existence of the mortgage, and intentionally withheld this fact from its attorney, and determined to base its defense alone on the failure of the assured to comply with the "invoice clause" of the policy, and it was developed on the trial that appellant's agents knew of this mortgage months before this suit was instituted.

For this reason the judgment is affirmed.

LEWIS, &c. v. SIZEMORE, &c.

(Filed January 8, 1903—Not to be reported.)

1. Title to land—Bastards—In this action appellants attack the title of appellees to a tract of land on the alleged ground that their vendor was a bastard and, therefore, incapable of inheriting from his father who derived title to the land by a patent from the Commonwealth. Held—That in the absence of strong proof to the contrary the presumption must prevail after the lapse of many years that appellees' vendor was of legitimate birth.

2. Legitimacy of children—The law presumes the legitimacy of children and the burden of overthrowing that presumption rests upon the party claiming the contrary.

3. Title bond—Unrecorded Instruments—Where a title bond executed by the father to the son, though not recorded, was insufficient to pass the legal title, yet it invested him with such an equitable title as to render a recorded deed to his vendees, which was recorded before the death of his father, valid, because it was constructive notice to all parties of the equitable title conferred by the bond.

Hazelrigg & Chenault for appellants.

T. G. Lewis, D. B. Logan and T. L. Edelen for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Settle.

Appellants sued appellees, and obtained an attachment against them, for

the value of timber cut upon a tract of land lying on the Puncheon Camp Branch of Rook House creek, on the waters of the Middle Fork of Kentucky river, of which appellants claim to be the owners.

The land was patented by the Commonwealth to Edward Sizemore, December 22, 1864, upon a survey made in September, 1863. Appellant claims title under a deed from the collateral heirs of the patentee, Edward Sizemore. The appellees also claim to own the land under a deed from John Sizemore, alias "Blue Buck," who was the only child of Edward Sizemore.

It is, however, contended by the appellants that "Blue Buck" was a bastard son of Edward Sizemore, and, therefore, incapable of inheriting from the father. This is denied by appellees. It is claimed by appellees, and shown by abundant evidence, that Edward Sizemore about the beginning of the civil war executed to his son, "Blue Buck," a title bond for the land in controversy, having sold it to him for a gun and helper. The bond was destroyed when "Blue Buck's" house was burned some years later.

In 1876, Blue Buck conveyed the land by deed to Wm. Sizemore, Edward Gibson and Thomas Gibson, and it is not denied that this deed was regularly recorded. Appellees hold under it, and they insist that this recorded deed gave the appellants constructive notice of its existence, and of appellees' claim of title, before and at the time they (appellants) attempted to take title of the collateral heirs. It is not denied that "Blue Buck" was a son and the only child of Edward Sizemore. The only controversy on this point is as to whether or not he was a bastard. On this point the witnesses are many, and the evidence conflicting. Several persons testified that Edward Sizemore was never married to the "Muncie" woman, who was the mother of "Blue Buck," and that his father said he was a bastard; and others that the parents were married, and that the father said the son was his legitimate child. The law presumes the legitimacy of all children, and the burden of overthrowing that presumption rests upon the party claiming the contrary.

We find the law on this question thus clearly stated by Judge Robertson in *Strode v. McGowan's Heirs*, 2 Bush, 621: "For, obvious reasons, the law presumes that every child in a christian country is *prima facie* the offspring of a lawful, rather than a meretricious, union of the parents, and that consequently, the mother, either by actual marriage or by cohabitation and recognition, was the lawful wife of the father, and in the absence of any negative evidence, no supplemental proof legal of marriage will be necessary to legitimate the offspring. Mere rumor is insufficient to bastardize issue, or require positive proof of actual marriage. If the presumption be false, repellant facts may be generally established; and if such fact can not be clearly proved, the presumption from mere filiation should stand."

This case illustrates the propriety of the foregoing rule. The son, the legitimacy of whose birth is here attacked, was born about 1821. There are few persons yet living who would be able to testify of their own knowledge as to the facts connected with his birth or parentage. Mere rumor should not be allowed, therefore, to stamp his birth with illegitimacy. We are of the opinion that the presumption of the legitimacy of "Blue Buck's" birth, supported as it is by long lapse of time and some slight evidence from the lips of living witnesses, ought to be allowed to prevail as against the unsatisfactory evidence produced by the appellants to the contrary.

In addition, it may be said that though the title bond executed to "Blue Buck" by his father, being an unrecordable instrument, was insufficient to pass the legal title to the land, it did invest him with an equitable right or title, and by the deed which he made conveying the land to his vendees, which was duly recorded, before the death of Edward Sizemore, the vendor in the title bond, the alleged collateral heirs of the latter were constructively notified of the equitable title conferred by the bond, so even if "Blue Buck" were only a bastard, it would nevertheless be right to let the equitable title of the appellees derived from his deed, prevail as against the claim of title attempted to be asserted by appellants.

As the judgment of the lower court is in accord with the views herein expressed the same is affirmed.

SCOTT'S ADM'R v. SCOTT, &c.

(Filed January 8, 1904—Not to be reported.)

1. Marriage—Validity of—Presumption—Where upon the death of S., who left an insurance policy payable to this wife, and a former wife set up a claim to it, the fact that the decedent had been separated from the former wife for fifteen years, that she lived near him and the wife by a subsequent marriage, permitted her children to visit them and yet was never known to deny the fact that he was divorced from her, or to make complaint of his subsequent marriage, are such facts as create a strong presumption that the last marriage was legal.

2. Same—Burden of proof—Where a marriage is shown in fact the law presumes, especially after the lapse of many years, in favor of its legality, and the burden is upon the party objecting to its validity to prove that it is not valid.

3. Same—Presumptions—The law supports the presumption of the legal dissolution of the first marriage because of its concern for the legitimacy of the offspring, and for the integrity of the family and the policy that favors the capacity of inheritance.

4. Insurance—Wagering—Where a policy of insurance was voluntarily taken by the husband for the benefit of the wife who was dependent upon him for a support and whose every interest would be advanced by his continuing to live, the contract can not be regarded as within the rule which prohibits the wagering of policies, she having an insurable interest in his life.

A. A. Hagan for appellant.

Wm. Krieger and Burwell K. Marshall for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

John M. Scott died intestate on the 14th day of May, 1902, in Louisville, Ky., his place of residence. Afterwards, on August 22, 1902, the appellant, William A. Earl, was by an order of the Jefferson County Court appointed administrator of the estate of the decedent. Before his death, the Mutual Life Insurance Co. of Kentucky issued to the decedent a policy of insurance, No. 24,024, on his life for \$1,000, in consideration of \$49.40, then paid, and a like sum to be paid by the insured on or before the 6th day of January in each year dur-

ing the continuance of the policy. The amount of the insurance being payable upon the death of the insured to his "wife, Nancy J. Scott," after receipt by the company of the necessary proofs thereof.

It appears from the record that John M. Scott was married three times. The first marriage was with Florilda Waldron, in Louisville, on October 12, 1869. Five children were born of this marriage, three of whom are living, and of full age. Scott and his first wife lived together for about eighteen years, then they separated, and continued to live apart until his death. The second marriage of Scott occurred in Cartersville, Ga., with Capernia Willis, formerly of Barren county, Kentucky. She died about fifteen months later, leaving one child, who was reared by, and yet lives with, the third wife. The third marriage was with Nancy J. Willis, who is yet living. This marriage occurred in Barren county, Kentucky, in July, 1860. The third wife was a sister of the second, and she continued to live with the decedent as his wife until his death. One child was born of the last marriage. He is still living, and is about eleven years of age.

The third wife, known as Nancy J. Scott, is the beneficiary named in the policy, and was found to be in possession of the policy after the death of the insured. Proofs of the death of the insured were furnished the insurance company by the appellee, Nancy J. Scott, but as she, Florilda Scott, the first wife, and W. A. Earl, administrator of the estate of John M. Scott, the deceased, were all claimants of the amount due under the policy, this action was instituted by the company to obtain of the chancellor advice, and direction as to the disposition to be made of the proceeds of the policy, and to this end all three of the claimants were made defendants, and called upon to assert their representative claims, which was done by proper pleadings on the part of each of them. In the meantime, by permission of the court, and agreement of the parties, the amount of the policy was paid into court by the insurance company, and an order entered discharging it from further liability. The judgment rendered by the chancellor gave the proceeds of the policy to the appellee, Nancy J. Scott, and from that judgment the appellants, Earl, administrator, and Florilda Scott have appealed.

It is insisted for the administrator that the marriage of his decedent with the appellee, Nancy J. Scott, was invalid, and that by reason thereof she had no insurable interest in his life, for which reason the insurance money should be received by him as assets belonging to the decedent's estate. The appellant, Florilda Scott, also relied upon the alleged invalidity of the decedent's marriage with the appellee, Nancy J. Scott, and insists that she (appellant) was never divorced from the decedent, and that she was, therefore, his only lawful wife at the time of his death, which entitles her to the insurance due under the policy. Upon the other hand, the appellee, Nancy J. Scott, contends that the copy of the marriage license, and the certificate of the minister, showing the solemnization of the rights of matrimony between her and the decedent presented by the record, furnish sufficient proof of the validity of that marriage, added to which is the further fact that she and the decedent continuously lived together as husband and wife from the date of their marriage to the time of his death.

We are of opinion that the facts appearing in the record create the legal presumption that the decedent was divorced from the first wife, the appel-

lant, Florilda Scott, as they conclusively show that he separated from her more than fifteen years before his death, and never lived with her again, and further that he left this State avowedly to live in another State long enough to get a divorce. Also that soon after the separation, and following his return to this State after a long absence, he married the second wife, and, after her death, the third, with each of whom he lived in Louisville, his place of residence, for more than thirty years, holding out to the world each in turn as his wife, all with the knowledge, and in the daily presence, so to speak, of the first wife, Florilda Scott, who was also a resident of Louisville during that time, and lived near enough to the second and third wives to meet the second before her death, and to see the third often and at any time, yet she was never known to deny that he had been divorced from her, or to make complaint of his marriage to either of them. In addition to what has been mentioned, the appellant, Florilda, permitted two of her daughters, young ladies, to live some time with their father and his third wife, to which it is not likely that she would have consented, if the latter were living in adultery. We think the strong presumption thus created as to the legality of the last marriage of the decedent shifted to appellants the burden of establishing the fact of its illegality, and in our opinion this presumption was not overthrown by the mere denial of the first wife, wholly unsupported, that the deceased was not divorced from her.

It is the law in this State that "when a marriage is shown in fact, the law raises a strong presumption, especially after the lapse of many years, in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid. This presumption is not conclusive, but is sufficient to shift the burden of proof." (*Howton v. Gilpin*, 24 Ky. Law Rep., 631; *Bishop's Marriage and Divorce*, last edition, sections 956-1145.)

"It will be presumed that the disability of a prior marriage has been removed by a divorce before one of the parties had contracted a second marriage." (*Enc. Law*, volume 19, 2d edition, 1208.)

In *Thompson v. Commonwealth*, 25 Ky. Law Rep. (yet unpublished), this court, in discussing the doctrine under consideration, said: "Appellant objected to the admission of parol evidence of the divorce on the ground that there was necessarily a record of the judgment of divorce, and that being the best evidence, must be produced. This is the general rule, and in a proceeding involving directly the legitimacy of the second marriage, it would, doubtless, be applied. But where the main inquiry is not whether the witness had or had not been divorced, that question arose collaterally. The law raises a presumption based upon existing conditions. That is, it will be presumed, nothing to the contrary appearing, that a second marriage of a person has been preceded by a lawful dissolution of the first one. This is partly because of the law's favorite presumption of innocence, by which it is always an act or state of being to be lawful rather than criminal. There is another policy of the law no less favored than the one first mentioned, which supports the presumption of the legal dissolution of the first marriage; which is the concern of the law for the legitimacy of the offspring of men and women, for the integrity of the family, its honor, and a policy that favors the capacity of inheritance.

"The various rules of law which fix the time for presuming a record, at

20, 30 or 40 years after it must have been made, are in reason only partially applicable to divorce records. They depend simply on lapse of time and the losses which a series of years may bring. But the law's favorite presumption of innocence, and its still more favorite pressing, even of mere possibilities, into the support of marriage, are severally forces greater than the other; so in legal principle there should be no specific waiting for years to pass by before a divorce may be presumed. A judicious and judicial discretion, varying with the circumstances, will better give form to this presumption than any iron rule which it would be possible for a text writer to suggest in advance."

In view of the state of the record, we think the chancellor might well have bottomed his judgment upon the doctrine announced by the foregoing authorities. But independent of the legal presumption as to the validity of the last marriage of John M. Scott, we are not disposed to dissent from the conclusion of the chancellor that the appellee, Nancy J. Scott, had under the facts manifested by the record an insurable interest in his life. As said in *Bayse v. Adams*, 81 Ky., 375: "It is not easy to define with precision what will, in all cases, constitute an insurable interest, so as to take the contract out of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. * * * In all cases there must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary, or of blood, or affinity, to expect some benefit or advantage from the continuance of the life of the assured; otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."

In *Joyce on Insurance*, section 1055, it is said: "Although it is held that by the term wife, is meant a lawful wife, yet a woman has an insurable interest in the life of a man with whom she has for years been living as his wife, notwithstanding there has been no marriage ceremony. Where he has openly and notoriously recognized her as his wife, and although she is named in the policy by another name than that of his wife; and substantially the same rule has been made in Georgia, and there is nothing against public policy in affecting such an insurance."

In *Eq. Life Ass. v. Patterson*, 41 Ga., 322, the wife, Catherine A. Patterson, had a husband (Talbird) living, from whom she had not been divorced at the time of her marriage to Patterson. One of the defenses to suit upon a policy upon Patterson's life in favor of his alleged wife, Catherine, was that she had no insurable interest in his life, by reason of her first marriage not having been annulled at the time of her marriage to Patterson. The court held: "But though such a marriage is void, and may be so treated in any court where the facts are made apparent, we do not see that it follows that a policy of insurance effected by the husband on his own life in the wife's name and for her benefit is void. We do not think such a policy comes within the reason of the law prohibiting gaming policies, nor that it

is open to further objection that it offers inducement to crime. In this case, though the marriage was illegal, yet in fact the woman had an interest and a deep interest in the life of the husband. He treated her as his wife, he supported her as such, and she was dependent upon him for support as such. It was the husband in fact who effected this policy. It was his only method of extending to this woman his assistance and protection after he should himself be dead. Here is no gaming, since the very person whose life is insured is the actor in the transaction. Here too as to the temptation to crime offered to the beneficiary of the policy it would seem that the person whose life is insured is himself an actor in the matter, the amount of temptation held out to others to take his life may, as a general rule, at least, be left to his discretion."

In commenting upon a similar state of case, it was said by the Court of Appeals of New York in *Story v. Williamsburg Masonic Mut. Benefit Ass'n*, 95 N. Y., 474: "Nor did the appropriation of the fund for her benefit contravene the policy or objects of the association. The plaintiff for sixteen years lived with Story, believing herself to be his lawful wife. They had children depending upon them for support. It was a case where it was the duty of Story to provide for them, and the provision he made was his insurance, which was in entire accord with the object of the defendant organization."

The well considered opinion of the chancellor truly says "the beneficiary, Nancy J. Scott, her child and step child (the son of her husband by second marriage) were absolutely dependent upon the decedent for support." It is apparent from the record that she in good faith married the decedent in the belief that he had been divorced from the first wife. Indeed, it further appears that she was never informed that there was even a doubt of the legality of her own marriage until after the death of her husband, although the first wife, Florilda, and her daughters, had every opportunity to have advised her of it long before his death, if it were true.

The decedent seemed to have voluntarily secured the insurance for her benefit. Under the facts in this case, she could have no reason for desiring his death; upon the contrary, her every interest would have been advanced by his continuing to live. The contract can not, therefore, be regarded as within the rule against wagering policies; and as, in our opinion, it would be inequitable and unjust to deprive her of the amount in controversy, the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. WATSON'S ADM'R.

(Filed January 19, 1904.)

1. Railroads—Damages—Where a boy nine years old was killed by a rick of staves which were knocked over upon him by a car that had been derailed, the boy being a licensee on the stove yard beyond the line of the railroad's right of way, the force that killed the boy came from the car and the company is liable.

2. Same—Evidence—In an action for damages for the death of a boy by a railroad, it was error to permit plaintiff to prove that a witness said to the engineer soon after the accident, "It looks like the engine could have been stopped before that," and that the engineer said, "Well, dam'n it, that

won't bring the boy back," because what the witness thought was immaterial and the answer of the engineer was a statement of no fact and was incompetent.

8. Excessive damage—Where the verdict is palpably excessive it will be set aside, and a new trial awarded.

Pirtle & Trabue and J. M. Dickenson for appellant.

Taylor, Gilbert & Lucas and Hazelrigg & Chenault for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

Harry Watson, a little boy nine years old, was killed in Paducah by a rick of staves which were knocked over upon him by a car of the Illinois Central R. R. Co., which became derailed and ran against the staves. This suit was filed by his personal representative to recover for his death on the ground that it was caused by the negligence of the defendant. The track of the railroad was curved; the outer rail was not raised as it should have been to keep the outer wheel from jumping off the track as it passed around the curve. The track was also wavy, as stated by the witnesses, that is it was not level and there were high and low places in it. The train was backing and the evidence for the plaintiff tended to show that it was running as fast as twenty miles an hour. It was ninety-five feet from the point where the boy was hurt to the point where the car left the track. The ground was plowed up by the wheels about forty feet, the wheels sinking in the ground about half way to the boxing. The staves were ricked in rows leaving an isle every eight or ten feet. There were five piles of staves. The child was in between the second and third. Three ricks were knocked over; the weight of the staves killed him. The child was in the yard of the Paducah Coopersage Co., but some of the staves were ricked up beyond the line of its yard, and over on the railroad's right of way. The car when derailed came in contact with the fifth rick of staves knocking it over on the fourth, the fourth over on the third, and it over on the child, who was a licensee on the grounds of the cooperage company. He had been employed there, but at the time of his injury was playing in the yard. He did not have steady work. The jury returned a verdict in favor of the plaintiff for \$18,000.

It is insisted for appellants that a peremptory instruction should have been given, because no duty was owed to the boy until his peril was discovered, and after it was discovered no amount of care could have saved him. The boy was rightfully on the yards of the cooperage company, and whether the staves were stacked out beyond the line of the right of way or not is immaterial for the purpose of this case, for if they were stacked over the line and extended upon the right of way, this was consented to by the railroad company or acquiesced in by it and its liability here is the same as if it had put the staves there itself. The right of way was only eighteen feet wide. It was incumbent on the defendant in operating so dangerous an instrumentality as a railroad train, to keep it under control and not allow it to leave the track and knock down structures on the lands of adjoining owners. The cooperage yard was a place where the presence of persons should have been anticipated, for people were regularly employed there working on

the staves and passing along the aisles between the ricks. It was within the limits of the city and it was incumbent on the company in handling so dangerous an instrumentality where the population is crowded to exercise proper care for the protection of human life. There was evidence sufficient to go to the jury as to the negligence of the company in the condition of the track and in the speed of the train. It was the duty of the company to build its track on the curve so that the cars could be safely operated on it with proper care. It was also its duty in backing these cars around the curves with the switching engine to move them at such a rate of speed as a due regard for the safety of others required. It is true it has been held that trespassers on the track at places where the presence of persons on the track should not be anticipated, can not recover for an injury received by them, unless it might have been avoided by proper care on the part of the defendant after their peril is discovered; but this rule only applies when the cars are running on the right of way. It has no application where they are negligently permitted to leave the right of way and trespass on another. And it has also been held that at places where the presence of persons on the track should be anticipated, ordinary care must be exercised to prevent injury to them and a recovery may be had if such care is not exercised and by reason of this they are injured. While the presence of the particular little boy was not to be anticipated between the ricks of staves, it was a place where the presence of persons and probable injury to them from the knocking down of the staves by reason of the running of the cars against them should have been anticipated. If the little boy standing where he was had been struck by the car itself, on elementary principles the defendant would be liable, for manifestly the company could not negligently run its cars on the property of the adjoining proprietor and commit a trespass on the person of another lawfully there without being responsible for the injury done him. The rule is elementary that he who negligently sets a force in motion is accountable for all its consequences directly flowing from it until exhausted. The force of the car was imparted to the fifth rick of staves and from it to the fourth, from it to the third and from it to the boy. The force that killed the boy came from the car and the defendant was liable therefor. (1 Bishop on Noncontract Law, section 48; Cooley on Torts, section 70.)

The injury in *Holland v. Sparks*, 93 Ga., 753, occurred under very different circumstances. The deceased was walking along the railroad track; he was on the right of way and at a place where those in charge of the train had no reason to expect any one; there was no evidence of negligence in the management of the train, except its speed and of that he could not complain. In *Dillon v. Connecticut River Railroad Co.*, 28 N. E., 399, the decedent was a trespasser on the right of way, and *Woolwine v. C. & O. R. R. Co.*, 39 W. Va., 329, the decedent was visiting an employe of the company on its right of way and where the presence of persons was not to be anticipated and was killed by the train leaving the track. None of these cases are, therefore, in point. The case of *Cumberland Telegraph, &c., Co. v. Martin's Adm'r*, 25 Ky. Law Rep., 787, is also relied on. But that case differs from this in that the wire there which caused the injury was in itself harmless, while the freight train rapidly moving backward was of itself danger-

ous. The death of the decedent was due there to the force that came from the clouds, while here it was due to the force that came from the car. This distinction was pointed out. In the response to the petition for rehearing in that case the court said: "He who handles an agency which is of itself dangerous to human life is responsible for injuries therefrom not caused by extraordinary natural occurrences or the interposition of strangers. But as to things which are not of themselves essentially instruments of danger the rule is different, and for them the negligent party is not responsible to strangers. If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented." (*Cumberland Telegraph, &c., Co. v. Martin's Adm'r*, — Ky. Law Rep., —.)

In the case before us the rapidly moving train was not only an instrument of danger, but at a point where the danger of the train leaving the track on the outside of the curve and the presence of others in the stove yard near by and injury to them should have been anticipated. The force which killed the boys came from the train and this force was projected beyond the right of way, there inflicting an injury for which had not death resulted an action of trespass would have lain at common law. The motion for a peremptory instruction was, therefore, properly refused.

The court erred in allowing the plaintiff to prove by Fred Collins that he said to the engineer about two minutes after the accident, "It looks like that engine could have been stopped before that," and that the engineer said, "Well, damn it, that won't bring the boy back." What Collins thought about the stopping of the engine was immaterial and the answer of the engineer was a statement of no fact, and was incompetent. The absence of a watchman from the crossing was immaterial as the deceased was not on the crossing and this had nothing to do with the injury. The fact that the cars got off the track now and then at other places was not competent as evidence for the plaintiff. There was sufficient evidence of gross negligence to submit the case to the jury, but we all concur in the conclusion that the verdict for \$18,000 is palpably excessive, and should be set aside. (*L. & N. R. R. Co. v. Creighton*, 106 Ky., 42; *Board of Internal Improvements v. Moore*, 33 Ky. Law Rep., 1885.)

Judgment reversed and cause remanded for a new trial.

Whole court sitting.

BISHOP v. ILLINOIS CENTRAL R. R. Co.

(Filed January 12, 1904—Not to be reported.)

1. Railroads—Conflict of evidence—Damages—Where appellant, a newspaper man, who went to a depot to gather news for his paper, and while there and assisting an invalid woman on the train, after having been told by the conductor that he would be given plenty of time, where the train stated before he could leave it and he was thrown in attempting to alight from it and injured, although there was some conflict of testimony, that was a question for the jury to determine, and it was error for the court to peremptorily instruct the jury to find for the appellee in an action to recover damages for the injury.

2. Same—Where "a passenger by wrongful act of the company is com-

pelled to choose between leaving the train while it is moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably."

George S. Wilson and H. X. Morton for appellant.

D. H. Hughes and Pirtle & Trabue for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Settle.

The appellant sued the appellee, railroad company, in the Union Circuit Court, for personal injuries received at Sturgis, this State, in attempting to get off one of its passenger trains while in motion.

The action is based upon the alleged negligence of the servants of appellee in charge of the train in starting it without notice to appellant, or opportunity to him to get off, though they knew that he had just gotten upon the train to assist an invalid woman into a car, and intended to get off the train at once. The appellee, by its answer, denied the negligence complained of, and averred contributory negligence on the part of appellant, but for which he would not have been injured. After the introduction of the evidence of both the parties, the jury, upon a peremptory instruction from the court to that effect, found for the appellee. Whereupon, judgment was rendered by the court dismissing the petition, and allowing appellee its costs. Of the judgment thus rendered, and the refusal of the lower court to grant him a new trial, the appellant now complains.

The facts as shown by the bill of evidence are as follows: On July 1, 1902, one Hearn, himself in feeble health, had his wife at Sturgis for the purpose of taking her on the first train to a sanitarium in Evansville for medical treatment. She was an invalid, and being unable to walk, had to be carried in a chair. The train was a few minutes late, but upon its reaching Sturgis, Hearn met the conductor as he stepped from the train on the platform, and informed him of his purpose to take his wife on that train to Evansville, and that as she was an invalid she would have to be carried on the train in a chair. The conductor thereupon promptly replied, "all right, I will give you plenty of time."

This entire conversation occurred in the presence and hearing of appellant, who, with a Dr. Martin, physician in attendance upon the invalid, at once picked up the chair in which she was seated and carried her therein upon the front steps or platform of the ladies' coach. Martin, Hearn, and perhaps, others, testified that they heard the conductor say that he would give plenty of time to get the invalid on the train. After placing her in the chair upon the platform of the car, appellant left the chair, and stepped back some feet on the depot platform, not intending to enter the car. About that time the conductor, as appellant testified, gave an order to him and Dr. Martin to go upon the rear steps of the next coach and lift the chair over the brakes to the platform of the ladies coach. The conductor then left and went forward to the baggage car, and appellant and Dr. Martin again taking up the chair and invalid proceeded with her into the ladies coach. Appellant backing as he went, followed by the chair; Dr. Martin advancing and holding on to the other side of the chair.

According to the testimony of appellant and Martin, they made all the haste possible in getting into the car with the invalid, but before they got far enough into the car to permit the door to close without striking the rockers of the chair, the train started. Putting down the chair as quickly as possible, the appellant and Martin started for the door, but Martin, being next to the door, succeeded in getting off the train without difficulty. But not so with appellant. He had some difficulty in getting around the chair and rockers, which were in his way, and by the time he got out and on the steps of the car, the train was going faster, having moved along the platform about seventy-five feet or more. At this juncture, choosing what he regarded a suitable place at the end of the platform, appellant stepped or jumped from the steps of the car and fell, thereby sustaining the injuries complained of. There is considerable conflict in the evidence. The conductor, for instance, testified that he gave no order to appellant to assist Dr. Martin to take the invalid into the car from the platform of another car where she was first placed after the arrival of the train, but admits that he did give such an order generally to those standing around. If he did so give the order, it applied as much to appellant as any other person then present, and he had the right to give the needed assistance to carry it out. Again, there is some conflict in the evidence as to the speed of the train at the time appellant got off; and also as to the manner of his getting off. The witnesses put the speed of the train at from three to five miles an hour when he got off. We incline to the opinion, from all the evidence, that the speed was not less than three, and not as much as five miles an hour. But in any event, that was a question for the jury to settle, and should have been submitted to them under proper instructions.

In *L. & N. R. R. Co. v. Eakins*, Adm'r, 20 Ky. Law Rep., 736, this court said, quoting from *L. & N. R. R. Co. v. Crunk*, 119 Ind., 549, "whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the case, taking into consideration all the circumstances in connection with the alighting."

In *Wood on Railroads*, volume 2, page 1298, it is said: "As a rule it may be said that where a passenger by wrongful act of the company is compelled to choose between leaving the train while it is moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably."

In volume 2, page 762, *A. & E. Enc. Law*, it is said: "When a passenger not having been set down or taken up at the station, to or from which the railway has contracted to carry him, is injured in the attempt to board or leave a moving train, the railway is liable if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man."

Appellant and others testified that he stepped or jumped off toward the engine; others that he jumped in the opposite direction; one witness that he jumped like a frog. Whether or not he was negligent in the manner of getting off the train was likewise a matter for the determination of the jury.

It appears that neither the conductor nor any brakeman connected with the train offered any assistance in getting the invalid on the train. Appel-

lant having been directed by the conductor to assist Dr. Martin in doing it, and having heard the conductor's assurance that he would allow plenty of time for the performance of the duty, had the right to rely upon that assurance, and to believe that he would be protected at least to the extent of receiving such notice of the time of the starting of the train as would enable him to get off in safety, and under such circumstances it was the duty of the conductor, if he knew, or had any reason to believe, appellant had gone upon the train for the purpose stated, to delay the train a reasonable time to permit him to get off.

Did the conductor comply with his promise to give appellant and Dr. Martin time to get the invalid into the car? It would seem not; for they in fact barely got her in the door, but could not place her in a seat before the train started. Did the conductor know that appellant had not gotten off the train when it started? If he got on the train to assist the invalid into the car by the conductor's direction or request, as appellant and others testified, it would be but fair to presume that the conductor had knowledge of when he got on the train, and, if so, it was his duty to use ordinary care to ascertain whether he had gotten off before the train started. The conductor testified that appellant was a newspaper man, in possession of a pass, and that he frequently rode on his train, and on the occasion in question he did not know but what he expected to go some where on the train. It was in proof that appellant was often at the Sturgis depot to meet trains in gathering news for his paper, and on this occasion, though he did not say to the conductor that he was not going on the train, the latter saw that he was standing on the depot platform some steps from the train after helping the invalid to the platform of the coach. His position and manner did not indicate any intention of getting on the train, and he did not go toward the train again until directed by the conductor to assist the invalid in the coach. From the facts and circumstances admitted in evidence the jury should have been allowed to determine whether the conductor knew or had reasonable means of knowing for what purpose appellant went on the train, and whether he had gotten off before it started.

The case of *Berry v. L. & N. R. R. Co.*, 22 Ky. Law Rep., 1412, is relied on by appellee to justify the action of the lower court in granting the peremptory instruction, because in that case it was decided by this court that a recovery was unauthorized. The facts of that case were wholly unlike those of the case at bar. It was unnecessary for Berry to enter the car containing his departing family. They were receiving from the porter all needed assistance, and it did not appear that the conductor knew of his entering the car, or of his purpose in so doing. But in this case the appellant had no intention of entering the car, and would not have done so but for the request of the conductor to assist a helpless woman therein, and the latter's assurance that he would allow ample time to get her into the car and seated.

The court in the *Berry* case, *supra*, quotes approvingly from the *Crunk* case as follows: "If the company sells a ticket to an invalid who is unable to assist himself, the carrier takes upon itself the obligation of allowing him assistance in placing him on the train and seating him in the car, and the compensation paid for the ticket includes such right, and the company

will owe the same obligation to his assistants while necessarily entering and leaving the car which it owes to him."

The principle here announced applies with peculiar force to the facts of the case at bar, and seems to leave no room for doubt that it was error for the lower court to take the case from the jury. In the Crunk case great emphasis is given the fact that none of the company's officers or trainmen assisted or offered to assist, in putting the sick man on the train, and the same is true in this case. There can be no question but that the injuries received by the appellant in getting off the train were serious and painful.

In our opinion the evidence was such as to entitle him to have his case go to the jury, and it was, therefore, error for the trial court to grant the peremptory instruction.

Wherefore, the judgment is reversed and cause remanded, with directions to grant the appellant a new trial, and for further proceedings consisting with the opinion herein.

GILL, &c. v. FUGATE, &c.

(Filed January 12, 1904.)

1. Lands—Fraudulent conveyances—Where vendors were simple and ignorant of their legal rights and testified that they only intended to convey the one-third of the dower inherited from their deceased sister, that no proposition was made to them to sell any other land, and the deputy clerk who took the acknowledgment testified that as he remembered the transaction the deed only mentioned the dower tract, the original deed not being produced, this state of fact together with other attending circumstances of the transaction show such fraud in the procurement of the conveyance that it was the duty of the chancellor to set judgment upholding the conveyance aside.

2. Bills and notes—Assignment—Where a conveyance was made to defraud creditors it was a voluntary conveyance and the assignee of the purchase money notes assumed the place of the payee, and such notes by our statutes (sections 474-483) are subject to every defense in the hands of an assignee that they would have been in the hands of the original holder.

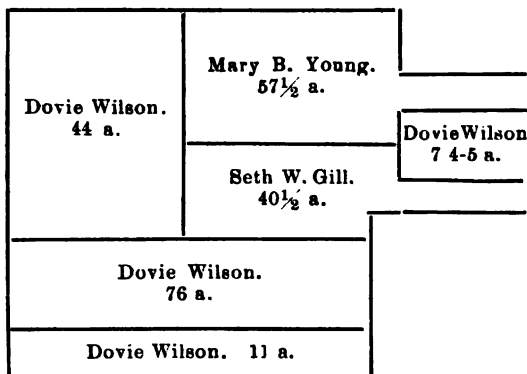
W. P. Sandidge for appellants.

Browder & Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

S. N. Gill owned a farm of about 236 4-5 acres of land in Logan county at his death. He died intestate. There survived his widow and three children, viz., Seth W. Gill, Mary B. Young and Dovie Wilson, who were his only heirs at law. The land was partitioned among them by mutual conveyances as follows: The widow was allotted 76 acres as dower. To the son, Seth W. Gill, was allotted 40 1/4 acres; to Mary B. Young 57 1/4, and to Dovie Wilson three tracts, one of 44 acres, another of 11 acres and the other 7 4-5 acres. The subjoined plat shows the situation, and will enable the other facts of the case to be more easily understood:



Dovie had married H. S. Wilson, who had been an attorney at law. In 1888 Seth W. Gill conveyed to H. S. Wilson, by deed, his 40½ acres, and his undivided one-third in the dower tract, subject to the widow's life. Mrs. Young at the same time conveyed to H. S. Wilson her 57½ acres and her one third of the dower tract. Part of the purchase money was unpaid and liens were retained in each of the deeds. Thereafter the widow died, and in a short while after her death, Mrs. Dovie Wilson died intestate, without having had a child born alive. In consequence, Seth W. Gill and Mary B. Young as heirs at law, inherited the three tracts allotted to Dovie Wilson (the 44 acres, 11 acres, and 7 4-5 acres), as well as her one-third of the dower tract. At the instance of H. S. Wilson, Mrs. Young and her husband and Seth W. Gill went to his house some time after the death of his wife, where he proposed to buy from them their interest in the dower tract, as they now claim. The negotiation resulted in a sale of the interest mentioned, for \$800, represented by two notes of \$400 each, executed to the vendors respectively by H. S. Wilson. The deed executed in pursuance to that sale is dated in 1898. This is the transaction principally involved in this suit. As stated, the vendors claim, and testify, that they intended to sell only the one-third of the dower inherited from their deceased sister; that no proposition was made to them to sell any other land; nor did they know that they had the title to the other lands formerly allotted to Mrs. Dovie Wilson. It may be here remarked that these two persons seem to have been simple people, and very ignorant of their legal rights, as well as without much knowledge or intelligence concerning such transactions. H. S. Wilson prepared the deed, which they say Seth W. Gill read aloud in the presence of the others. The grantors some days later carried the deed to a deputy county court clerk living in the neighborhood, and without re-reading it signed and acknowledged it. The deputy clerk endorsed the acknowledgments on the deed, and it was delivered to H. S. Wilson. Seth W. Gill and Mrs. Young each testify that the deed only recited a sale of their one-third interest in the dower tract. The deputy clerk, who knew the land and the parties, testified that he remembered the transaction, and that the deed mentioned only the dower interest. The original deed is not produced, but the certified copy from the record of deeds in the county court clerk's office

shows that a tract of land by metes and bounds was conveyed, including every foot of the 236 4-5 acres except the 11 acres. It is charged in this suit by appellants Seth W. Gill and Mary B. Young that the deed, as recorded, was procured by the fraud of H. S. Wilson.

A year or so after the last-named deed was executed H. S. Wilson conveyed all the land mentioned to his father, S. A. Wilson, then and now a resident of the State of Tennessee. The recited consideration for the conveyance which included all the personal property on the farm, was \$5,500, evidenced by four notes executed by S. A. Wilson to H. S. Wilson for \$1,375 each, payable in one, two, three and four years respectively. These notes H. S. Wilson assigned to certain of his creditors to secure antecedent debts, and borrowed also about \$900 additional on them, and procured the release of about \$1,500 of collateral from one of his creditors, the Peoples Bank of Adairville. He then became a bankrupt, and has left the State.

Seth W. Gill sent his notes to an attorney at Russellville to bring suit enforcing a lien in his favor on the land he had sold to H. S. Wilson. Mrs. Young sent her notes to an attorney at the same place for like purposes. The attorneys, not knowing what lands had been conveyed, and being referred by their clients to the county court records for proper descriptions, and the clients being ignorant of the fact that the deeds contained any reference to any but the lands actually sold, having no reason to suspect otherwise, the suits were brought in their names by their attorneys to enforce their liens on all the lands referred to in their deeds. The Peoples Bank of Adairville, as holder of three of the \$1,375 notes executed by S. A. Wilson to H. S. Wilson and by him assigned to the bank, and C. E. Haddox, the assignee of the other \$1,375 note, were made parties to the proceedings and set up their notes and liens. A judgment was rendered, by consent of all the lienholders through their attorneys, enforcing the liens on all the land comprising the 236 3/4 acres, including the 11 acres which no one claimed had been conveyed at all since Mrs. Dovie Wilson's death. At the sale made under this decree appellee M. L. Fugate, who was cashier of the Peoples Bank of Adairville, became the purchaser of the whole tract for \$2,750. It was appraised at \$5,328.

This suit was brought by appellants Seth W. Gill and Mary B. Young to obtain a new trial of the action last mentioned. In addition to the facts above stated, it is alleged that the judgment was rendered decreeing a sale of their lands, viz., the 44 acres, 11 acres and 7 4-5 acres inherited from their sister, to satisfy debts of S. A. Wilson and H. S. Wilson, and by casualty and misfortune they were prevented from appearing and showing that fact in the original suits. The learned judge who tried this case has advised us by an opinion filed in the court below, of his conclusions of law as well as the finding of the facts upon which he based his judgment refusing the new trial. It is contended for appellees here that the transaction between H. S. Wilson and appellants shown by the deed of 1898 was not fraudulent. No witness testified upon that branch of the case save appellants and the deputy clerk who took their acknowledgments. An ingenious argument is made by appellees counsel in support of his theory. But the facts will not be reconciled with it. The trial judge was moved to remark: "I am convinced from the proof in this case that S. W. Gill and Mrs. Young were the innocent victims in

the hands of an unscrupulous scoundrel who would not have hesitated to rob them of their patrimony in their ancestor's estate, and did to a very great extent do so. * * * In his last deal with them he procures a conveyance from them investing him with the entire interest derived by his said wife from her father's estate practically for a nominal consideration. I do not think in my practice I am cognizant of a case which so strongly appealed for the intervention of a chancellor to redress the outrageous wrong as the case at bar, and I would take pleasure in granting the relief prayed for if it could be done without making the innocent suffer who is free from fault or neglect."

The innocent referred to in the chancellor's opinion, and whose interest and attitude arrested his arm, is the People's Bank of Adairville. As stated, the bank was a creditor of H. S. Wilson for about \$1,500 secured by collateral notes. This collateral was surrendered and \$900 additional loaned on the three \$1,375 purchase-money notes of S. A. Wilson, above alluded to. It was the view of the chancellor that the bank was an innocent holder for value of these notes which had been executed for a conveyance of a title shown by the proper records to be apparently vested in the grantor; that as between it and appellants, who had been defrauded of their lands by another, it should be protected. This brings us to consider what was the relation of these parties to the real subject matter of the suit, to wit, the land. Under the findings of the chancellor the land had not been bargained, nor had it been intended by appellants to convey them. They were included in the deed by mistake, or by the fraud of H. S. Wilson, according to all the proof in the record. Appellants could have sued immediately to have had that conveyance corrected. If H. S. Wilson conveyed the land to another, with notice of his fraud or of the mistake; or if he conveyed it to such other without valuable consideration, the title would have been liable in the hands of such grantee to the same relief at the instance of appellants as if it remained in H. S. Wilson. Now the allegation was, and we think the record sustains it, that H. S. Wilson executed this conveyance to defraud his creditors; that it was in reality a voluntary conveyance to his father to defeat his, H. S. Wilson's creditors. Appellants were of his creditors. That being true, the conveyance was void, in so far as appellants were creditors. In no event was it an obstacle to their recovering their own as against the volunteer, S. A. Wilson. The latter merely assumed the place of his son, H. S. Wilson, as holder of his title for whomsoever might have the right to reclaim it from said H. S. Wilson. The notes executed by S. A. Wilson to H. S. Wilson were not negotiable. By our statute (sections 474 488, Kentucky Statutes), they were subject to every defense in the hands of an assignee that they would have been in the hands of the original payer. Therefore, when the bank took these notes, whether for value or not, it merely took H. S. Wilson's title to them, took his place as payee. It could have no greater or other rights growing out of them except as against H. S. Wilson than he had. The bank, as holder of these notes, being in H. S. Wilson's place, could not have interposed them as a defense to the suit of appellants to recover of H. S. Wilson the land of which he had defrauded them. S. A. Wilson could not have been compelled by the bank to pay the notes. H. S. Wilson, by assigning the notes, the fruits of his fraud upon appellants,

could not create a valid title in his assignee to the estate represented by them.

What would have been the situation had H. S. Wilson, with an apparent title of record, sold and conveyed the land for value to an innocent purchaser, or had mortgaged it to an innocent creditor, we need not stop to consider. That is not this case. On buying the non-negotiable notes the bank took them cum onere. It will not be relieved by suggesting that it might have got a good title from the same person in some other way. Nor is this a case of estoppel. It is not claimed nor shown that the bank was misled by the state of the record of deeds; nor that it examined or relied on the record. Appellants made no representations by which the bank was induced to alter its condition. It acted alone on H. S. Wilson's representations, and relied on its faith in his apparent title to the paper, as an evidence of an enforceable debt, owned by him against the land. Unfortunately his title was not good. The paper did not give him an enforceable lien on the land; it was not enforceable for any purpose, it was worthless; his assignee must, therefore, lose.

It is very earnestly argued that under section 518, Civil Code, subsection 7, the new trial was not authorized, for it was under that section that it was sought. It reads: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it (7) for unavoidable casualty or misfortune preventing the party from appearing or defending."

It is claimed that there was no misfortune that prevented appellants from appearing. They are not defending. Appellants were not aware that their deed contained the description it did. Having no thought of that kind, and nothing to suggest it to them, it was not reasonable that they would or should make inquiry, or examine the record to discover the truth of it. They lived some eighteen miles from their county seat, Russellville. They sent their notes by mail to their attorneys for collection. This was not an unusual or negligent method of transmitting them. It was not probable that they would have copies of the description of the land at hand—they were contained in the deeds of record. Supposing naturally that the record showed the truth, it was not improper to merely refer the attorneys to the records to get the necessary boundary descriptions to be set out in the petition to enforce their liens. The attorneys, not being told, and nothing appearing to excite inquiry, supposed of course that the deeds to which they had been referred by their clients were genuine, and brought the suits accordingly. The suits being based upon writings filed therewith, were not required to be verified or signed by the plaintiffs. There was no issue of fact presented in the case, and consequently no reason for calling the clients for consultation before the trial. They took the usual and formal course. No negligence appears, for negligence implies a failure to do something which duty or prudence requires should have been done. The combination of probabilities of every reasonable appearance that would mislead an ordinarily careful and prudent person pursuing that business, was such as to produce the mistake in the trial of the lien suits enforcing a lien on land not sold by the plaintiffs, for debts for which it was in no wise liable. This was the result of a "casualty," an unforeseen incident, a misfortune.

The case of *Denny v. Wickliffe*, 1 Met., 216, is relied on by appellees. There the plaintiffs sought a specific execution of a contract of sale. The defense was that he had not paid all the purchase money. After the judgment plaintiff sought a new trial on the ground that he had since discovered that the title was defective. The court held that as a purchaser the law presumed him constructively notified of the state of his title shown by the record, and that the record was open to him for inspection. That it was natural and usual for purchasers to investigate the records concerning the title they are buying. That is what the records are for, principally. But here the vendor is not called upon by any sort of ordinary prudence to examine the records to see if his deed had been tampered with since it left his hands, nothing having occurred to arouse his suspicion about the matter.

In *Elliott v. Harris*, 81 Ky., 470, Mrs. Elliott, the holder of purchase-money lien notes against land, in a suit to enforce them, lost because of an apparent failure of title in the vendor. After the judgment she accidentally discovered the deed of record constituting the missing link. In her action for a new trial it was urged, as here, that she must take notice of the records. This court held, that as the deed, though recorded, was not indexed, it was not a lack of diligence not to find it. (*Hall v. Commonwealth*, 17 Ky. Law Rep., 231.) The facts stated were held to constitute casualty or misfortune entitling the losing party to a new trial. The purchaser at the decretal sale had paid nothing; had bought at a price entitling the owner to redeem; a price, at which the sale might have been set aside for inadequacy, if any other casualty or error in the proceedings, even slight. The circuit court should have set aside the judgment and proceedings thereunder, and have awarded the new trial.

Judgment reversed and cause remanded for proceedings consistent herewith.

CURRY V. KENTUCKY WESTERN R. R. CO.

(Filed February 3, 1904—Not to be reported.)

1. Railroads—Right of way—Where one entering into an agreement with a construction company to donate lands for a right of way in consideration for the building of a line of railroad, in an action to compel him to execute a deed to the strip comprising the right of way, it is not a defense that the company at the date of the execution of the right of way had not been incorporated, the proposition to give the right of way not being directed to any particular corporation, but to any corporation that would build the road.

2. Estoppel—Where a land owner has encouraged actively or passively the appropriation of his land by a corporation for public use, he will be estopped from subsequently claiming an injunction against the corporation to restrain it from continuing to occupy the land.

M. C. & G. D. Givens for appellant.

W. E. Bourland, J. M. Dickinson and Pirtle & Trabue for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, the Kentucky Western R'y Co., brought this action against

the appellant, H. M. Curry, to enforce the specific performance of the following written contract signed by appellant:

"AGREEMENT TO GIVE RIGHT OF WAY.

"We, the undersigned land owners, in consideration of the construction of a line of standard guage railway to run from Dixon, Ky., to a point on the Illinois Central Railway, agree that in case said railway is located through or over our land, we will give a right of way for same as an inducement for the construction of the railway."

The petition alleges that pursuant to the contract plaintiff had taken possession of the right of way through defendant's farm, constructed and put in operation over it a line of standard guage railway from Dixon, Ky., via Lisbon and Clay, intersecting the Illinois Central Railway near Blackford, Ky., prior to the 19th of January, 1900; that since that date it had run two trains each way daily over its line of railroad through and over the right of way donated by the defendant, the right of way being described by metes and bounds; that the defendant had failed and refused to make them a deed to the right of way, and prayed that the court cause its commissioner to execute a deed to them for and on behalf of the defendant to the strip of land in controversy. The defendant, Curry, in his answer says that early in the year 1899 he executed and delivered the paper filed with plaintiff's petition to James P. Hunt, who was acting for and in behalf of the Southern Construction Co., of St. Louis, Mo., which was a different corporation than plaintiff, and alleges that the construction company had never accepted or acted upon the paper in any way, and denied that he had made or executed any other contract or paper; that the plaintiff was not incorporated until the 13th of December, 1899; and charges that plaintiff had taken possession of the strip of land through his farm against his will and without right; that during the construction of its road, it had exposed his crops to the depredation of stock to his damages, for which he prayed judgment. The plaintiff replied that during the year 1899 the citizens of Webster county, along the line of the railroad as now located, accepted a proposition made by the Southern Construction Co., of St. Louis, to organize and incorporate the Kentucky Western R'y Co., that a number of citizens agreed to and did subscribe for \$50,000 of first mortgage bonds to be thereafter issued by the Kentucky Western Railway Co., when it was organized and incorporated upon its line or railroad, rolling stock and other property; that a number of land owners, among them the defendant, agreed to donate the right of way across and over their land; that a number of other citizens, about fifty-two in number, signed another paper, by the terms of which they agreed and promised that they would provide a right of way eighty feet wide for the railway from the point of intersection with the Illinois Central R. R. and the town of Dixon, with suitable depot grounds, etc.; that these facts were well known to the defendant at the time of his execution and delivery of the foregoing contract; that it was made with the view and for the purpose of having plaintiff, the Kentucky Western Railway Co., organized and incorporated, and a line of railroad constructed from Dixon to Blackford; that the Kentucky Western railway was subsequently duly organized and incorporated as contemplated by the parties to the contract; and that the right of

way over defendant's land was taken possession of by the Southern Construction Co. and the Kentucky Western Railway Co., under the contract, and had been in the possession of the plaintiff and its successor, the Illinois Central Railroad Co., ever since; denies that this strip was taken possession of against the defendant's will or by force, or that the residue of defendant's tract of land was damaged, or any damage to his crops. The cause was, by agreement, submitted on the pleadings and exhibits. The trial court granted the rule prayed by plaintiff, and dismissed defendant's cross action in so far as it sought to recover damages for the right of way, and transferred the case to the ordinary docket for trial upon the issue as to the alleged damages to crops, and the defendant has appealed.

The main ground relied on for a reversal is, that appellee had not at the date of the obligation sued on been incorporated as required by section 763 of the Kentucky Statutes, and having no legal existence was incapable of making an enforceable contract. The proposition of appellant to donate the right of way through his farm is not directed to any particular corporation, but to any person or corporation who would construct a line of railway from Dixon to a point on the Illinois Central R. R., and it was delivered to an agent of the Southern Construction Co., a corporation organized under the laws of Missouri, who were proposing to organize the Kentucky Western Railway Co., and to build the proposed railroad. In *Lackey v. Richmond and Lancaster Turnpike Road Co.*, 56 Ky., 43, it was decided that a subscriber for stock in a turnpike company prior to its incorporation, who subscribes to induce the location of the road on a particular route, was liable for the payment of the amount subscribed to a subsequently incorporated company. This doctrine was re-affirmed in the *Twin Creek & Colemansville R. R. Co. v. Lancaster*, 79 Ky., 562, and the law is well settled that where several persons promise to contribute to a common object desired by all, the promise by each will be held a good consideration for the promise of the others. (2 *Parsons on Contracts*, 452; and the *Cadiz R. R. Co. v. Roach*, 24 Ky. Law Rep., 1763.) Appellant's next contention is that the contract is not enforceable because of the uncertainty of the parties, and of the description of the land to be taken. It is admitted by the pleadings that appellee took possession of the boundary of land described in the petition within a short time after the execution of the obligation sued on, constructed its roadbed and laid its track, and has for several years operated trains over it. The contract has been executed, and there is neither uncertainty as to the parties or the land sought to be conveyed. Thompson in his *Commentaries on the Law of Corporations*, section 5272, says: "The doctrine of estoppel prevents a land owner who has encouraged, actively or passively, the appropriation of his land by a corporation for public use, from subsequently claiming an injunction against the corporation to restrain it from continuing so to occupy the land."

This section was cited with approval in *Cadiz R. R. Co. v. Roach*, 24 Ky. Law Rep., 1764, and we think the facts of this case bring it within this rule, and the pleadings and exhibits filed therewith support the judgment of the trial court.

Judgment affirmed.

WILHITE v. CONVENT OF THE GOOD SHEPHERD.

(Filed January 12, 1904—Not to be reported.)

Corporations—In an action against a corporation styled in the petition "The Convent of the Good Shepherd," in which its location was set out, it was error in the trial court to quash the summons on the petition because the name of the corporation was not correctly set out and where the corporation failed to give its true name, so the mistake in pleading may be corrected by amendment.

W. T. Burch for appellant.

Kinney & Fitzgerald for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

The appellant, Rosa Wilhite, brought this action against a corporation, which she styled "The Convent of the Good Shepherd," which she alleged owned and operated a laundry on 23d and Bank streets in the city of Louisville, and that their place of business was enclosed by a brick wall, twelve or eighteen feet high; that in 1887, she was brought from Hardin county and delivered to the possession of the defendant against her will and consent; and that she had been illegally detained by defendant within its enclosure and compelled to perform hard labor or them continuously until the 19th of April, 1900, without legal authority on their part; that she had never received any compensation for any part of the labor so performed by her, which she alleged was reasonably worth \$5,000, for which sum she prayed judgment. The summons which issued on this petition was executed on Mary Bigley, who was designated by the sheriff as the "Mother Superior of said convent and chief officer." Thereupon Mary Bigley appeared in court and filed an affidavit, in which she stated that she was not at the time of the service of said process, and was not then, "the Mother Superior of the Convent of the Good Shepherd," or connected with it as an officer in any way. Thereupon the plaintiff filed an amended petition, making "the Sisters of the Good Shepherd of Louisville," defendant, and alleging its place of business was on Bank street, between 23d and 24th, in the city of Louisville; that their name appeared in the city directory as the Convent of the Good Shepherd; that defendants had not complied with the law in having their corporate name placed over its door or upon its bill heads, or had any one designated with the Secretary of State upon whom process might be served; that defendants had been and were doing business under the name of the "Convent of the Good Shepherd" and "St. Xavier Laundry," that the Convent of the Good Shepherd and the Sisters of the Good Shepherd of Louisville and the St. Xavier's Laundry were one and the same corporation, and that Mary Bigley was the Mother Superior thereof, and its chief officer and agent, and reaffirmed all the averments of their original petition. Thereupon Mary Bigley again appeared in court and made affidavit that she was not at the date of the service of process upon the amended petition the Mother Superior or chief officer of the Sisters of the Good Shepherd of Louisville, and moved the court to quash the officer's return upon the process, which was sustained, to which the plaintiff excepted and thereupon stated

that the true corporate name of the institution doing business on Bank street, between 2nd and 9th, was "the Sisters of the Good Shepherd, Bank street, Louisville, Ky.," of which Mary Bigley was the chief officer and Mother Superior. The appellee then filed an answer in which it alleged that the Sisters of the Good Shepherd, Bank street, Louisville, Ky., was incorporated on the 18th of May, 1901; that it was not theretofore a corporation or organized as such, and was not guilty of the acts complained of in the original and amended petition. Thereupon, plaintiff moved for judgment upon the fact of the record, which the court overruled and instead thereof entered a judgment dismissing plaintiff's petition, and from that judgment this appeal is prosecuted.

When a defendant corporation is not correctly named in an action against it, it can only be taken advantage of by a plea in the nature of a plea in abatement, and to make this plea good, it is bound to give its true name so that plaintiffs' mistake may be corrected by amendment. (Enc. of P. & Ph., 68; 1 Chitty on Pleadings, 447; L. & N. R. Co. v. Hall, 75 Ky., 131.) As the affidavit of Mary Bigley, the chief officer of appellee, on the motion to quash the original return made by the sheriff in this case, and also in the process which issued upon the first amended petition, failed to comply with this requirement of good pleading, the trial court erred in quashing the sheriff's return upon the summons which issued upon the original and amended petition. We think the trial court also erred in overruling plaintiff's motion for judgment upon the face of the record, and in dismissing her petition, after appellee had filed its answer in the name of the Sisters of the Good Shepherd, Bank street, Louisville, Ky. This answer does not specifically deny the allegation of the original and amended petitions; that it had detained the plaintiff and compelled her to perform hard labor for them continuously for nearly fourteen years against her will and without legal authority, or that it had been doing business under the name of the Convent of the Good Shepherd, and the Sisters of the Good Shepherd, Louisville, and as St. Xavier's Laundry.

Our attention is called to an act of the general assembly, approved January 29, 1867, incorporating the Sisters of the Good Shepherd of Louisville, and conferring upon them the same powers as upon the Sisters of the Good Shepherd, Bank street, Louisville, Ky., as disclosed by its charter filed with its answer in this case. The original and amended petition, taken together, charge in substance that the defendant, whether operating under the name of the Convent of the Good Shepherd, or Sisters of the Good Shepherd, Louisville, or Sisters of the Good Shepherd, Bank street, Louisville, or St. Xavier's Laundry, is in reality one and the same corporation. The law is well settled that an action against a corporation by its former name can not be defeated by showing that it had changed its name, unless it also clearly appears that there has been in fact a change in its membership. Nor does such change exonerate it from liabilities previously created, if in fact, it is substantially the same concern. (560 of Kentucky Statutes; McGregor v. Fuller Implement Co., 78 Iowa, 148; Welfby v. Shenandoah Iron, &c., Co., 83 Va., 768; Kansas, &c., R. R. Co. v. Smith, 40 Kan., 192.)

For reasons indicated the judgment dismissing plaintiff's petition is reversed and the cause remanded, with instructions to allow both parties to amend their pleadings if they so desire, with a view of pleading to an issue and for other proceedings consistent with this opinion.

WRIGHT v. WILLIAMS.

(Filed January 12, 1904—Not to be reported.)

1. Conveyances—Passways—Where in the sale of a lot in a city where there was in fact no alley at the point, but where the deed called for such a one, and the alley was used for about ten years by the vendor and his vendees, a judgment in favor of the original vendor in an action to recover possession of the alley was erroneous, the deed calling for such an alley amounting to a dedication of it for that purpose.

2. Estoppel—Where the owner of land stands by and sees, and without question, permits another to sell it to an innocent stranger, he will not be allowed thereafter to deny that the title passed by the sale.

Wight & McElroy for appellants.

John M. Galloway for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee's wife owned a large lot of land in the city of Bowling Green; she and appellee sold to one Quinn part of it, being a lot fronting fifty feet on College street, and extending back the same width, 205 feet, to a ten-foot alley. Twelve hundred dollars of the purchase price was unpaid. There was then in fact no alley at that point, but the deed called for such one, which amounted to its dedication by the owners, Williams and wife, for the use of the lot sold. Quinn failed, and contracted the lot to one Wilford, who assumed the payment of the \$1,200 balance of purchase money to appellee's assignee and creditor. It is claimed by appellant (who has since bought the lot from Wilford,) that when Quinn was preparing to sell the lot to Wilford, appellee, J. Tom Williams, was present, and represented to Wilford that the lot included the right to use a ten-foot alley-way alongside and running from College street to the alley first mentioned, and which was in the rear of the lot sold. The use of this alley was not only necessary to make the first-named alley of any value whatever to that lot, but was quite desirable as affording a way to the rear of the lot by wagons, etc. Wilford says that appellee showed him the lines of this alley, and told him to set the fence accordingly; that relying upon that representation of appellee, he bought the lot from Quinn, and paid off the lien owing to appellee's assignee, appellee having assigned the notes to a creditor of his. Wilford did fence the passway, and he and his vendee, appellant, continued to use it for about ten years, till this suit was brought, without molestation or question. Later, Mrs. Williams died, and by will devised to her husband (appellee) all her property.

Appellee then brought this suit to recover the ten-foot alley-way, which was not referred to in his deed to Quinn, resulting in a judgment in his favor. The case was tried by the chancellor in equity. It is conceded that Mrs. Williams, who was the owner of the land over which the alley-way is claimed, did not convey the alley to Quinn, nor did she make any representations to Wilford when he bought from Quinn. Her husband, appellee, as her agent, it is claimed, represented her in that transaction, though, whether she would have been estopped to deny Wilford's right to use the

passway, we do not determine. In this suit by appellee to recover the passway from appellant, the only defense upon which there was any proof, is that appellee having by his representations induced Wilford to buy the lot under the assurance that there went with it as an appurtenant, the right to use the ten-foot strip adjoining it on the side as a passway, the former is thereby estopped from asserting the contrary.

The proof consisted of the statement of the two witnesses, Wilford and appellee, and evidence of the physical conditions brought into being and maintained immediately after and ever since the alleged matter of estoppel. Wilford testifies clearly and unequivocally that appellee made the representations and staked off the place for the fencing of the disputed alley-way. Appellee as positively denies having made the representations, and denies that he was even present. The burden of proof is on appellant to maintain her plea of estoppel. We conclude that Wilford must be correct in his recollection of what occurred; for he is corroborated by the contemporaneous act of taking possession of the passway, of which appellee then knew, or saw shortly after, and of having maintained it without question for about ten years. It is not likely that appellee would have submitted to such an encroachment unless there had been some understanding about it. The attending circumstances, and conduct of the parties since, are sufficient corroboration to tip the balance in appellant's favor.

If the owner of land stands by and sees and without question permits another to sell it to an innocent stranger, he will not be allowed thereafter to deny that the title passed by the sale. If the owner himself represents that such seller has the title, misleading the purchaser into buying it, the case is even stronger against the owner as an estoppel. Title to land, derived by estoppel, first came to be applied where one not the owner undertook to convey by deed with covenant of seizin or warranty, and afterward acquired the title. In a very learned discussion of the subject by the author of *Herman on Res Adjudicata and Estoppel* volume 2, chapter 60, page 377 441, it is asserted that title by estoppel can be derived only from a covenant of warranty, actual or implied, or by some similar assurance or declaration of title in the conveyance of the grantor. The author observes, however, (page 431): "Warranty even in its palmy days, when collateral as well as lineal warranty flourished in all its vigor, never possessed the power of conveyance."

The whole matter, as treated by the author, and as seems to be sustained by principle and authority, however it may be made to turn in the reasoning of the judges, comes at last to the homely and familiar doctrine, laying at the very base of every estoppel, that no one should be allowed to deny the truth of that which he has previously asserted to be true, whereby another has acted on it so as to alter his condition. Estoppel in pais, unknown to the common law in the time of Coke, a creation of equity, has come to be applied at law answer those matters of estoppel by deed or record. It has been held differently in different jurisdictions, e. g., in Illinois, *Mills v. Graves*, 38 Ill., 455 (89 Am. Dec., 314), it was decided that as title to land could not be passed by parole agreements, an estoppel by mere oral declarations, was equally ineffectual, and repugnant to the statute of frauds and

perjuries. In *Bell v. Goodnature*, 50 Minn., 417, it was held just to the contrary.

In this State there is a long line of cases which have applied the doctrine of estoppel in pais to defeat the claim of title by the true owner where he had induced an innocent stranger to buy the land from one not the owner; and the court has not halted to consider whether at the time of the representation afterwards invoked as an estoppel, the guilty declarant then had the title, or acquired it subsequently. (*Craig v. Baker*, Hard., 269; *Gerault v. Anderson*, 2 Bibb., 543; *Barclay v. Hendrix*, 3 Dana, 380; *Sale v. Crutchfield*, 8 Bush, 645; *Morris v. Shannon*, 12 Bush, 89; *Brothers v. Porter*, 6 Ben Mon., 118; *Davis v. Tingle*, 8 Ben Mon., 542; *Carpenter v. Carpenter*, 8 Bush, 288; *Hampton v. France*, 17 Ky. Law Rep., 980; *Loeb v. Struck*, 19 Ky. Law Rep., 935; *Stith v. Carter*, 23 Ky. Law Rep., 1488; *Ritterhouse v. Clark*, 22 Ky. Law Rep., 1610; *Wimmer v. Ficklin*, 14 Bush, 193; *Ratliffe v. Bellfonte, &c., Co*, 87 Ky., 559; *McFarland v. Baugh*, 13 Ky. Law Rep., 744; *Greer v. Greer*, 11 Ky. Law Rep., 380; *Wallender v. Wintersmith*, 2 Ky. Law Rep., 232; *Arnold v. Stephens*, 13 Ky. Law Rep., 622; *Klemp v. Liebold*, 3 Ky. Law Rep., 684; *Alexander v. Woodford Spring Lake Fishing Co.*, 90 Ky., 215; *Ramsey v. C. & M. T. P. Co.*, 1 Ky. Law Rep., 308; *Schwitzer v. Wogner*, 94 Ky., 458.)

Following these cases, and under the evidence as we construe it, the circuit court should have denied appellee's claim and dismissed his petition.

Judgment reversed and cause remanded, with directions to enter judgment in accordance herewith.

QUINTANCE V. FARMERS MUTUAL AID ASSOCIATION.

(Filed January 12, 1904—Not to be reported.)

Fire insurance association—Salary of officer—Where appellant and four others obtained a charter authorizing them to organize and operate a fire insurance company and where all persons insured became members, the charter being silent as to the subject of salaries and the president being compensated by receiving \$2 from each member as he would insure, the officials of the association in the absence of such power being conferred upon them by the charter had no power or authority to fix compensation of an officer of the company.

W. G. Dearing and G. A. Cassiday for appellant.

J. P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellant against the appellee in February, 1896, by which he sought to recover \$502.50, balance of salary due him as its president, for the years 1892 to 1896. Appellee traversed the claim.

In substance the facts, as they appear of record, are as follows: In the year 1875 appellant, with four others named, obtained a charter authorizing them to organize and operate a fire insurance company in the county of Fleming. The business of the company was, by the charter, confined to property situated in Fleming county. By the charter appellant was made the president of the

company for the first year, and the other persons named were to be its directors. All persons who insured their property in this company became members thereof. The company or association was authorized to make and publish by-laws, ordinances, etc. The members of the association upon notice by the president, had annual meetings for the election of officers, and the transaction of its business. It appears from the charter that powers of assessment and the creation of liabilities were reserved to the members of the association. The charter is silent on the subject of salaries, nor does it authorize the board of directors to fix same. The appellant became president in 1875, and was continued in office until 1896, when another was elected in his place. From the year 1875 to the third of September, 1892, the only compensation the president received was \$2 received from each person who was induced by him to become a member of the association, and a part of such a fee received from persons who were induced by other solicitors to become members thereof. The testimony of appellant shows that for several years prior to 1892 he had endeavored to induce the members of the association, at their annual meetings, to allow him additional compensation. On the 3d day of September, 1892, the appellant with four directors or solicitors of the company met in an office in Flemingsburg, and appellant prepared and all signed the following paper:

"September 3, 1892.

"At a meeting of the board of officers of the Farmers Home Insurance Co., held in Flemingsburg on the above date, by an in compliance with our charter, page 5, article 5, the following resolutions were offered and passed:

"Article 13. That the solicitors shall have the right to charge all persons on becoming members of this company \$2, and the same for each subsequent certificate they issue.

"Article 14. The secretary shall have the right to charge the company 5 per cent. on all calls or collections, for his services.

"Article 15. The president shall have the right to charge the company one-twentieth of 1 per cent. per annum on the aggregate amount of insurance, for his services.

"Article 16. Property in adjoining counties may be insured in this company.

"Article 17. This company will not make any calls for less than one-fifth of 1 per cent. in the future."

These articles were never recorded on the books of the company, and it does not appear that any member of the association other than those interested had any knowledge of same. The appellant, in his testimony, gives the reason why these resolutions were passed by him and the solicitors. In answer to a question in which he was asked if in soliciting members he did not represent to them that there was to be nothing taken from the company to pay salaries, etc., his answer was:

"No, sir, I never. I was trying to get them to vote me something at the annual meetings, which they failed to do, and then I took advantage of the charter."

"Q. Does not your own statement say that you made no assessments except to meet losses?"

"A. No, this was a two-fold affair, there was a certificate and instruction to solicit." * * *

"Q. Did you consider it an emergency to pass a resolution giving you a salary?"

"A. Well, you can call it what you please. I was entitled to it, but every effort I made at a meeting to get anything through, some fellow would amend my motion in such a way as to change the whole thing, and I never could do anything."

"Q. Is that the reason you never made it when all of them were present?"

"A. I could not get it through."

"Q. And you had it passed by the board of solicitors?"

"A. I had it passed according to the charter."

The section of the charter upon which appellant relies to sustain the action of himself and board or solicitors, or directors, in fixing his salary the association shall not have the power to assess or collect any money from any member of the association unless there has been a loss. But the association shall have the right to assess and collect annually not exceeding one fifth of 1 per cent. upon the amount insured by each and every member, to pay contingent expenses. It does not appear from this section of the charter that the president and board of directors or solicitors have the power to fix their compensation, and in addition to this it appears that the association had, prior to September 3, 1892, passed a by-law which was then in force which provided that the officers of the company should not collect an assessment for any purpose other than to pay losses, without the consent of the company. We are of the opinion that the officials of this association in the absence of power given by the charter and in opposition to this by-law, had no power or authority to fix by resolution or otherwise, their compensation.

(Thompson on Corporations, volume 1, 956, and volume 3, 4018; American & Eng. Ency. of Law, volume 17, 166.)

It appears that from the year 1875 to 1892 appellant recognized the fact that the association only had the right to pass by-laws and fix the compensation of its officials, and when from time to time at the annual meetings, he had been prevented from getting what he considered just compensation, he then concluded that five of the charter gave the right to the officials to fix their own salaries. We think appellant is in error as to his last construction of five of the charter.

Therefore, the judgment of the lower court is affirmed.

PULASKI COUNTY V. SEARS.

(Filed January 12, 1904—Not to be reported.)

1. Roads—Powers of fiscal court—Where the fiscal court of a county adopted a system of working public roads by taxation, it had no power to invest the county judge with general supervision of the same, nor confer authority upon the justices of the various magisterial districts as assistants and then allow them pay for such services.

2. Same—Supervisor of roads—The statutes permit the appointment of a supervisor, or supervisors, of county roads, but the fiscal court can not create a different office, or same office with different name, fill it by electing themselves and then vote themselves pay for their services.

B. T. Wesley for appellant.

Denton & Robinson and G. W. Shadoan for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge O'Rear.

In Pulaski county the fiscal court had adopted the system of working the county roads by levying and collecting a tax known as the "road and bridge fund." The work was done and material furnished on the road at the expense of the county, and paid out of this fund at schedule prices fixed by the fiscal court.

The fiscal court did not appoint a supervisor, but entered an order of record investing the county judge with the general supervision of the roads of the county, and attempted to invest the justices of the magisterial districts with the power as assistants. The various justices, acting under this order throughout their term of office, superintended and controlled the keeping of the roads within their respective districts, and were subsequently, by an order of the fiscal court, allowed a sum in payment for their services. The county refused to settle on this basis, and this suit was brought by appellee, one of the magistrates named, to collect for his said services. The statutes permit the appointment of the supervisor or supervisors. (4313-4344, Kentucky Statutes.) But the county did not do this. They attempted to create a different office, or perhaps the same office with a different name, and then attempted to fill it by electing themselves, and then attempted to vote themselves pay for their services. This they could not do. As was held by this court in the recent case of Daviess County v. Goodwin, 25 Ky. Law Rep., 1081.

Judgment reversed and cause remanded, with directions to dismiss the petition.

LIPP'S GUARDIAN V. ALLPHIN.

(Filed January 12, 1904—Not to be reported)

Commissioner's sale of land—Inadequacy of price—Lien—While mere inadequacy of price is not sufficient to authorize the setting aside of a sale, in this action where the infant was only fourteen years of age, and the land brought only \$1,725, and it appears of record that upon a resale B has obligated himself in due form to start the bid at \$2,325, in view of this and the inadequacy of price, the inclement weather on the day of sale, the fact that the land the whole time it was advertised was covered with snow so it could not be examined, and because the lower court did not provide in its judgment a lien on the land for the infant's interest as required by the Civil Code, it was error not to set the sale aside and order a resale of the land.

S. Gaines for appellant.

S. W. Tolin and John S. Gaunt or appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought in the court below by Susie N. Adams and her husband, J. S. Adams, against Cordelia M. Whitson and her husband, Charles Whitson, Ethel E. Lipp and S. Gaines, as her guardian, for the pur-

pose of procuring an order of sale, under subsection 2 of 490 of the Civil Code, for 56 acres of land, which plaintiff alleged was in possession of, and owned jointly by Susie N. Adams, Cordelia M. Whitson and Ethel E. Lipp, by inheritance from their deceased father, George W. Lipp; and also alleged and proved that the same could not be divided between the three joint and equal owners without materially impairing its value. The court directed the sale thereof, and the master commissioner, pursuant to the order of court, made a sale of the land on March 2, 1908, at which sale the appellee, Allphin, became the purchaser thereof, at the price of \$1,725. The commissioner reported to the court this sale at the April term, 1908. The appellant, Ethel E. Lipp, by her guardian, filed exceptions to this report of sale, in substance, as follows: "First, because the land lays on a county dirt road, and during the time it was advertised for sale, the road was so bad that it was almost impassible, and contemplated purchasers were thereby prevented from seeing and examining the land, with a view of purchasing; second, because during the time the land was advertised, a very deep snow covered the land, and it could not be seen and examined by people who desired to purchase it; third, because the day of sale was bad, and few people attended the sale; fourth, because this defendant is an infant under fourteen years of age, and this land is all the estate of any kind that she has; and because the price for which it sold is grossly inadequate."

It appears from the uncontradicted proof that this is a well-improved and valuable tract of land worth \$3,000 or more, and it is evident that the price it brought at the commissioner's sale was inadequate; but it has been held by a long line of decisions by this court, nothing else appearing in connection with the sale, detrimental to the interest of the party excepting, that mere inadequacy of price is not sufficient to authorize the setting aside a sale fairly made. It is agreed that there was snow upon the ground which covered this land during all the time it was advertised for sale, and that the day of sale was a severe, cold day, but it is not shown, except by inference, that any person or persons were prevented from attending the sale by the inclemency of the weather, or that any person attempted to examine the land with a view of purchasing it, and was prevented by its being covered with snow; but it appears from the record that one Henry Bishop, as principal, and W. M. Lancaster as his surety, executed a bond in due form, obligating themselves that in the event this sale to Allphin is set aside, that they would start the bid at the next sale at the price of \$2,225, and a like bond was given by J. S. Gaines, principal, with T. J. Booth as his surety, offering to start the bid at the next sale, should one occur, at the price of \$3,200; but no special reasons were offered why they were not present at the sale.

As stated, this action was brought for a sale of this land by virtue of subsection 2 of section 490 of the Civil Code. Subsection 1 of section 497 is as follows: "In the action mentioned in subsection 2 of section 490, the share of an infant, or a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest, until the infant becomes of age, or the person of unsound mind becomes of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as is required by section 498."

The lower court in its judgment directing the sale of this land, erred in not adjudging that this infant appellant's interest therein should remain a lien on the land bearing interest until she become of age, or until her guardian executed a bond, as required by section 498 of the Code. This error possibly was prejudicial to the interest of appellant and the other parties in interest. Persons contemplating the purchase of this land would naturally look to the judgment for the terms of sale, and upon examination of the judgment in this case, they would have found that the whole purchase price was payable to the commissioner, divided into three payments of six, twelve and eighteen months; when, if they had found, as the Code requires, that one-third of the purchase price, with interest at 6 per cent. should remain a lien upon the land until this appellant arrived at the age of twenty-one years, or until her guardian executed the bond as required by the Code, if such had been the case, persons with limited means and desiring to purchase a home, might have been induced to pay a greater price, believing that they could get a much longer time to pay a third of the purchase money than this judgment gave them,

When a court of equity exercises its statutory power by ordering a sale of infants' land, it must require the proceedings to conform strictly to the statute. We understand the public interest in having purchasers at judicial sales "secure" in their purchases, and that this is one of the paramount reasons in not sanctioning the setting aside of such sale for mere inadequacy of price alone, or for frivolous and immaterial causes, but we know from this record that for some reason that there has been a great sacrifice of this infant's property, it being unable to protect itself. In view of this great inadequacy of price, coupled with the inclemency of the weather on the day of sale, and the snow upon the ground during the whole time that it was advertised, which possibly prevented persons from examining the land and attending the sale, and the error of the lower court in not asserting in its judgment a lien on the land for the infant's interest, we feel impelled, in justice to this infant, to reverse the action of the lower court.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

MARTIN v. BARNHILL.

(Filed January 12, 1904—Not to be reported.)

1. Construction of contract—Former appeal—Where every question was determined on a former appeal except as to whether or not a contract between the mother and son, "is a suitable and proper arrangement," and the lower court upon the return of the case found the contract to be a suitable and proper arrangement, his judgment will not be disturbed.

2. Will—Construction of—Where a testator devised to his widow all his property for life, and upon her death that it should be equally divided among his children, she was authorized under the will to treat the property as her own and dispose of it as her necessities might require. It was not intended that she should sell the property or give it away, but that she should not be hampered in its appropriation to her necessities.

Sweeney, Ellis & Sweeney for appellants.

Miller & Todd for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal in this case; the former appeal was decided on March 29, 1900. The opinion is reported in volume 21, Kentucky Law Rep., 1666.

On the former appeal every question made herein was determined, except as to whether or not the contract made by the appellee, R. M. Barnhill, with his mother, Siberia A. B. Barnhill, "is a suitable and proper arrangement" for her to make for her own support. With every other question eliminated, the case was remanded by this court to the Daviess Circuit Court for a trial of that one question; the depositions of the parties and their witnesses were taken, and upon a trial in the lower court the chancellor found this contract to be a suitable and proper arrangement for the widow to make for her own support and dismissed the petitions. From this judgment this appeal is prosecuted. We will only state such facts as will be necessary to elucidate the question at issue.

Joseph Barnhill died in the year 1894, and left a will, and this litigation grew out of the construction of the first provision of this will, which is as follows: "I will and bequeath to my beloved wife, Siberia A. B. Barnhill, after my burial expenses and just debts are paid, all of my property, consisting of lands, stocks, moneys, bonds, notes, etc., household and kitchen furniture, to have and to hold, and to dispose of as her own property, as long as she shall live, and after her death to be equally divided among my children or their legal representatives."

This provision of the will was construed by this court in the case referred to. In that case, the court said: "We think it was the intention of testator to provide for the comfortable support and maintenance of his wife as long as she should live, and that, if necessary to enable her to attain this object, she was authorized to treat the property bequeathed her as her own, and to dispose of it as her necessities might require; and if at her death any part of it remained undisposed of, it should then be equally divided among testator's children, or their legal representatives. He did not intend that she should sell this property, or give it away, but that she should not be hampered in its appropriation to her own necessities."

After the death of Joseph Barnhill, the appellee, his widow, was left alone; she induced appellee R. M. Barnhill to leave his home and reside with her on a small farm containing about 75 acres. In August, 1896, they entered into a written contract, in which it was recited, in substance, that in consideration of the services by her son, R. M. Barnhill, in supporting and caring for her since her husband's death, and in further consideration that he would support and care for her so long as she lived, she gave him the use of her real estate for her life, and three notes, amounting to about \$360 each, with a credit on one of them for about \$50. Her other children and their husbands instituted a suit against them, alleging that this contract was procured from her by her son, R. M. Barnhill, through the exercise of undue influence over her, and with a design to appropriate to his own use the entire estate devised by their father, in which they might ultimately be

interested as remaindermen; that it was in effect not a provision for her own comfort and support, but for his. The appellees traversed the allegations of the petitions.

It will be observed that this is not an instance where a party to a contract is seeking to avoid it. On the contrary, both the parties to the contract are insisting that it was understandingly entered into, and that it is a fair and reasonable one. We quote, with approval, a part of the opinion of the lower court: "According to the construction given the will by this court the widow had the unrestricted right not only to possess and control the property devised to her, but to use it, and, if necessary, to her comfortable maintenance, to consume any part, or the whole of the personal property, and that seems to be conceded. But the difference between the plaintiffs and defendants arises out of the meaning and scope that is to be given to the word 'necessary.' From the standpoint assumed by the plaintiffs (appellants here), as evinced in their pleadings and evidence, the amount necessary for the support of defendant (appellee here), should be determined by the lowest price for which a qualified person might undertake to clothe, board and lodge her. In other words, the idea which seems to be entertained by the plaintiffs is, that her 'keep' might be let out to the lowest bidder, or that the amount she may be allowed out of the devised estate embracing the income or rental value of the land for her support should be measured by that standard. This court is of a different opinion."

It was not intended that she should be hampered in the appropriation of this property to her own bare and exact necessities. The proof in this case shows that all the parties to this action are honest, well meaning people, but their personal interests, unfortunately, causes them to place different constructions upon this provision of the will. It is sufficient to say that the proof also shows that appellee R. M. Barnhill did not use any undue influence in obtaining this contract from his mother; that his mother was about 70 years of age when he went to live with her, and that it was reasonable and natural that Mrs. Barnhill should have preferred to make her home at the place where she had lived for more than fifty years, and to have her son to live with her, and that he was an honorable and upright man is shown by this evidence. The old lady is still alive; the rental value of the farm is worth about \$125 a year, and if her son continues the care and support of his mother for any considerable length of time (that is, if his mother continues to live much longer), it will be a losing contract on his part, if he should consider it in the light of profit. Considering all the facts and circumstances, we are of the opinion that this was not an improvident contract upon her part, and should be permitted to stand.

For these reasons the judgment of the lower court is affirmed.

SMITH v. KENTUCKY LUMBER CO.

(Filed January 12, 1904—Not to be reported.)

Damages—Personal injuries—Master and servant—Appellant, a member of a logging gang, over his objection, but at the direction of the foreman of the gang, went upon a drift of logs to roll a big one out, which rolled upon

him, inflicting dangerous injuries. It was error for the trial court to peremptorily instruct the jury, in an action to recover for the injury, to find for the defendant, the rule being that if the risk was such as a prudent man would refuse to assume, the servant acts at his peril in undertaking it, but where the master insists over the objection of the servant the servant has the right to rely upon the master's presumed superior knowledge.

Denton & Robinson and W. A. Morrow for appellant.

O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Joe Smith, instituted this action against the appellee, the Kentucky Lumber Co., to recover damages for a personal injury sustained by him while in their employ, which he alleges was due to the negligence of one of appellee's servants superior in authority to himself, and under whose direction he was at the time of the injury.

The answer of the defendant was first, a denial; second, a plea of contributory negligence; third, that appellant's injury was chargeable to the negligence of a fellow servant. Upon the trial of the case at the conclusion of plaintiff's testimony, a judgment was entered at the direction of the court in favor of the defendant, and this appeal is prosecuted by the plaintiff. The testimony shows that plaintiff at the time he received the injury was in the employ of the defendant as one of a gang of laborers, engaged in clearing away drift from White Oak Creek, one of the tributaries of the Cumberland river, and in rolling logs owned by them into such a position that when a flood came in the river, the logs would be floated out and brought down the stream to the defendant's mill at Burnside, Ky., under the direction of Richard Taylor, as foreman. Appellant testified that as the gang were going down the creek, they came to a drift near the edge of the water on the bank of the creek, which had lodged against two trees twenty-five or thirty feet apart, and was some eight or nine feet high; that a number of sawlogs belonging to the defendant had lodged in the drift; that one of them, about twenty-five or thirty feet long, extended out beyond the face of the drift about six or eight feet; and that it looked like it might be easily loosened; that the trees against which the drift was lodged leaned towards the bed of the stream; that appellee's foreman, Taylor, got on top of the drift and examined it, and directed George Davis and Sam Collier, the axemen of the party, to cut the two trees, remarking that when the rise came the drift would float out; that Collier began to cut on one tree and Davis on the other; that Taylor told Davis to cut from the under side so that the drift would not hang on the stump; that Davis responded that it was unhandy for him to do so; and that Taylor thereupon directed him to cut the tree from the under side as he was left handed; that he was standing at the time below the drift in the bottom of the creek; and that he told Taylor that he thought the big log referred to should be rolled out, as it might fall on him; that Taylor responded that he had walked from one end of it to the other and that it was safe, and for him to proceed with the cutting; from where he stood he could not see but one side of the drift, while Taylor, who was on top of it could see its entire bearing; and that he, therefore, took it

For granted that there was no danger of the log slipping; that he had only struck one or two strokes on the tree with his ax, when the other tree, on which Collier was cutting, fell; and that the big log immediately slipped from its moorings, falling upon him inflicting dangerous injuries. Under this state of fact, appellee insists that as appellant was aware of the danger from cutting the tree, he assumed the risk, and was guilty of such contributory negligence as to preclude recovery.

The rule on this subject, as frequently announced by this and other courts, is that if the risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant acts at his peril in undertaking it. But where the probability of injury is such that the minds and judgment of prudent men might differ upon the certainty of its happening, and where the master insists after the objection of the servant, that the servant proceed with the work, then the servant has the right to rely upon the master's presumed superior knowledge. (*Walk & Co. v. Price*, 2 Ky. Law Rep., 696-; *I. C. R. R. Co. v. Hart*, 23 Ky. Law Rep., 1054; *Shearman & Redfield on Negligence*, 126; *Long v. I. C. R. R. Co.*, 24 Ky. Law Rep., 524; *Lash, &c. v. Stratton*, 101 Ky., 472.)

The appellant, from his standpoint below the drift, could only see the side of the drift next to the river, while Taylor, standing on the top of the drift, could see every side of it, and was, therefore, much better able to determine the probability of the log slipping than appellee.

Under these circumstances, appellant did not have equal opportunities with Taylor to realize and appreciate the danger, and he had the right to believe that he would not require him to perform a dangerous act, especially after his attention had been called to this danger. We, therefore, conclude that the trial court erred in giving to the jury the peremptory instruction to find for the defendant, and the judgment is, therefore, reversed and cause remanded for a new trial consistent with this opinion.

HAZELWOOD, &c. v. WEBSTER, &c.

(Filed January 12, 1904—Not to be reported.)

1. Construction of will—Where H., by the last clause of his will, provided that "all the property that I have given to my above-named children, I give to them and their bodily heirs forever," but by codicil stating, "I have this day made the above change in my will as interlined, to wit: The word heirs or bodily heirs," in an action by the vendees of the devisee to quiet title, the ruling of the lower court in favor of appellees, vendees, that by the will and codicil the devisees took the fee-simple title subject to the limitations imposed by the will, was proper.

2. Practice—Section 364, Civil Code, providing that equitable actions shall stand for trial at any term if pleadings have been completed sixty days before commencement of such term applies, only where there is an issue of fact.

J. W. Gore, L. B. Handley and Haynes Carter for appellants.

J. T. Moss and Garnett & Garnett for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge O'Rear.

Richard Hazelwood, by his last will, admitted to probate in July, 1859, devised all his estate. By the 9th clause he gave to his son, James E. Hazelwood, a certain tract of land, subject to the life estate of the testator's widow, and to a charge of \$1,000 to another son of testator.

The last clause of the will was: "All the property that I have given to my above-named children, I give to them and their bodily heirs forever."

A codicil also probated with the will, and bearing date a few months after the date of the will, is as follows: "I have this day made the above change in my will as interlined, to wit: The word heirs for bodily heirs."

The life tenant, the widow of testator, is dead. The devisee, James E. Hazelwood sold and conveyed the land, and it has since been conveyed to appellees, who brought this suit to quiet their title against appellants, children of James E. Hazelwood. The circuit court adjudged the case in favor of appellees, holding that by the will and codicil James E. Hazelwood took the fee-simple title, subject to the life estate and charge mentioned. It was claimed of appellants that they took title to this land under the will with their father.

The original draft of the will is not before us. But, from the language of the codicil we take it that the words originally appearing in the will were "bodily heirs," and that testator intended by the codicil to substitute the word "heir," the latter being a word of purchase, and the former probably of limitation. The whole context of the will rather supports this conclusion, as it appears from the entire instrument that the testator really intended to invest his children with the absolute title to his property, a great part of which consisted of slaves and personalty. Appellant's principal contentions on this appeal are over matters of practice. Appellees, plaintiffs, alleged that they were the owners of the land mentioned and described. Appellants denied that plaintiffs were the owners. A number of pleadings were filed, but the gist of them was as to the effect of the language of the will which we have quoted. No issue of fact was presented. Both parties claimed under the same title, viz: Richard Hazelwood's and it was not necessary to go further than to construe the will on the point involved, purely a question of law.

Appellants complain that the case was ordered submitted and tried on its merits before the issue had been joined sixty days and, therefore, did not stand for trial under §64, Civil Code. This section applies only where there is an issue of fact. It is next complained that one of appellants' attorneys was unable, by reason of sickness, to attend at the term at which the case was tried. There were two or three other attorneys associated in the case with the one who was sick, and it does not appear that they were not fully competent to attend to the trial of the question of law presented, the only thing to be tried. We fail to see that the substantial right of appellants was prejudiced by the action of the court.

Judgment affirmed.

CHESAPEAKE & OHIO RY. CO. v. TOPPING.

(Filed January 12, 1904—Not to be reported.)

1. Railroads—Damages—Instructions—In this action where appellee was a passenger on appellant's mixed train with a ticket from Catlettsburg to Curnett's Station, and the conductor failed to stop the train at last-named station and carried appellee beyond, he agreeing to get off at a near-by tank, and in stopping at the tank and while appellee was in the act of alighting from the train he was thrown off, receiving injuries, it can not be said that as a matter of law his leaving the seat to go forward to the door of the coach as the train is slowing up to stop at the station is per se negligence.

2. Same—Duty of carrier—Where a passenger agreed to leave the train at a water tank instead of the station the carrier undertook the same care for the safety of the passenger in making the stop at the tank that he would have been required to take at the station.

W. H. Wadsworth for appellant.

R. T. Burns and W. S. Burns for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was a passenger on appellant's mixed train with a ticket from Catlettsburg, Ky., to Curnett's Station, in Lawrence county. The conductor failed to stop the train at the last-named station, and carried appellee beyond. When the conductor's attention was called to it, he offered to take appellee back, or to return him on the next train. Appellee elected, however, to get off at a near-by water tank where the train was to stop to take water for the locomotive. In stopping at the last-named point, and while appellee was in the act of leaving the car, he claims the train gave an unusual and very hard jerk, or jolt, throwing him and cutting off the end of his thumb.

There were two trials of the case. There was not very material conflict of evidence except upon the point whether the train had fully stopped before appellee attempted to leave the car, it being the theory of appellant that until it had, it was contributory negligence for appellee to leave his seat and go to the door of the car where he was hurt by the door being shut too, catching his hand. Each trial resulted in a verdict for appellee. The lower court granted a new trial from the first verdict. The court instructed the jury that "in riding on a mixed train plaintiff assumed the ordinary danger of that mode of travel, and that to entitle him to recover they must believe from the evidence that his injury was caused by more than the usual bumps and jerks of such train."

Appellant asked the court to tell the jury, also, that "it was the duty of the plaintiff to remain in his seat until the train had made its customary and usual stop at the water tank, and if the jury believe from the evidence that plaintiff arose from his seat before the train had so stopped and placed himself where he was injured and that but for so placing himself in such position he would not have been injured, he was guilty of contributory negligence, and the jury will find for the defendant."

We can not say that as a matter of law if a passenger leaves his seat and goes forward to the door of the coach to leave it as the train is slowing up

to stop at his station, it is per se negligence on the part of the passenger. No authority had been cited in support of the proposition. The trial court, on this point, told the jury that "it was the duty of the plaintiff to exercise reasonable care to protect himself from injury while leaving the defendant's cars," and that his failure to do so, and that if otherwise the injury would not have occurred to him, although the plaintiff was also negligent in the manner of stopping the train, it would be such contributory negligence as required a verdict for the defendant. We are of opinion that this instruction taken in connection with the others given, fairly stated the law applicable to this matter. When appellant and appellee agreed that appellee was to leave the train at the water tank instead of the station to which he bought his ticket, the carrier undertook to use the same care for the safety of its passenger in making the stop at the water tank, as if it were making it at the station. The complaint of other errors does not appear to us to have substantial basis.

Judgment affirmed.

PARKER'S ADM'R v. CUMBERLAND TELEPHONE AND TELEGRAPH CO.

(Filed January 13, 1904—Not to be reported.)

Damages—Evidence—Negligence—Where it is alleged that a superior gave to a servant sticks of dynamite to thaw them out for the purposes of blasting and the servant put them in a stove containing fire when they exploded inflicting injuries upon him from which he died, in an action by the administrator, these allegations being denied, and contributory negligence being pleaded, it is not a ground of reversal that the trial court refused to permit a witness for the decedent's administrator to prove statements of the superior made several days after the accident to the effect that he failed to instruct the deceased as to the proper mode of preparing the dynamite, such statements being inadmissible as against the principal against whom the action was brought.

Chas. Carroll for appellant.

Fairleigh, Straus & Fairleigh for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Barker.

Appellant's decedent, David Parker, was in the employment of appellee, the Cumberland Telephone and Telegraph Co., performing services in Green county, Kentucky, at the time he received the injuries from which he died. The petition substantially states that, while in the employ of appellee, David Parker was ordered by the foreman, who was over him in authority, to thaw some sticks of dynamite, for the purpose of being used for blasting; that the decedent was ignorant of the nature of dynamite, or of the proper manner of preparing it for use; that without knowing of the danger, and without having been instructed thereof by appellee, or its employe having charge and control of him, he, in obedience to the order of his superior, placed some seventeen sticks of dynamite in a stove containing fire, which was situated in a box car owned by appellee, and then closed the door of the

stove, whereupon the dynamite exploded, completely wrecking both the store and the car, and inflicting upon him such injuries that he, after suffering great agony, died. It is further charged, that the foreman who gave Parker the aforementioned order, to prepare the dynamite for blasting, well knew that he was ignorant of the nature of dynamite, or of the manner of safely preparing it for use, and, with this knowledge of the decedent's ignorance, the foreman, with gross negligence, failed to instruct him as to the proper mode of preparing, or the danger in handling, it.

The answer controverts the material allegations of the petition, and pleads contributory negligence of the decedent. A trial resulted in a verdict and judgment for the defendant. Upon appeal, appellant relies upon but two grounds for reversal:

1st. That the trial court erred in refusing to permit appellant (plaintiff below) to prove, by a witness, as original testimony, the statements of appellee's foreman, made several days after the accident, containing an admission of his failure to instruct the decedent as to the proper mode of preparing the dynamite. This ruling of the court was entirely proper; except where they are a part of the *res gestæ*, such statements of the agent, made after the injury complained of, are inadmissible as against the principal. (*Embry v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 437; *C. & O. Ry. Co. v. Smith*, 101 Ky., 111; *L. & N. R. R. Co. v. Webb*, 99 Ky., 332; *McLeod, Rec'r v. Ginther*, 80 Ky., 899.)

2d. That the trial court erred in permitting appellee's agent to testify against the decedent, as to instructions given him about the use of dynamite.

In the case of *Cobb's Adm'r v. Wolf*, 96 Ky., 418, this court said: "It is competent for an agent who acts for a party in a transaction with one afterwards dying to testify for his principal concerning any verbal statement of, or any transaction with, or any act done by, the decedent. There is no reason why there should be such a rule as would preclude him from doing so. The agent has no pecuniary interest in the result of the litigation. He incurs no financial loss nor gains any material benefit by the result. The purpose of the law was to protect the estate of dead men by not allowing the one who is to profit by the litigation, to testify concerning any verbal statements of or any act done by the decedent, nor as to any transaction with him. The wisdom of this provision is evident. Were it otherwise, the estates of dead men would become a prey to the rapacity of perjurers. The agent being free from the motive of profit which his principal possesses has not been declared incompetent as a witness as to the acts, etc., of a decedent."

The fact that appellee is a corporation does not change the rule above announced, or take its agent out of the reasoning of the opinion.

For the reason indicated the judgment is affirmed.

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KENTUCKY COURT OF APPEALS.

CALVERT v. BROSIUS.

(Filed January 13, 1904—Not to be reported.)

Damages—Contributory negligence—In an action by a servant for injuries sustained by coming in contact with a saw on a table where he was sitting awaiting directions by the superintendent, the accident was attributable to his own carelessness and the trial court was authorized to peremptorily instruct the jury to so find.

L. P. Tanner for appellant.

Wm. B. Noe and G. W. Hickman for appellee.

Appeal from McLean Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant sought in this action to recover damages for the loss of two fingers and a portion of one of his hands, which were cut off by a strip saw in appellee's sawmill, which he alleges was due to the negligence of appellee's agents and servants in charge of and operating the mill. The answer was a traverse and a plea of contributory negligence.

The trial in the court below resulted in a verdict for the defendant rendered in obedience to a peremptory instruction given to the jury by the trial court. The testimony introduced by plaintiff is to the effect that for several months he had been employed by the defendant to stack lumber in his lumber yard adjacent to his sawmill; that he finished this work on Saturday, the 16th of August, 1903, and that on that day he communicated to appellee that there would be nothing for him to do in the yard until some lumber was sawed, that appellee directed him to report to Mr. Lorey, his superintendent in charge of the mill on the following Monday morning; and that he would direct him what to do; that pursuant to such direction on Monday morning he went to the mill shed and found that the mill was not running; that Mr. Lorey, the superintendent, and several employes of the mill were busy at work on the carriage way of the mill; and that not desiring to interrupt him whilst he was so employed, he took his seat on the edger table

in which was located the edger saw; that suddenly and without warning the mill started; that his attention was directed to the cut-off saw, which was making an unusual noise and began to wobble as though it would fly off of the bar on which it was placed; that about this time Mr. Lorey called out "look out," and believing that he was in danger, and under the impulse of the moment, in attempting to get out of the way of the cut-off saw, his right hand came in contact with the edger saw on the table on which he was sitting, and a portion of his hand and two fingers were cut off, from which he suffered greatly. There is no testimony or claim that appellant was directed by the defendant, or any of his agents, to take his seat upon the edger table, or that any duty which he owed the defendant required that he should do so, and it also appears that he was unduly alarmed as the cut-off saw did not in fact escape the axle on which it revolved. Even if it be conceded that appellant was in the employ of appellee at the time of the accident, we do not feel that he has shown any right to recover. A servant can not recover of a master for any injury to which his own negligence contributed, and it was certainly negligence of the grossest kind for him to go into a sawmill which he knew would soon be in operation and take his seat upon the edger saw table. He was not discharging any duty which he owed the defendant. The accident seems to be entirely attributable to his own carelessness and fright, and we think the trial court properly directed the jury to find a verdict for the defendant.

Judgment affirmed.

HOWARD v. McNEIL.

(Filed January 18, 1904—Not to be reported.)

Contracts—Where it was not recited in the contract that any part of the contract price for the sale of coal mining property was to be paid appellant, but it was to be paid to others in consideration of the payment of certain debts specified in the contract, the language of the contract excluding the idea that anything should be paid except the debts mentioned, the contention that appellee should reimburse appellant with a sum paid on the debt will not be upheld, that being no part of the consideration for the sale of the property.

Sam C. Hardin for appellant.

W. R. Ramsey for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

A. P. Settle, as assignee of the Queen City Coal Co., sold certain coal mining property to appellant for \$2,550, for which he executed three notes for \$850 each, payable to the trustee, with appellee, McNeil, and B. F. Howard as sureties. Some payments were made on the notes by the appellant and McNeil, when appellant sold and transferred to McNeil certain coal mining property, etc., which contract of sale was evidenced by a writing in which the consideration of the sale was recited as follows: "In consideration that J. McNeil will pay off the notes executed by me to A. P. Settle, as trustee of America Howard, one note executed by me to A. L. Howard or

his son, also one note to J. G. Phillips & Co., and all accounts I owe J. & E. S. McNeil, or J. McNeil per Star Coal Co."

Previous to the time the property was sold to appellee, the appellant had paid at one time \$210 on the debt. By this action he seeks to recover that amount and interest. First, upon the idea that he did not recollect this payment at the time he sold to McNeil; second, that McNeil subsequent to the purchase of the property promised to reimburse him for the sum so paid, and interest.

It will be observed that it is not recited in the contract that McNeil was to pay appellant any part of the contract price, but that he assumed to pay to others as a consideration for the property, certain debts for Howard particularly specified in the contract. The language employed in the contract excludes the idea that McNeil was to pay anything, except such debts as were specified in the contract. It is fairly inferable from the testimony of appellant that McNeil at the time of the purchase did not agree to reimburse him the sum in question, because he said that he had forgotten having paid it until long after the contract of sale was made. (This shows that it was not part of the consideration for the sale of the property that McNeil was to reimburse the appellant the sum claimed. It, therefore, was no part of the consideration for the sale of the property, nor was it estimated in fixing the contract price in its purchase. This being true, no subsequent promise of McNeil (if one was made) could be enforced, because there was no consideration to uphold it. This view obviates the necessity of discussing the question, as to whether such a promise was made or not after the sale of the property.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BARRALL.

(Filed January 13, 1904—Not to be reported.)

1. Railroads—Injunctions—S., claiming to own part of appellant's right of way upon which its tool house stood, obtained warrants of arrest, under section 1256, Kentucky Statutes, against several of appellant's employes, charging them with trespassing, when appellant instituted an action in the lower court to enjoin S. and the justice of the peace, who issued the warrants, from continuing the prosecution, the ruling of the trial court in sustaining the demurrer of appellee to the petition was proper.

2. Same—It is a well settled rule of equity that an injunction will not lie to restrain the prosecution of crime, and an allegation that a fraudulent conspiracy had been entered into to deprive one of his property, does not alter the rule.

Fairleigh, Straus & Fairleigh for appellant.

Chas. Carroll for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Barker.

Appellant, the Louisville & Nashville R. R. Co., operates a trunk railway line through Bullitt county, Kentucky, on a right of way said to be sixty-six feet wide.

S. C. Sanders, claiming to own a part of this right of way, upon which stood a tool house used by appellant, obtained from appellee, who is a justice of the peace of Bullitt county, the issuance of warrants of arrest for several of the employes of appellant, charging them with trespassing and injuring his property, under section 1256 of the Kentucky Statutes.

Upon the issuance of these warrants, appellant instituted this action in the Bullitt Circuit Court, for the purpose of obtaining an injunction against S. C. Sanders and S. F. Barrall, the justice of the peace in question, charging them with the fraudulent and collusive conspiracy to unlawfully and illegally issue warrants of arrest against its employes, and, in this way, to drive appellant and its employes out of the possession of its property. General demurrers to this petition were filed, both by appellee and S. C. Sanders; that of Sanders was overruled; that of appellee was sustained. Whereupon appellant declining to plead further, as against appellee, its petition was dismissed; from which judgment it has appealed. No rule of equity jurisdiction is better settled, than that an injunction will not lie to restrain the prosecution of crime. The allegation that the justice of the peace had entered into a fraudulent conspiracy with the prosecuting witness, to issue warrants of arrest in order to deprive appellant of its property, does not alter the rule. It is only well-pleaded allegations of fact that are admitted to be true by the demurrer. Every burglar, taken with the stolen property upon his person, could, and would, make just such an allegation against the court and prosecuting witness if it availed to restrain the process of the law against him. Appellant's employes were charged with crime, in a court having jurisdiction of the subject matter, and which, by its process, had acquired jurisdiction of their persons, and injunction will not lie against the court to restrain this prosecution.

High, in his work on Injunctions, section 272, thus states the rule: "It is a well settled principle of equity jurisprudence, that an injunction will never be granted, for the purpose of restraining proceedings of a criminal or quasi criminal nature, in a court having jurisdiction over such matter." Spelling, in his work on Injunctions and other Extraordinary Remedies, section 24, says: "Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor to interfere for the prevention of illegal acts, merely because they are illegal. Nor have courts of equity jurisdiction to prevent, by injunction, the institution of bona fide prosecutions for criminal offenses, whether the same be for violations of State statutes or municipal ordinances."

The case of *Shinkle v. The City of Covington*, 83 Ky., 420, does not militate against the principle announced in the case at bar. There, a citizen who had taken possession of property claimed to be one of the public streets of the city of Covington, was proceeded against by ordinance warrants sued out in the mayor's court, which had jurisdiction of the subject-matter.

Fifteen warrants were issued against the alleged trespasser, and in each case a fine was entered, so small in amount that it could not be appealed from. To remedy this evil, the defendant in the ordinance warrants instituted an action to enjoin the city of Covington from further prosecution in the mayor's court, under the ordinance, and to test his title to the property in question. It was held, that the action of the city, in thus constantly

suing out warrants under the ordinance, and the imposition of fines too small to be appealed, inflicted an injury upon the plaintiff for which he had no adequate remedy at law, and upon this ground the injunction was sustained. That is not the case here: Appellant's employes have not been tried, and no fine whatever has been imposed upon them; no facts are alleged, or shown, tending to establish irreparable injury to appellant, or that a multiplicity of suits will be instituted against it.

In the case cited by appellant, it is said: "The aid of a court of equity can not be invoked so as to interfere with proceedings of subordinate tribunals, unless to prevent irreparable injury, or a multiplicity of suits." (Ewing v. City of St. Louis, 5 Wall, 413; Mayor of Brooklyn v. Mearsole, 26 Wend, 132.)

The injunction issued and sustained in the case cited was only against the city, not against the judge of the court in which the warrants were pending.

The judgment is affirmed.

CITY OF OWENSBORO v. YORK'S ADM'R.

(Filed January 18, 1904.)

Damages—Electricity—In an action against appellant by the administratrix to recover damages for the death of intestate, it appearing that he was twelve years of age and was killed by coming in contact with a live electric wire, where the boy was dared by another boy to touch the wire, and he said he would touch it if he could get a board on which to stand, and that it would not hurt him, the same rule does not apply as in the case of an adult, and it is a question for the jury to determine whether considering his age he exercised such care and discretion as might reasonably be expected of a child situated as he was, and no injustice is done the appellant in this distinction and in thus limiting the defense of contributory negligence.

G. W. Jolly for appellant.

Wilfred Carico and Birkhead & Clements for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this suit as the administratrix of the estate of James P. York, to recover of appellant for his death. The intestate was a boy twelve years old. Some boys playing in the street discovered that a wire connecting with the electric light system was hot. When the curfew rang the larger boys went home. The intestate was sitting on a fence post. One of the boys dared any one in the crowd to touch the wire, and said he would give a nickel if some one would touch it. The intestate said that if he could get a board and stand on it he could touch it, and it would not hurt him. Some one got a board, and the little boy got on it; as soon as he touched the wire he was immediately killed; one of the boys who pulled him off from the wire by catching hold of his person, was severely shocked. One of the older boys, who was fourteen years of age, before he left told the boys not to touch the wire or they would get killed. But it is uncertain from his testimony whether the intestate heard this. About this time also one of the boys got a piece of wood and touched the wire with the wood, and it shocked him.

It is earnestly insisted for the city that there can be no recovery, although it was negligent in having the hot wire in the street, for the reason that the intestate knew the danger and voluntarily took the risk, assuming that if he stood on the board the electrical current would not hurt him. This would be true of an adult, but the question is whether the same rule should be applied to an infant twelve years old. If the child had been three years old, it would not be maintained that his negligence or willfulness in touching the wire would acquit the city of responsibility for having such an instrument of death negligently in the street; and when the child is older it is a question for the jury whether, considering his age, he exercised such care and discretion as might be reasonably expected of a child situated as he was. In *Macon v. The Paducah Street Railway Co.*, 28 Ky. Law Rep., 46, a boy twelve years old was killed by a live wire in the streets, and there was evidence in that case, as here, that the child was warned of the danger, but after showing that there was evidence of negligence on the part of the defendant sufficient to take the case to the jury, the court in disposing of the defense of contributory negligence, said: "It was also the province of the jury to determine whether or not plaintiff had in fact been warned of the danger of taking hold of the wire, and, if so, whether, considering his age and capacity, and all the other circumstances as shown by the evidence at the time, that he did take hold of it, he was guilty of such contributory negligence as barred his right to recover in this action."

In *Texarkana Gas Co. v. Orr*, 43 Am. St. Rep., 30, the wire was lying in the street and a hog had been shocked by it. A boy who was passing along the street, took hold of one of the wires lying in the street, which was not charged, and began dragging it across the street. A policeman saw him, and called to him to put it down. He then took the wire in both hands and began throwing it backwards and forwards, with a view to throwing it down; when he did this, the wire was thrown in contact with a live wire, while he yet held it in his hands, and he was killed. His exact age is not stated in the report, except that it appeared that he was "of that indiscreet age which is between the irresponsibility of youth and the full responsibility of manhood." It was held that it should be left to the jury to say how far he should be held responsible. These decisions are in accord with the current of authority. In *Washington, &c., R. R. Co. v. Gladmon*, 15 Wallace, 401, a child seven years old was injured. The court said: "Of a child three years of age less caution would be required than of one of seven, and of a child of seven, less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

In *P. & M. Railroad v. Hoehle*, 75 Ky., 41, a child twelve years old was struck by a train; it was held that she could not recover if she would have escaped injury "by exercising the caution and prudence that one of her age would ordinarily have used under the circumstances."

In *Kentucky Central Railroad v. Gastineau's Adm'r*, 88 Ky., 119, a boy between fourteen and fifteen years old was run over and killed by a car. It was held that the jury should have been instructed to find "whether, from the age of the deceased, he had discretion enough to know his danger and guard against it or not."

In 1 Shearman & Redfield on Negligence, section 73. It is said: "It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. No injustice is done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault."

In 7 Am. & Eng. Ency. of Law, page 408, after a discussion of the rule requiring that allowance must be made for childish instincts, impulses and want of discretion, it is said: "As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether the child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child fall short of the standard which the law erects for determining what is ordinary care in a person of full age and capacity."

Electricity is such a deadly instrumentality as used by an electric light company, and the wire when charged with it has so little appearance of danger, that a child of twelve years would not appreciate the peril of touching the wire. The fact that the child was warned of the danger, or told not to touch the wire, while it is a circumstance to be considered by the jury, is not conclusive on the question of negligence; for it is the want of discretion in the child, rather than the want of information, which underlies the rule exempting him from the consequences of his act as shown by the authorities above referred to. Children act upon childish instincts and impulses; that discretion which is expected of an adult can not be required of them. It is incumbent on those handling dangerous instrumentalities not to leave exposed to the reach of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they could handle or play with. In the case at bar, the little boy, from his want of discretion and judgment, thought he could handle the deadly wire if he stood on a board. His ignorance as to the danger of taking hold of the wire while standing on the board, his childish impulse to take hold of it, not to take a dare, and his childish want of discretion were the causes that led to his death. Under such circumstances it was a question for the jury to determine under all the facts whether he exercised such care and discretion as might be reasonably expected of one of his age situated as he was. The petition was sufficient, under the rule, in this State as to the necessary allegations in an action to recover for death by negligence. (L. & N. R. R. v. Wolfe, 80 Ky., 82; Childs v. Drake, 2 Metcalfe, 149.)

Judgment affirmed.

Whole Court sitting.

Judges Paynter, Barker and Settle dissent

HALL v. BLANTON, &c.

(Filed January 13, 1903—Not to be reported.)

1. Lands—Title—Disputed boundary—Patents—Where appellant claiming title from F., who obtained a patent for 1,000 acres of land, and on the same day the deviser of appellees and one Ledford, obtained a patent to 1,000 acres, which patents lap and both parties claiming title to the land in controversy, it appearing that the patent under which appellant deduces his claim was the elder and took priority over the patent under which appellees claim and that appellant held the land adversely and continuously for more than fifteen years prior to the institution of this action, the ruling of the trial court adjudging the title in appellees will not be upheld.

2. Same—"Where two patents lap, the holder of the junior title can not by taking actual possession of a part of the land included in his patent—not in the lap—acquire a title to the interference, by claiming to a defined boundary which would include the interference."

3. Same—Cutting timber, conducting sugar camp, allowing stock to range, and other such trespasses do not constitute adverse possession within the meaning of the law.

Wm. Low and W. F. Hall for appellant.

J. S. Forester, James Howard, J. A. Scott and W. C. Marshall for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Barker.

This action involves the title to a boundary of land in Harlan county, Kentucky. On the 2d day of July, 1844, the Commonwealth of Kentucky issued to Louis Farmer a patent for a boundary of 1,000 acres of land in Harlan county, and, on the same day, it issued to John Ledford and Robert Napier a patent for 1,000 acres of land in the same county. The patents lap each other on the waters of what is now called Bobs creek, and the interference thus made contains the land in controversy, and, being issued on the same day, their priority is decided by the date of the survey, which is shown to be in favor of the Farmer patent, by a few days in time.

Appellant deduces his claim from the Louis Farmer patent; appellee from the Ledford and Napier patent. Prior to the issuance of either of the patents before named James Farmer had obtained a patent for 50 acres of land on Bobs creek, which he had sold to Robert Napier, who lived thereon at the time the 1,000-acre patent was issued to him and Ledford. After obtaining their patent, John Ledford and Robert Napier, who were brothers-in-law, made a verbal division of the land called for by its terms, so that Robert Napier's moiety would lie next to his home place. After thus settling the boundary between himself and John Ledford, appellee claims that Robert Napier remained in possession of the land, claiming to a well-defined boundary, which included the land in controversy, from 1844, until his death in 1883, when, by the terms of his will, it was devised to his wife for life, and then to his nine children, one of whom, Minta, intermarried with appellee Blanton.

After the death of his father-in-law, appellee purchased all of the outstanding interest in the land in question, except that belonging to his wife, and, by virtue of this acquisition, claims title to it. In 1882, appellant

W. K. Hall, as the remote grantee of Louis Farmer, and claiming to be its owner, took possession of the land in controversy, and has remained in possession thereof from then, continuously, up to the institution of this action. Both of the parties litigant claim the land by record title, as above shown, and also claim possessory title by the adverse holding by themselves and their grantors, for the full statutory period of fifteen years.

Upon the trial of the case, the chancellor held that the deed to appellant was champertous within the terms of the statute, because, at the time it was made the land was in, the actual, adverse possession of Robert Napier; that the appellee had a good possessory title, and adjudged him the owner of the whole disputed boundary. To review this judgment, this appeal is prosecuted.

The learned chancellor properly held that the Louis Farmer patent was the elder, and took priority over the Ledford and Napier patent, but, we can not agree to the conclusion reached by him, that the deed from J. K. Farley to W. K. Hall was champertous, and void, for the reason that the land in controversy was then in the actual possession of Robert Napier, or that Robert Napier had the actual possession of the lap in the patents from 1844 until 1883, or that, since that time, his heirs and the appellee have had possession of it. Where two patents lap, the holder of the junior title can not, by taking actual possession of a part of the land included in his patent—not in the lap—acquire title to the interference, by claiming to a defined boundary which would include the interference. (*Greer v. Bowling*, 21 Ky. Law Rep., 1648; *Wait v. Gower*, 11 Ky. Law Rep., 750; *Trimble v. Smith*, 4 Bibb, 257; *Jones v. McCauley's Heirs*, 2 Du., 14.) In order to acquire title by possession, as against the elder grant, he must take actual, physical possession of all the land within the interference, which he proposes to acquire, and hold it, adversely, actually and continuously, for the full statutory period. This principle is thus announced by Judge Robertson, in the case of *Jones v. McCauley's Heirs*, 2 Du., 14: "There can be no constructive possession of the same land by conflicting claimants. In the absence of any actual possession, if there be any constructive possession, it must necessarily be in the holder of the best title, unless he had renounced it. And his constructive possession can never be ousted by any constructive possession claimed under the inferior title; nothing short of a renunciation or actual disseizin can evict him. Nor will the statute of limitations run in favor of a mere constructive possession by the claimant under a junior patent; such ideal possession can not be either wrongful or hurtful to the holder of the elder grant, and, per se, could not give him any cause of action. Nor would a mere trespass, in cutting or removing wood or timber, authorize an action of ejectment. Such wrongs do not, in law, give actual possession of the land, nor amount to an eviction. The law of limitation, being reasonable and founded on principle, does not allow the statute to run when there is no cause of action; and, therefore, to bar an ejectment by time, the adverse possession must have been not only actual, but so continued for twenty years as to have furnished a cause of action every day during the whole period, and, consequently, as conclusively and consistently adjudged, claim of title, however notorious, and occasional use under that claim, without actual possession, continued without intermission or interruption for twenty years, will not bar an adverse right of entry."

Measured by the standard thus announced, the evidence in this case wholly fails to show that Robert Napier ever had the actual, continuous and adverse possession of the lap in question for the full period of twenty years. This was wild, unenclosed, mountain land, and, until very recently, of small value. The fact that Robert Napier "masted" his hogs thereon, or allowed his cattle to range on it, or had a sugar camp, or occasionally cut timber therefrom, and other like desultory trespasses, did not constitute an adverse possession within the meaning of the law. The deed from Farley and wife to W. K. Hall was not champertous; as Robert Napier's claim, and the occasional trespasses before mentioned, did not constitute an adverse holding, the deed can not be held champertous on that ground. But it is urged that the evidence shows that one of the sons of Robert Napier had the actual possession of the interference in controversy at the time the deed was made. The evidence does show that Nathan Napier, one of the sons of Robert, was occupying a small log house, which had been built upon an enclosed boundary containing an acre or two of the property involved in this litigation. The rule is that, where the holder of the junior patent takes actual possession of a part of the interference, there having been an entry under the elder, his possession in law is limited to his actual enclosure. (*Miller v. Humphries*, 2 A. K. Marsh., 448; *Crockett v. Lashbrook*, 5 T. B. Mon., 530; *Shrieve v. Summers*, 1 Dana, 239.)

The adverse possession, then, of Robert Napier, at the time the deed of Farley and wife to appellant was executed and delivered, must be limited to the small enclosure which his son was actually occupying. The evidence shows, however, that there was no actual, adverse holding of any part of the interference on the part of Robert Napier. His son, Nathan, who occupied the cottage in question, and his wife, Rhoda Napier, both testified (and in this they are not contradicted by any evidence whatever), that, when W. K. Hall evinced an intention to take possession of the interference, under claim of title, they moved out of the cottage, under the orders of Robert Napier himself, who told them to let Hall have the land. We conclude then, that at the time appellant acquired title to the land in controversy, no part of it was in the adverse possession of Robert Napier, or any one for him.

The evidence conclusively shows that, after his entry in 1882, W. K. Hall held the land in question adversely to all the world, and continuously, up to the date of the filing of this action, a period of more than fifteen years. As to whether or not he had the whole of the interference enclosed is immaterial, as he, having entered upon it under the elder patent, by construction of law, his possession is that of the whole, the rule being the reverse of that where the entry is made under the junior patent. In the case of *McGowan v. Crooks*, 5 Dana, 65, the rule is thus declared: "One of the well-established principles on the subject is that where the junior patentee has made an adverse entry within the interference, and holds possession of it, if the elder patentee enter upon it within twenty years, for the purpose of taking possession, such entry stops the running of the statute of limitations against him, and may vest him with the entire possession. (*Hord v. Bodley*, 5 Litt., 88.) Such an entry certainly gains the possession of the unenclosed land, and though it should not be continued, would operate to save the right of

the elder patentee for twenty years from the time of its removal or cessation."

To the same effect is *Shrieve v. Summers*, 1 Dana, 239. But we think the evidence shows that, for the period of time elapsing from 1882 to the institution of this action, the possession on the part of Hall was actual as to the whole tract of land.

The record in this case is voluminous, and the testimony of many witnesses was taken on the question of the adverse possession of Robert Napier. A great many of the witnesses introduced by appellee testified, in general terms, that Robert Napier claimed to a well-defined boundary, which included the land in controversy; but, we think the great weight of the testimony, and, in fact, all which is directed to the particular issue, as to whether or not he claimed title to this land, shows that he did not so claim. Nathan Napier, his son, and Rhoda Napier, his daughter-in law, both testified that he did not claim it, but, on the contrary, ordered Nathan to move off of the small part he occupied, and give Hall possession. William Clem, Sr., one of appellant's vendors, testifies that Robert Napier did not claim the land in controversy, but offered to buy it from him. N. H. Howard, in his evidence, shows that he did not claim it, but desired Howard to aid him in purchasing it from Clem. Rans Hall, a son of appellant, testifies that Robert Napier told him that he did not claim any part above Clem's line (the land in controversy); that the title to that was "as good as wheat in the mill." We are of opinion, that the claim of appellee grew out of a misapprehension as to the real condition of the record establishing the priority between the Farmer and the Ledford-Napier patents. It seems that, after the death of Robert Napier, his heirs instituted an action in ejectment, in the Harlan Circuit Court, against appellant, to recover possession of the land involved here. This action, although pending for fourteen years, appears never to have been prosecuted to a trial. The reason for this is shown in the testimony of J. M. Napier, one of the sons of Robert, who says: "By looking at the survey books, the patent, under which we claim on Bobs creek, or the survey, showed to be older than the one under which W. K. Hall claimed, and myself and the heirs of Robert Napier brought suit against W. K. Hall, to recover this land. We sent to Frankfort and got certified copies of the original survey and plat to each one of the surveys, the one under which W. K. Hall claimed was the oldest, and we quit the suit and never prosecuted it any further. I sold out my interest to W. S. Blanton in the land owned by Robert Napier at his death; W. F. Hall, James D. Black and John Dishman were our attorneys. They advised us we could not recover the land, and we quit the suit. * * * I sold him (Blanton) all my interest in the Robert Napier land. W. S. Blanton said he was going to law for the W. K. Hall land. I told him if he could gain it, it was all right with me."

E. V. Napier, another son of Robert, in answer to a question as to whether or not there was any marked line around his father's home farm, including the land of W. K. Hall, said: "No, sir, none that I ever knew of." Again he was asked: "State if your father ever had any sort of possession of any part of what is known as the W. K. Hall tract of land, after W. K. Hall moved there, and you will further state whether or not any of his heirs ever

had any possession of any part thereof after his death?" He answered: "No, sir, I think not. Neither did any of his heirs ever have any possession after his death, that I ever knew of."

We conclude that the record shows that W. K. Hall, at the time of the institution of this action, had a good title to all the land in question, and was in possession of it.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

VANCEBURG AND STOUT'S LANE T. P. R. CO. v. MAYSVILLE & BIG SANDY R. R. CO.

SAME v. BRUCE, &c.

(Filed January 13, 1904.)

1. Turnpikes—Taxation—Where a turnpike company was created and by the act creating it there was levied on all species of property for the purpose of building it a tax on all the property within the bounds of a certain taxing district, 50 cents upon each \$100 of taxable property, and provided that the company might appoint an assessor to assess the property of individuals, and the county court should appoint two commissioners to list the railroad property and that the county judge was required to assess the property and report it to the company, persons paying taxes becoming stockholders of the company to the extent of the taxes paid, where appellee Bruce enjoined the collection of the tax on the ground that the act was unconstitutional, but after the assessment was made as indicated it should be by this court and this assessment was approved. Upon a second appeal where the collection had again been enjoined both as to the individual taxpayers, and to the railroad company, where property had been levied on under the assessment made under the charter instead of by the assessor. Held—That the opinion on the former appeal is conclusive and the questions raised can not again be considered.

2. Same—Lease—Where a turnpike company finding that it could not complete its road because of the suspension of a tax, leased the road to a county until it got in such financial condition as would enable it to finish the road, such lease was not a surrender of its franchise, the legal effect of such a lease being entirely different from the Free Turnpike Act Kentucky Statutes, section 4748, subsection 8, the road in this case not having been sold to the county.

3. Same—Section 7, article 4 of the act of 1892, providing that the same rate of taxation which was levied on other real estate in any year should also be levied on railroad property, there being no assessment on individual property, previous to 1895, no tax can be collected from the railroad company for any year previous to 1895.

A. E. Cole & Son, W. C. Halbert and E. L. Worthington for appellant.

W. H. Wadsworth and Wadsworth & Cochran for appellees.

Appeals from Lewis Circuit Court.

Opinion of the court by Judge Hobson.

The opinion heretofore rendered in the first of these cases (Vanceburg, &c., Turnpike Co. v. Maysville, &c., R. R. Co., — Ky. Law Rep., —) was withdrawn and a re-argument ordered. On the re-argument the second case

was, by consent of parties, heard with the first case in order that the court might get more fully before it all the facts in the controversy; and we will now dispose of the two cases together.

The turnpike company was incorporated by an act of the legislature, approved April 4, 1890. (Acts 1889 90, volume 2, page 1885.) By its charter appellant was authorized to construct and operate a turnpike commencing at the west end of the bridge across Salt Lick creek; thence down the Ohio river bottom, the best and most practicable route to Stout's Lane, following, so far as convenient, the existing county road. In order to enable the company to build the turnpike as speedily as possible, and equalize the burden thereof, there was levied by the act on all species of property including that of railways situate within the bounds of a certain taxing district, subject to taxation for State purposes, the sum of 50 cents upon each \$100 worth of taxable property, each year, commencing with the year 1891 and continuing until the road was built and paid for. It was also provided that the company might appoint an assessor to assess the property of individuals subject to taxation, his assessment to be returned to the May or June term of the Lewis County Court in each year, and to be subject to correction thereby; the taxes were then to be listed with the sheriff of Lewis county for collection. As to railroad property the Lewis County Court was required, at its January or February term in each year, to appoint two commissioners to ascertain and report the number of miles and the value of the property within thirty days from this report, and such other evidence as might be introduced by any party in interest. The judge of the county court was required to make an assessment of the property and certify it to the railroad company. The taxes levied were required to be listed with the sheriff for collection on or before the 15th of July of each year; they were due from that date and the sheriff might then proceed to collect and distrain therefor. Persons paying taxes became stockholders in the company to the amount of taxes paid; and certificates should be delivered to them therefor whenever they paid an amount equal to \$25 until the road was completed and paid for.

The company organized as provided in the charter on June 18, 1891, and proceeded then and for each year thereafter to have the property assessed within the taxing district as provided by the charter, the order of the county court for that year as to the appointment of commissioners to assess the railroad property being made at the June term. The taxes were placed in the hands of the sheriff for collection, and the company proceeded with the construction of its pike. T. J. Bruce and other individual taxpayers residing in the taxing district then filed a suit enjoining the collection of the taxes on the ground, among other things, that the statute was unconstitutional. The circuit court perpetuated the injunction, and on appeal to this court the judgment was affirmed. The court said: "It seems to us that so much of the act in question as attempts to provide for the assessment of the property in the taxing district is unconstitutional and void, and that the appointment and assessment made by the appointees of the company are both invalid. But the legislature had power to levy the tax and to that extent the act in question is valid and by virtue of the general law the assessor of the county should assess the property in the taxing district and return the same as other tax lists are returned, and that the taxpayer should have the

same right to obtain corrections in or modifications of the list, as is allowed by the general law respecting the assessment of property for general taxation." (Bruce v. Vanceburg, &c., Turnpike Co., 18 Ky. Law Rep., 35.)

After this opinion was rendered the turnpike company procured from the county court an order, directing the county assessor to assess the property as indicated in the opinion, and to return his assessment to the county clerk to be submitted to the county board of equalization. Under this order assessments were made for the years 1895, 1896, 1897, 1898 and 1899, by the county assessor; his assessments were submitted to the county board of equalization, and were by it approved. No assessment appears to have been made of the property of the individual taxpayers for any year previous to 1895, except those made by the appointees of the turnpike company as provided in its charter, which was in this respect held unconstitutional in the case above referred to. The second of the above actions was brought by Bruce and others on July 5, 1897, to restrain the sheriff from levying on or selling their property under the assessment made under the charter, before the property had been assessed by the county assessor as indicated in the opinion of this court, above quoted. The subsequent assessment by the county assessor was set up in the action, and the case as finally presented, involved the right of the turnpike company to collect the taxes at all. The court perpetuated the injunction in that case, and also dismissed the petition in the first action above named in which the turnpike company undertook to collect from the railroad company its taxes. From these judgments the turnpike company appeals.

The opinion heretofore rendered on the former appeal is conclusive upon the parties and the validity of the charter provision as to the assessment of the property by the appointees of the company can not now be reconsidered. The assessment of the property of the individual taxpayers by the appointees of the company has been determined to be void. Being void, it conferred no right upon the sheriff to collect taxes thereunder, and was no bar to an assessment of the property by the county assessor; for, as it was void, the property had not in law been assessed at all, and not having been assessed, the case stood simply as an omission by the county assessor to make an assessment which he ought to have made. The fact that the assessor in making this list did not again call on the taxpayers does not invalidate the assessment. They were called on for the list of their property in each year when the county assessment was made, and they had ample opportunity to appear before the county board of supervisors and have any errors corrected.

It is insisted for appellees that they can not be taxed by reason of section 4736, Kentucky Statutes, because their property lies in two districts. By that section it is provided that whenever in any county there is in force a system of taxation for turnpike purposes under which part of such taxes are general and part thereof levied in turnpike road districts, then when the same property is situated in more than one of such districts, the property shall be liable for only one district tax, which shall be that levied in the district in which is the turnpike from which the property or its owner derives the greater benefit, and this shall be determined by the fiscal court or board of county commissioner, and its judgment shall be final. It is not averred that any such decision has been made by the fiscal court. By the

charter of appellant the tax is levied by the legislature on all the property in the taxing district, and if any taxpayer seeks exoneration from it he must apply to the fiscal court or county commissioners and obtain its judgment exempting him. Until this is done the sheriff may go on and collect the tax, as prima facie under the act all property within the taxing district is subject thereto.

The turnpike company, when the collection of the taxes was suspended, finding itself unable to complete its road, adopted on March 18, 1897, the following: "It was moved and adopted by a unanimous vote of all the directors of the company, that the portion of the road now completed and graded, be leased to Lewis county, as and for a county road, until such time as the company is in a financial condition to finish the road and properly take care of and maintain the same under its charter; the company reserving the right under its charter to resume possession for the purpose of finishing the road at any time it is financially able to do so, and also all its rights under its charter."

Under this resolution a lease was made stating that during the litigation in regard to the collection of taxes for the construction of the road and as the company was unable from lack of funds to finish the road or keep it in repair or to build a sufficient length of road to erect a gate and collect toll, the company in consideration of the premises leased its road, so far as built, to the county until it was in a condition financially to resume control, the county agreeing to surrender possession to the company when it was able and desired to retake possession and resume the work of construction under its charter. It is insisted for appellants that the company thus surrendered its franchises. The legal effect of the contract thus made is entirely different from that provided for by the free turnpike act (Kentucky Statutes, section 4748 b, subsection 8), which provides that when a pike shall be sold to the county, the charter, franchises and privileges of the company shall be at once dissolved and terminated. The road in this case was not sold to the county. The county court simply took charge of it temporarily under its general power of providing for the county highways, the pikes having been in part built upon the line of the county road. (Kentucky Statutes, section 4306.)

After the turnpike company was organized and had laid out its pike and constructed one mile of it, it became apparent to the directors that it was necessary to get enough of the road constructed as soon as possible to erect a tollgate and collect toll, so as to keep it in repair. The officers of the company to this end borrowed money in their own name and individually, which they used in grading the road and in getting ready for the completion of the first section necessary for a tollgate. The charter of the company contains the following: "Provided, That the company shall not be permitted to issue any bonds or other written obligations of indebtedness, nor to make any contract or contracts for constructing the road or any portion thereof until the taxes collected, with the stock subscriptions and the aid given by the county as hereinafter shown and provided for, shall be sufficient to meet and pay for said contract or contracts of construction of the road so let, et cetera."

The words "aid given by the county as hereinafter shown and provided

for," refer to a following section of the charter by which the Lewis County Court was authorized to subscribe the sum of \$1,000 per mile to the capital stock of the turnpike road company for each mile of the road constructed and ready for travel by the public until the entire road was finished and completed whenever the resources of the company were sufficient with the aid of the subscription to enable the company to construct its road one mile or more. The length of the road was about six and one-half miles. At the time the officers borrowed the money referred to the stock subscriptions of the company amounted to \$1,050, and little taxes had been collected. It is insisted for appellees that the borrowing of this money was forbidden by the charter, and that the taxes sued for are aimed to be collected to pay off the debts thus incurred, and not for the purpose of completing the road. We fail to see that there is any force in this position. If the directors of the company created a debt, they had no power to create, this is no reason why they should not go on and complete the road and pay for it as required by law. It is no defense for the taxpayer to say, when called on for the payment of taxes which were levied by the act of the legislature until the road was constructed and paid for, that the board of directors had created a debt they ought not to have created. It is not alleged that the road has been constructed and paid for, and it is, therefore, unnecessary now to consider whether the company made a contract for the construction of its road or any part thereof when the taxes collected with the stock subscriptions and the aid given by the county court, as therein provided, were insufficient to meet such contract, or what would be the rights of the parties if the turnpike company on receiving the benefit of the contract and having the money to pay, should voluntarily pay for the benefit received. These questions are not presented by the record, and are not passed on. We only decide that the borrowing of the money by the directors individually and the spending of it in the construction of the pike is no defense to the taxpayer when sued for the taxes levied for the building of the pike. When he pays his taxes he will then be a stockholder in the company, and if the money of the company is misappropriated, he may then complain. The proof fails to show that the company is not in good faith attempting to carry out its charter and to collect the taxes for the purpose of constructing and paying for the road as therein provided.

In the suit to collect the railroad tax the turnpike company set up the assessment of the property for each year both by commissioners, as provided in its charter, and by the railroad commission, as provided by the Kentucky Statutes, alleging that it was not advised as to which was the proper method of assessment, and praying the court to determine and enter judgment accordingly. On motion of the defendants the court required the plaintiff to elect which assessment it would rely upon. The plaintiff excepted, and under protest, elected to rely on the assessment made under the charter. On final hearing the court gave judgment in favor of the defendants.

The act of November 11, 1892, was a general law regulating taxation. By article 4 it regulated the assessment and payment of taxes by railroads, not only for State and county purposes, but for the purposes of each tax district of any kind. (Section 7, acts 1891-2-3, page 308.) This act superseded all local or special acts regulating the assessment of railroad property and re-

pealed to this extent the provisions of appellant's charter providing for a different mode of assessment of railroad property. The plaintiff's petition in so far as it sets out the assessment made by the commissioners of the county court, stated matter that was surplusage. There was no inconsistency between the allegations of the petition. The court was simply asked to determine which was the legal assessment, and this he should have done. The plaintiff stated but once cause of action, and there was no more reason for requiring an election than there would have been if the plaintiff had set up in a suit for real estate two deeds executed by the defendant alleging that the defendant claimed that one or the other was void and he did not know which was valid, the same property being embraced in each. The assessments referred to were precisely the same for some of the years, and substantially the same for all. But by section 7, article 4, of the act of 1892, it was provided that the same rate of taxation which was levied on other real estate in any year, should also be levied on railroad property. So far as appears from the record there has been no assessment in law of the property of individuals in the taxing district referred to for any year previous to 1895. This being so, no tax can be collected from the railroad company for any year previous to 1895.

The judgment in each case appealed from is, therefore, reversed and the cause is remanded for further proceedings consistent herewith.

Whole court sitting.

FRANKLIN v. TRACY.

(Filed January 13, 1904.)

Damages—Landlord and tenant—Where a house collapsed and fell, the tenant who occupied it can not recover damages for the destruction of his property. In this action where such damages were sought to be recovered a demurrer to the petition was properly sustained, it being as much the duty of the tenant as the owner to take notice of the dangerous condition of the house and no knowledge of its condition being brought to the owner by the tenant.

Henry J. Tilford and P. C. Beckley for appellants.

Huston Quinn for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Barker.

The appellant, Fannie Franklin, instituted this action in the Jefferson Circuit Court, to recover damages for injury to her property caused by the collapse of a house belonging to appellee, which she had rented, and which contained the injured property at the time of the collapse.

The petition states that the appellant rented the house, being No. 633 Center street, in Louisville, Ky., on the 20th day of July, 1900, from the Columbia Finance and Trust Co., which was the agent, for that purpose, of its owners, Mattie L. Tracy and Susie B. Tracy; that the renting was from month to month, until the contract lease between herself and appellee

should be terminated; that she remained in possession of the premises, under lease, until the 24th day of February, 1903, when the house, by reason of its unsafe, dangerous and defective condition, suddenly, and without warning, collapsed and fell, breaking and destroying all the property of appellant therein, which was reasonably worth the sum of \$200; that the house was in the unsafe, dangerous and defective condition, which caused it to fall at the beginning of the lease, and remained so until the day on which it fell; that this condition of the house was well known to the appellant, and each of them, or could have been known to them by the exercise of ordinary care at the time the lease was made, and on the 1st day of February, 1903; but was not known to appellant, and could not have been known to her by the exercise of ordinary care at the time the lease was made, or on the 1st day of February, 1903; that by reason of the collapse of the house in question she was damaged in the sum of \$250.

To this petition a general demurrer was interposed by the appellee, which was sustained by the court. Whereupon, appellant declining to plead further, her petition was dismissed, from which judgment this appeal is prayed. The demurrer admits, as true, all of the well-pleaded allegations of the petition, and presents for adjudication the question as to whether or not a landlord is liable for injuries to his tenant, caused by inherent defects in the construction of the tenement at the time of its rental, of which he did not have actual notice, but which, by the exercise of reasonable diligence and care, he could have known, and which the tenant did not know, and could not have discovered by ordinary diligence. In the case of *Battres v. Heiss*, 2 Ky. Law Rep., 308, it was said by this court: "It is as much the duty of the tenant as landlord to take notice of the dangerous condition of premises, and unless actual knowledge is brought home to the landlord, no recovery can be had on account of injuries received by reason of defects in the premises, even though: an ordinance as to repairs of such places has not been complied with."

The case of *Coke v. Gutkese*, 80 Ky., 588 was an action for damages resulting to a little child, by reason of the defective privy floor through which she fell into the vault below. The petition in the case alleged that, at the time the landlord rented the premises to the plaintiff's father, he knew the timbers upholding the floor were defective, rotten and dangerous, but suppressed his knowledge of its condition from her father, and "neither she nor her father could discover the dangerous condition of the privy floor by reason of the character of its construction, and that she fell through the floor, and was precipitated into the vault below, and greatly damaged, physically and mentally, by the fall."

A general demurrer to the petition having been sustained, this court, in reversing the judgment, thus states the rule: "This case is not like the cases cited, where the premises were defective or dangerous, but unknown to the lessor, who is not bound to repair, and, in such cases, not responsible for injuries to third persons. They lack the ingredients of knowledge, and the culpable neglect in disclosing it, about tenements or premises whose dangerous character could not be known by ordinary care, and whose use necessarily placed the occupant in peril."

Taylor, in his work on *Landlord and Tenant*, 6 edition, section 381, says:

"There is no implied warranty on the letting of a house or land, that it shall be reasonably fit for habitation or cultivation, or for any other purpose for which it was let. And where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate, that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent. And, in all cases of this kind where a tenant has been allowed to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment, as to the state of the premises which were the subject of the letting; or else the premises were proved to be uninhabitable by some wrongful act, or default of the landlord himself."

Shearman and Redfield, in their work on Negligence, 5 edition, section 709, say: "On the owner's entire surrender of control over premises to a lessee, he is, in the absence of any warranty of their condition or fraudulent concealment of known defects or agreement to repair, on his part, free from liability to the lessee and to those whom the latter invites upon the premises, for defects which could have been discovered by the lessee, on reasonable inspection, at the time of hiring. In other words, if the lessee had the same opportunities as the owner to discover a defect, at the time of leasing, the rule of caveat emptor supplies, and he takes the premises as he finds them. There is, therefore, no implied warranty on the part of a lessor that the demised premises are safe or reasonably fit for occupation. Where, however, there is some latent defect, e. g., an original structural weakness, or decay, or the presence of an infectious disease, or other injurious thing, rendering the occupation of the premises dangerous, which were known to the lessor, and were not known to the lessee, nor discoverable by him on a reasonable inspection, then it was the duty of the lessor to disclose the defect: and if an injury results therefrom, he is liable as for negligence."

In note three to the section cited, the rule is stated as follows: "A landlord who lets a house in a dangerous condition is not liable to his tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is on his contract, if any."

In support of which doctrine, the learned authors have collated a large number of cases

In the American and English Encyclopædia of Law, 2 edition, volume 18, subject, Landlord and Tenant, page 215, it is said: "At the common law, it is a well settled rule that, in the absence of any agreement between the parties, the landlord was under no obligations to his tenant to keep the demised premises in repair. The rule of caveat emptor applies in regard to leases, and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows, therefore, that, in the absence of any agreement on the part of the landlord to repair, a tenant can not recover from the landlord the cost of

the repairs made by him, nor can the tenant recover from the landlord for injuries to his person or property, or the property or person of his family, caused by the defective condition of the demised premises."

In support of which text, the authors of this work have, in a note, collated a vast number of adjudicated cases. One of the most instructive cases to which our attention has been called is that of *Doyle v. The Union Pacific Ry. Co.*, 147 U. S., 143, wherein the court, in a learned opinion, discusses the question of the responsibility of a lessor to his tenant for defects or dangers existing in the tenement at the time of the demise, and arrives at a conclusion in harmony with the rule enunciated by the authorities cited.

The cases of *Hines v. Wilcox*, decided by the Tennessee Supreme Court, and contained in 34 L. R. A., 834, and *Wilcox v. Hines*, decided by the same court, 41 L. R. A., 278, as authority for the doctrine contrary to that herein announced, have been pressed with great earnestness upon our attention. With the highest respect for the ability and learning evinced in the utterance of the Supreme Court of Tennessee in the cases cited, we can not concur in the conclusion therein reached, that the landlord is liable to his tenant for damages accruing to him by reason of defects existing in the tenement at the time of the demise, of which the landlord had no actual knowledge, but which he could have known by the exercise of reasonable diligence. In a note to the first of the cited cases, the annotator thus speaks of the rule announced in the opinion of the court: "*Hines v. Wilcox* is a new departure in the law of Landlord and Tenant. It places a duty upon the landlord which has not been the rule to place there, and, to a large extent, relieves the tenant from a duty which has always rested upon him. It makes a general rule of an exception which has only been applied in a peculiar class of cases, which does not include so obvious a defect as existed in *Hines v. Wilcox*. No active care and diligence, to discover defects, have generally been placed on the landlord."

And then follows a review of the cases bearing upon this question, which demonstrates that the principle announced by the Tennessee court is out of harmony with the overwhelming weight of authority on the subject. Negligence, as used in law, may be defined as the failure to discharge a legal duty whereby injury occurs. There can be no negligence, where there is no duty imposed. The law, as we have seen, imposes no duty of inspection on the landlord, but casts that duty on the tenant, who has equal facility with the owner to examine the premises; in other words, it applies to the contract of leasing the doctrine of *caveat emptor*. In this particular case, the tenant shows, in her petition, that she had been in the possession of the premises for thirty-one months before the accident, and it is difficult to understand how the landlord, who, at best, could only have seen the premises occasionally, could have discovered a defect, which the tenant, who was in it constantly, could not discover in nearly three years.

The judgment is affirmed.

BULLOCK'S, &c., TRUSTEE V. GUDGELL.

(Filed January 13, 1904.)

Judicial sales—Infants—Where lands of an infant are sold the proceeds are required to be re-invested, and it was error for the court in an action to sell the land to order so much of the proceeds as belonged to the infants paid to the trustee, and such payment did not relieve the purchaser from responsibility so far as the infants are concerned, being a purchaser at a judicial sale she was bound by the rule of caveat emptor.

P. J. Beard and E. H. Davis for appellants.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of Mrs. Mary Bullock was duly probated by the Jefferson County Court. The first section thereof is as follows: "I devise three-eighths of my property on the corner of 7th and Main streets in Louisville, and my land in McCracken county, namely, viz., the land derived from my uncle, Isaac Clark, and by gift from my sister, Martha, to H. C. Pindell, for and during the life of my son, E. Pearce Bullock, in trust, to collect the rents and profits thereof, pay the taxes thereupon, maintain it in good order and repair, keep the buildings thereon to which I am or may become entitled well, insured, and apply the net profits to the support of my son, E. Pearce Bullock, and his children, remainder to be equally divided among descendants of said E. P. Bullock, living at the time of his death, per stirpes, with power to said trustee and the said E. P. Bullock, to dispose of McCracken county land and invest the proceeds in such real estate, or the improvement of such as the said E. P. Bullock may direct."

The surviving husband of testatrix, W. F. Bullock, was appointed trustee under the will in lieu of H. C. Pindell, who declined to qualify, and continued to serve in this capacity until his death, when W. G. Anderson was appointed. Subsequently Anderson resigned, and the Shelby County Trust Co. qualified as trustee. Finally in June, 1901, the Shelby County Trust Co. tendered its resignation as trustee, which was accepted, and upon motion of E. P. Bullock, his son, J. Lowry Bullock, was appointed trustee, and duly qualified. Prior to the appointment of J. Lowry Bullock as trustee, the real estate in Louisville had been sold under judgments of the Jefferson Circuit Court, and a part of the proceeds thereof invested in a farm in Shelby county, which contained in the aggregate ninety acres and sixty poles; the title thereto was taken to the trustee for the use and benefit of E. P. Bullock and his children, as required by the will of Mary Bullock. After the qualification of J. Lowry Bullock, as trustee, he collected from the former trustee \$930 in cash, which belonged to the trust estate. And on the 13th of August, 1901, he contracted in writing with the appellee, Mary E. Gudgell, for the sale to her of the Shelby county farm for \$3,000, of which \$300 was paid in cash, \$1,700 to be paid when the deed was made to her, and the balance of \$1,000, was to be paid on the 25th of December, 1902, and to bear interest from the date of the deed. On the 24th of August, 1901, J. L. Bullock, as trustee, instituted this suit against his father, E. P. Bullock, and his wife, N. L. Bullock, and all of his children, namely, J. L. Bullock, W. A. Bullock, H.

P. Bullock, Lunsford Bullock, E. P. Bullock, Jr., Bessie Harwood, and her husband, T. W. Harwood, and the appellee, Mary E. Gudgell, as defendants. The petition alleged that the defendants, Lunsford Bullock, Helen M. Bullock, Thomas B. Bullock and E. P. Bullock, Jr., were infants; that all of them resided with or were under the care and control of their father, the defendant, E. Pearce Bullock; that neither of them had any guardian, curator or committee; and set out at length the contract for the sale of the land with Mrs. Gudgell, and asked the court to confirm it and authorize the execution of a deed to her by the trustee. The petition also set forth certain reasons why it would be beneficial to the "cestui que trust" that the sale should be confirmed. The defendants, E. P. Bullock, N. L. Bullock, J. L. Bullock, W. A. Bullock, H. P. Bullock, Bessie Harwood and T. W. Harwood, filed their joint answer to the petition, in which they admit each and every allegation of the petition, and affirmatively aver that the sale of the real estate to Mary Gudgell is at its full value, and will be highly beneficial to the trust estate, and pray the court to grant the prayer of the petition. The guardian ad litem, appointed for the infants, filed an answer stating that he was unable to make an affirmative defense for his wards. On the 28th of September, 1901, a judgment was entered directing the master commissioner of the Shelby Circuit Court to sell this tract of land after being properly advertised, and directing that \$2,000 of the purchase money should be paid to J. Lowry Bullock, trustee, on the day of the sale, and the balance twelve months from the date of sale, for which a bond should be made payable to the trustee, bearing interest from date. This judgment was duly executed by the sale of the property, and Mrs. Gudgell became the purchaser at the price agreed on, paying on the day of sale \$1,700 in cash to J. L. Bullock, as trustee, and executed bond to him as trustee for the unpaid purchase money. This sale was regularly confirmed, and it was further adjudged that the purchaser of the property should be permitted to pay the balance of the purchase money before its maturity, if she so elected. On the 26th day of March, 1902, Mrs. Gudgell paid to J. L. Bullock \$400 upon her note for the balance of the purchase money. Subsequently on the 16th of September, 1902, she came into court and asked for a rule against J. L. Bullock requiring him to pay the money into court, and that it be re-invested in other real estate under order of the court; and that the proceedings thereafter might conform to the requirements of law. In response to this rule, J. L. Bullock asked a settlement of his accounts as trustee by the commissioner, and that he be given until the next term of the court to obey the rule. At the next term, he paid into court \$766.50, and after the allowance of all proper credits, there remained in his hands as unaccounted for a balance of \$2,189.73, which included the \$930 in money collected from the former trustee. J. L. Bullock was thereupon removed and the Shelby County Trust Co. re-appointed trustee of the funds, and on its motion a rule was entered against Mrs. Gudgell to pay all of the purchase money into court. She responded, setting out the fact that she had paid \$2,400 to J. L. Bullock, and offered to pay the remaining \$600 in her hands, with interest, if the court should hold that she had acquired a good title. The trial court adjudged her title good, and directed the payment by her into court of the \$600 and interest. To this ruling of the court, the trust company and the guardian ad litem both ex-

cepted, and have prosecuted an appeal to this court, and insist that the Shelby Circuit Court had no jurisdiction to direct that the purchase money for the lands sold in this action should be paid to the trustee.

The law is well settled that courts of equity have no jurisdiction to sell the real estate of infants except as authorized by statute, and a strict compliance with the provisions of such statute is uniformly held necessary to divest the title of an infant in land. In *Hicks v. Jackson*, 24 Ky. Law Rep., 218, the court said: "The statutory safeguards of infant's real estate can not be too strictly enforced by the courts. If they are literally adhered to and followed, much of the confusion in titles and loss to infants or purchasers at such sales would be averted." (*Malone v. Conn., &c.*, 95 Ky., 93; *Isart v. Davis*, 7 Ky. Law Rep., 686; *Dineen v. Hall*, 23 Ky. Law Rep., 1616; *Craig v. Wilcox's Ex'or*, 94 Ky., 484.)

In sales under section 498 of the Civil Code, the bond required by sections 491 and 493, are dispensed with, but in lieu thereof, as an equally adequate protection of the rights of the infant, the proceeds of the real estate sold are required to be paid into court, and reinvested by the court in other property to be held in the same way. We are, therefore, of the opinion that the Shelby Circuit Court had no jurisdiction to order so much of the purchase money of the land sold in this action as belonged to the infant defendants, Lunsford Bullock, Helen M. Bullock, Thomas B. Bullock and E. P. Bullock, Jr., at the death of their father, E. Pearce Bullock, paid to the trustee; and that the payment by her to J. Lowry Bullock did not relieve her from responsibility so far as they are concerned; and that they are not divested of their interest in the land until their part of the purchase money has been paid into court. Being a purchaser at a judicial sale, she is bound by the rule of caveat emptor.

But as to the adult defendants a different rule of law applies. They were parties to the proceedings. The petition filed by J. L. Bullock, asking for a confirmation of the sale made by him to Mrs. Gudgell, set out the terms of the written contract entered into with her, and recited that \$2,000 of the purchase money was to be paid to him, and a note executed to him for the balance. They voluntarily entered their appearance in this action by filing a joint answer, in which they united in the prayer of plaintiff's petition. They made no objection to the judgment authorizing the payment of the purchase money, to J. Lowry Bullock; on the contrary, they requested that same might be entered. We are, therefore, of the opinion that E. Pearce Bullock and all of his adult children are now estopped by their acts and conduct from complaining of the judgment, or the payment thereunder of the purchase money to J. Lowry Bullock. (*Loeb v. Struck*, 19 Ky. Law Rep., 595.)

Upon the return of the case, the lower court is directed to have the value of the infant defendants' interest in the land bought by Mrs. Gudgell ascertained and paid into court as directed by the amendment to section 498 of Carroll's Civil Code, and so reinvested as to secure to them the full benefit of the provision made for them by the will of their grandmother, Mrs. Mary Bullock, applying the \$600 paid by her to this fund.

For reasons indicated the judgment is reversed and cause remanded or the proceedings indicated.

BOGARD v. TYLER'S ADM'R, &c.

(Filed January 13, 1904—Not to be reported.)

Attorneys fees—Where one successfully asserts his claim to attached property he can not recover in an action for attorney's fees expended in defense of his right to the property, such fees not being a part of the damages which are recoverable for the wrongful seizure.

Sims & Thomas for appellant.

R. A. Burnett for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Paynter.

The facts essential to be stated as admitted by the demurrer are as follows: The appellant advanced William Parks certain sums of money on lumber which was to be delivered on the bank of the Cumberland river. The appellant was to have a lien upon it for the sums so advanced and which was to be shipped for account of appellant. Part of the lumber was placed upon board of a steamer. W. J. Fuqua and John D. Tyler obtained an order of attachment against the property of Parks and had it levied upon the lumber. The appellant became a party to the action and claimed the lumber under his contract with Parks. The question thus raised was, whether the property was subject to the attachment. In other words, whether the appellant was entitled to it under his contract with Parks, as against the attaching creditors. The courts finally sustained the appellant's claim. He now seeks to recover by this action the amount which he expended for attorney's fees in successfully asserting his claim to the property.

The action is not based upon the attachment bond, for the order of attachment was not against the property of the appellant. It was not for maliciously obtaining the attachment, because it was not sued out against him. The money paid out as attorney's fees was in defense of his right to the property. Substantially the same question was involved in *Worthington, &c. v. Morris' Ex'tx*, 18 Ky., 54. The court there held, that when one who successfully resists an action against him seeking to subject his property to the payment of another's debt, can not recover attorney's fees as a part of the damages for the wrongful seizure of his property under an attachment. Where the property of one is wrongfully seized under an order of attachment against another, attorney's fees paid by the person whose property was so seized are not part of the damages which are recoverable for the wrongful seizure. (*Farmers and Shippers Warehouse Co. v. Givens*, 21 Ky. Law Rep., 1348.) We are of the opinion that the court properly sustained the demurrer to the petition.

The judgment is affirmed.

RIVERS v. MORRIS, &c.

(Filed January 14, 1904—Not to be reported.)

Wills—Where a bequest was made of all testator's property to William Morris and wife, and their children, with directions that Morris and wife take full charge of it and use same for the support of the family and the

education of the children, and that when all the children arrive at the age of twenty-one years, then said Morris and wife shall give to each one his portion under the will, the interest that Morris and wife took was subject to the charge made in the will and they became the trustees for the infant children.

Mongtomery & Lee for appellant.

Jas. F. Askew for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

The will of Green Stucker thus disposed of his property: "After the payment of all my debts and burial expenses, I will and devise all of the balance of my estate of every kind, real and personal, to William Morris and his wife, Harriet Morris, and their children, the children they now have and such as they may hereafter have. The children they now have are named Rheta, Sallie, Benjamin, John and Ada Bell Morris. I will that said William and Harriet Morris take charge of all of said property and use the same for the purpose of supporting the family and raising and education of said children so far as the rents and profits from said property will go, and when all the children arrive at the age of twenty-one years, then said William and Harriet Morris shall give to each one his or her portion under this will."

The testator is not shown to have been in any wise related to the devisees. William Morris, named as one of the devisees, died intestate in 1900. Harriet Morris, his widow, also named in the will, was married to appellant J. C. Rivers in April, 1902. She died in the fall of that year. Harriet Morris had five children by William Morris, the same named in the will of the testator, as living at the time the will was made. No other children were born to her. All of the devisees were living at the death of the testator. Two of them died infants, intestate, and without issue before either their father or mother died. One of the children named as a devisee is yet an infant. After the death of Harriett Morris-Rivers, appellant, her last husband, brought this suit for a partition of the land devised by the will, it being something over 100 acres. He claims that Harriet Morris-Rivers took an undivided one-seventh as a devisee under the will, and that she inherited one-half of an undivided one-seventh from each of her infant children who had died intestate; that the parties had occupied this land as a homestead, and that appellant, as the surviving husband of Harriet Morris Rivers, is entitled to either dower or homestead in her two-sevenths of the land. The circuit court denied his claim and dismissed his petition.

Under the will Harriet and William Morris did take an interest, but they took it subject to the charge made in the will that the use and income of the whole of the property devised should be for the purpose of supporting the family, and raising and educating the children named, and that the property was not to be divided among any of the devisees until all of them arrived at the age of twenty one years. William and Harriet were trustees for their infant children, who were given primary interest and the income in this estate. So long as they continued members of the family they too were entitled to support from that income. Upon their death the whole of the income and profits from the property was set apart by the will for the

education and support of the children until the youngest shall have arrived at the age of twenty-one years. This was a charge upon the estate of each child, those dying intestate, as well as it was upon the interest of Harriet and William Morris. The death of the trustees in no wise affected the trust. It continues until the time of distribution named in the will. Under section 2184, Kentucky Statutes, the wife is endowed of those lands only of her husband of which he, during coverture, was beneficially seized, and of which he had the fee-simple title. Under section 2148 the husband is now given dower in the wife's land in the same manner and to the same extent.

Considering the law as embraced in section 2181 this court has held that to entitle the surviving spouse to dower the other must not only have been seized of the fee-simple title to the land during coverture, but it must have been the land of which the owner was entitled also to the beneficial use and possession. (*Young v. Morehead*, 94 Ky., 608; *Butler v. Cheatam*, 8 Bush, 594.)

In this case the wife was not entitled to the possession of any of the land devised as against her children. It was not such a title as that her surviving husband was entitled to dower in the land. The court could not allow appellant a homestead in the land without imposing a burden and creating an estate different from that contemplated and provided for the testator in his will.

The judgment is affirmed.

IRVINE, &c. v. GIBSON.

(Filed January 14, 1904.)

1. Slander—Damages—Instructions—Insanity—In an action for slander where the defense was insanity the evidence conducing to show that the reason of appellant was dethroned and her mind disordered and that her condition of mind was incurable, the court should have instructed the jury "that if they believed from the evidence that at the time of the speaking of the defamatory words by the defendant she was insane upon the subject of her husband's relations with women which incapacitated her from knowing or understanding the meaning of the defamatory words, they should find for the defendant."

2. Same—Power over judgment—This court where a judgment is excessive can not reduce the amount as it is not authorized to enter a remittitur. If the judgment is erroneous, it can only be reversed and the jurisdiction of this court over the action ceases with its reversal, neither has this court power upon the reversal of a judgment in actions like this to put the appellant upon terms by requiring him to enter his assent of record that the present judgment shall stand as security for whatever damages may be found upon a second trial.

3. Same—In an action of slander insanity is a good defense, but it should satisfactorily appear from the evidence that at the time of speaking the defamatory words, the person uttering them must either be totally deranged or laboring under an insane delusion on the subject to which the words related.

J. W. Caperton, W. B. Smith, R. W. Miller, Smith & Bush and J. H. Hazelrigg for appellants.

J. A. Sullivan and J. Tevis Cobb for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Florida Gibson, a young woman of excellent character, residing in Madison county, instituted in the circuit court of that county an action for slander against the appellant, Bettie H. Irvine and her husband, I. Shelby Irvine, laying her damages at \$30,000.

These are the slanderous words set forth in the petition, viz.: "Florida Gibson left here this summer, and had a baby, and I know it is so."

It is averred in the petition that the slanderous words were falsely and maliciously spoken and published by Bettie H. Irvine of and concerning the appellee, and though it appears from the bill of evidence, made a part of the record, that other harsh and false charges derogatory to the character of the appellee, were made by Mrs. Irvine, the words complained of were shown to have been spoken but one time, and in the hearing of but one person. I. Shelby Irvine entered a motion to require the appellee to elect which of the defendants she would prosecute her action against, which motion was sustained by the lower court. Appellee elected to prosecute her action against Bettie H. Irvine, which caused its dismissal as to I. Shelby Irvine. Thereafter I. Shelby Irvine, as the husband of Bettie H. Irvine, and assuming to act as her next friend, filed an answer to the petition in which it was averred that she was a person of unsound mind and unable to defend the action or herself, and that if the slanderous words were spoken by her it was when she was of unsound mind and unable to understand what she said, or the meaning of the words used.

On motion of appellee this answer was, by the court, stricken from the file, and the court then appointed two able and experienced members of the Madison county bar, guardians ad litem to defend for Bettie H. Irvine. The guardians ad litem, by answer, set up for their ward the defense that the words complained of were not spoken by her, or if they were spoken that she was at the time of the speaking laboring under a pronounced and well-defined monomania, or delusional insanity upon the subject of her husband's relation with women, which incapacitated her from knowing what she said of the appellee, or the meaning or effect of the words complained of. In addition, the answer contains the following testimonial to the appellee's character: "They further state that the plaintiff is a woman of most excellent character, esteemed by her friends, and respected by the community as a woman of pure life and chaste character."

The answer of the guardians ad litem, except as to the testimonials to appellee's character, was controverted by the reply filed by the appellee, and upon the issues thus formed the case went to trial, which resulted in a verdict and judgment for the appellee for \$30,000 in damages. The guardians ad litem entered motion and grounds for a new trial, which was refused by the trial court, and the case is now before us for review upon the appeal of Bettie H. Irvine by the guardian ad litem. And Bettie H. Irvine having died since the taking of the appeal, the same has been revived in the name of I. Shelby Irvine, administrator of her estate, he having been appointed as such administrator by the Madison County Court. The grounds relied on for a

new trial are thirteen in number, but as in our view of the case the fourth ground authorized the granting of a new trial asked, it will not be necessary to consider the others. This ground complains of the failure of the lower court to instruct the jury that insanity or monomania was a complete defense to the action. In other words, it is contended by the appellants that the lower court should have either peremptorily directed the jury to find for the appellant, Bettie H. Irvine, or instructed them that if they believed from the evidence that at the time of the speaking of the slanderous words, if she did speak them, she was of unsound mind, that is, laboring under such monomania or delusional insanity upon the subject of her husband's relations with women as to incapacitate her from knowing what she said in using the slanderous words of appellee complained of, or the meaning or effect of such words, they should find for the defendant.

Mr. Justice Cooley, in his admirable work on "Torts," discusses at great length the responsibility of lunatics for torts. He seems to be of the opinion that though they can not, because of the absence of a criminal intent, be punished for acts that would be criminal if committed by a sane person, nevertheless, in certain cases, they, or their estates may be held civilly liable for torts committed by them, but that they nor their estates are responsible in actions for slander or libel.

An illustration of this point may be found on page 99 of the volume *supra*, where it is said: "The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and by force or by terror of his threats takes from him his horse and vehicle and abuses or destroys them. In a sane person this may be highway robbery; but the lunatic is incapable of a criminal intent, and, therefore, commits no crime. Neither is the case one in which a contract to pay for the property, or for the injury, can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been deprived of his property, and if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the unfortunate occurrence should fall upon the estate of the person committing the injury, rather than upon that of the person who has suffered it."

One eminent law writer has doubted if there ought to be any responsibility in such a case. In the case of a "compos mentis" he says, although the intent be not decisive, still the act punished is that of a party competent to forsee and guard against the consequences of his conduct, and inevitable accident has always been held an excuse. In the case of a lunatic, it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident."

In discussing whether a person of unsound mind is responsible for slanderous or libelous words, Mr. Cooley further says: * * * "It has been seen that in some cases malice is a necessary ingredient of the tort. How can a non compos be responsible in such cases; such for instance as a malicious

prosecution or libel? Legal malice certainly can not be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person, or for any wild communication he might send through the mail, or post upon the wall. There can be no tort in these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element. And if in the case of defamatory publications, it may be said that after all the requirement of malice as an element in the wrong is only nominal, still there can be no tort because presumptively the utterances, or rather publications which proceed from a diseased brain can not injure." (Cooley on Torts, page 108.)

"In reason, an insane person can not have the malice essential in slander and libel. And this doctrine may be deemed to be sufficiently, though not very firmly established." (Bishop Noncontract Law, section 506.)

"Inasmuch as malice, actual or implied, is an element of slander, a person is not liable in damages therefor, if at the time of speaking the defamatory words he was totally deranged, or was the victim of insane delusion on the subject to which the words related." (16 Am. and Eng. Ency. Law, 2 edition, 622.)

"Insanity is a complete defense to an action for slander or libel." (Townsend on Slander, 3 edition, section 248; Bryant v. Jackson, 6 Humphreys (Tenn.), 199; Homer v. Mun. (Va.) 466; McDougal v. Coward, 95 N. C., 368.)

This court is asked for the first time to say whether or not insanity is a good defense in an action of slander. In view of the authorities supra, we are of the opinion that the question should be answered in the affirmative.

Insanity, however viewed anciently, is, in modern times, deemed a visitation from God, a disease or malconstruction of the mind. If God does not hold accountable for their misdeeds those whom he suffers to be thus afflicted, shall his creatures, entrusted with the enforcement of human laws, refuse to excuse their ostensible evil doing? Surely not. But while such is our view of the law, we would see that in order to defeat a recovery in a case like the one at bar upon the ground of insanity, it should satisfactorily appear from the evidence that at the time of speaking the defamatory words, the person uttering them was either totally deranged, or laboring under an insane delusion on the subject to which the words related.

In considering the evidence introduced as to the condition of mind of the unfortunate woman against whom the recovery was had in this case, we have been profoundly impressed by its weight and force. Without undertaking to discuss it in detail, or to mention the names of witnesses, we find that it manifests the facts that Mrs. Irvine was the fortunate possessor of practically unlimited wealth, a happy home and devoted husband. It seemed to be the constant aim of the husband to minister to her happiness. Both time and money were lavishly expended by him in the effort to restore her health and surround her with all that makes life desirable. She was apparently as devoted to her husband as he was to her. During all their married life he gave her no cause to doubt his affection for, or loyalty to.

her, and in his relations with respect to other women his conduct was exemplary in the extreme. But with the passing years disease, such as sometimes afflict her sex, came upon her, insidiously at first, but later with such force as to undermine her constitution, wreck her health, and practically destroy her mind. For fifteen years before her death she was thus afflicted. Repeated operations were performed upon her by the best and most experienced physicians and surgeons, and she was taken by her husband to sanitariums and health resorts in the effort to restore her health, but without avail.

According to the evidence, soon after the disease fastened upon her body, her mind began to give way, and about four years before her death became so impaired that she was possessed of delusions and imaginings which for the remainder of her life controlled her actions, dominated her will, and wrecked her mind. From an affectionate and trusting wife, she, without cause, became jealous and suspicious of her husband, and her mind dominated by the delusion that he was unfaithful to her. When laboring under these delusions she was incapable of being reasoned with or of knowing or understanding what she said or did. When told that her suspicions against her husband were groundless, and her charges of infidelity on his part untrue, she would grow excited, and cry out with rage. She was especially under the delusion that her husband had become the father of a child by a young woman who lived with the appellee, and she, without cause, accused the latter of harboring the mother and child. Any woman that she met, particularly with a child, became to her disordered mind and frenzied imagination the object of her husband's love. This condition of Mrs. Irvine's mind was established by the testimony of divers witnesses, several of them the most distinguished physicians and specialists on diseases of the mind in the country. Others, being business men, friends and neighbors of herself and her husband, who knew her well, and had every opportunity to become acquainted with her condition of mind. These witnesses all agree that her mind was disordered, and her reason dethroned on the subject of her husband's relations with other women. The physicians say that her disease of mind was known as monomania, and that it was incurable.

There were witnesses introduced by the appellee who testified to the effect that Mrs. Irvine was of sound mind, but all of these witnesses were non-experts, and only two, certainly not more than three of them, had such association with or knowledge of Mrs. Irvine as gave them opportunity to testify understandingly in regard to her mind. What they stated amounted in the main to mere expressions of opinion, with little to base the opinion upon.

It was said by this court in *Brown v. Commonwealth*, 14 Bush, 38, in discussing non-expert evidence on the question of insanity: "Opinions of witnesses derived from observation are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained."

Again: "The court must be satisfied that the witness has had an opportunity by association and observation to form an opinion as to the insanity of the person in reference to whom he is to speak."

Tested by this rule, we incline to the opinion that the testimony of all but

three of appellee's witnesses as to the condition of Mrs. Irvine's mind was of little, if any, value, and much of it incompetent. If correct in our view of the law of this case, it follows that the instructions of the lower court to the jury were altogether erroneous. In addition to the customary and general instruction setting forth the grounds which, if sustained by the evidence, would authorize the jury to find for the plaintiff, the court should have instructed them as to the measure of damages. And finally that if they believed from the evidence that at the time of the speaking of the defamatory words by the defendant she was insane, or laboring under delusional insanity upon the subject of her husband's relations with women which incapacitated her from knowing or understanding the meaning of the defamatory words, they should find for the defendant.

It is proposed of record by the appellee that this court, in the event it should find the amount of the verdict and judgment excessive, may, instead of reversing the judgment, reduce the amount thereof to such a sum as it may deem proper. We are of opinion that we are not authorized to enter the remittitur. If the judgment is erroneous, we can only reverse it, and our jurisdiction over the case ceases with its reversal. The remittitur can not be entered after the reversal for the further reason that there will be nothing upon which it can operate, because by the reversal, the judgment is rendered void. And by such a course of action as is here proposed, the parties in other cases, following the precedent thus set, by like means would avoid the consequences of erroneous proceedings to the prejudice of those against whom they were committed. It is also insisted for appellee that if the court should find it necessary to reverse the judgment of the lower court it should put the appellant upon terms by requiring him to enter his assent of record that the present judgment shall stand as security for whatever damages may be found for appellee upon a second trial, and *Turner, Adm'r v. Booker*, 2 Dana, page 334, is relied on in support of this contention.

We are unable to grant this request, because without power to do so; nor do we regard *Turner's Adm'r v. Booker*, supra, as authority in point. The judgment in that case went against Turner in the lower court by default. He moved for a new trial, for cause set out in his affidavit. The motion was laid over to the succeeding term, before which time Turner died. The judgment was all the while suspended by the motion for a new trial. The motion for a new trial was finally overruled by the lower court, and upon appeal to this court it was held that the affidavits presented by Turner in the lower court were sufficient to authorize a new trial, consequently the case was reversed, but as a naked reversal would operate to abate the action altogether, upon its return to the lower court on account of Turner's death, it was deemed just to put the administrator of his estate upon terms as was done, because it was not the fault of Booker, but that of Turner, that he did not make defenses before judgment, and obtain a trial of the case upon its merits. The court, therefore, refused to allow his fault to be made the possible instrument of a great injustice.

The case at bar is wholly different. Here there was a trial, the appellant administrator, his deceased wife, and her guardians ad litem are without fault, but grave errors were committed by the lower court to appellant's prejudice, resulting in a verdict for damages, with one exception, unprece-

dented in this State as to amount. In that case the motion for a new trial only suspended execution against Turner. Here the rights of the surety on the supersedeas bond have intervened, and will be affected. This court can only declare the law, though the effect of its so doing in this case will be to abate the appellee's action upon its return to the lower court because of the death of the appellant, Mrs. Irvine.

For the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict and judgment and dismiss the petition.

Whole court sitting.

DAVIS v. ALLEN.

(Filed January 14, 1904—Not to be reported.)

Contracts—Sales—Where 11,000 pounds of wool were sold subject to inspection and approval, and where at the time one of the firm buying it examined five bags of the wool, and upon being notified by the seller to come and get it, the buyer returned and examined five bags, three of which were the same bags he had examined at the time of the sale to him, and refused to take the wool, saying it was trashy, the seller within the time expressed in the contract in which it was to be delivered notified the purchaser to come and get the wool, and that if he did not and it failed to bring as much as he had contracted to pay for it, he would be looked to for the difference, in this action for the difference in what the wool then sold for and its contract price, the buyer failing to take it, a verdict in favor of the seller for the difference in what he received for the wool and the contract price will not be disturbed, the evidence showing that the wool was of uniform grade and quality and the same as that contained in the five bags.

O'Neal & O'Neal for appellant.

W. Pratt Dale for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Burnam.

On the 22d of January, 1902, the appellant, D. Davis & Son, and the appellee, J. A. Allen, mutually executed the following contract in duplicate:

"January 22, 1902.

"Sold to D. Davis & Son my wool, about 11,000 lbs., at 20 cents per pound, F. O. B. cars, Bloomfield, Ky. This wool is to contain no burry wool, and is to contain not exceeding 275 pounds of black wool, and 100 pounds of fleece grown wool. The wool is to be subject to D. Davis & Son's inspection and approval. Wool is to be delivered to and received by D. Davis & Son within the next thirty days, or sooner, if Mr. J. A. Allen is ready to deliver same. This wool is in Mr. Allen's warehouse, and is at his risk until received by D. Davis & Son.

(Signed) "J. A. ALLEN.

"Accepted, D. Davis & Son, per Sidney Davis."

This contract was written by Sidney Davis. Previous to its execution he had very thoroughly examined five bags of the wool which was stored in the

warehouse of Allen. On the 3d day of February, 1902, Allen notified Davis & Son that he was prepared to deliver the wool to them, and on February 6, 1902, Sidney Davis came to Bloomfield for the ostensible purpose of inspecting and receiving the wool. When he arrived at the warehouse he examined five bags of the wool, three of which were the same bags he had examined on the 22d of January, the date of the execution of the contract of sale. None of the bags examined by him contained any black or fleece wool or burry wool. He, however, expressed the opinion that it was trashy, and left without receiving or paying for it. On the 13th of February following, Allen notified Davis & Son, in writing, that he was ready to deliver the wool to them, and would hold it for them for thirty days; that in the event they failed to receive and pay for it under the contract, he would sell it to the best advantage, and if any loss was sustained, he would look to them for the difference. In response to this communication, D. Davis & Son notified him that they declined to take the wool. He subsequently sold the wool at 17½ cents per pound, or \$289.88 less than it would have brought at 20 cents per pound. On the 30th of April, 1902, he brought this suit against the appellant for this difference. D. Davis & Son filed a general demurrer to the petition, which was overruled. They thereupon filed an answer denying liability under the contract, and a jury was empaneled to try the issue. At the conclusion of plaintiff's evidence, the defendant moved the court that the jury be instructed to find for the defendant, which was overruled, and he excepted. At the conclusion of the testimony, the court gave to the jury the following instruction: "Under the contract sued on, the defendant had the right to reject the wool mentioned in said contract for any reasons deemed satisfactory to them, but before making such rejection, were compelled to examine said wool in good faith. Now, the court instructs the jury that they shall find for the defendant unless they believe from the evidence that the defendant, D. Davis & Son, through his agent, Sidney Davis, did not inspect said wool in good faith, but only fraudulently pretended to inspect the same. In which latter event they shall find for plaintiff."

The trial resulted in a verdict and judgment for the plaintiff, and the defendant appealed, and insists that the writing of January 22, 1902, imposed no obligation upon him to receive or pay for the wool mentioned there; that the words "the wool is to be subject to D. Davis & Son's inspection and approval" left it wholly optional with them whether to accept or reject the wool, or, at most, if upon inspection they were not satisfied with its quality, that they could refuse to take it, and there was no appeal from their decision. We can not concur in this contention. The contract of January 22, 1902, is in no sense optional or conditional, but an absolute sale by appellee to appellant of about 11,000 pounds of wool at 20 cents per pound. As appellant had only examined five bags of the wool, the contract provided that before its acceptance he had the right to inspect all of it, and refuse to accept any burry, black or fleece-grown wool in excess of the amounts stipulated for in the contract; and a fair construction of the contract would also have included any other wool which was not substantially similar to the sample already examined by him, or which from any cause was not merchantable. But it is conclusively shown by the testimony that the fleece-grown wool and black wool were separated from the rest, and that there

were only 91 pounds of fleece-grown wool and 458 of black wool; and that the rest of the wool was of a uniform grade and quality, and of the same grade as that contained in the five bags examined by appellant before he entered into the contract. The construction given by the trial court to this contract, and the instructions given to the jury, were more favorable to appellant than the contract warranted. But even under that construction, the testimony shows that appellant did not in good faith comply with his contract in the inspection made by him at the time of his visit for the ostensible purpose of receiving the wool.

Appellant has called our attention to a number of decisions, considering contracts in which the vendee was given the unqualified power to refuse or accept the merchandise contracted for, if not satisfied. In the main, they consist of cases where the article sold was to be made to satisfy the personal taste of the buyer, like portraits, busts, articles of wearing apparel, etc. These decisions afford no support to appellant's contention as to the proper construction of this contract. It speaks for itself. The agreement to buy is unconditional.

We, therefore, conclude that appellant has no legal ground for a reversal, and the judgment is affirmed.

DAVIS v. COMMONWEALTH.

(Filed January 14, 1904—Not to be reported.)

1. Criminal law—Evidence—In an indictment for murder, where appellant who was marshal of the town of G. undertook to arrest the deceased for disorderly conduct, and claiming that deceased drew a pistol, appellant fired three shots at the deceased as he claims to save his own life. The court did not err in refusing to permit appellant to prove that he made the statements to a witness which he had called at the trial that he testified to himself because that testimony formed no part of the *res gestæ* and was, therefore, inadmissible.

2. Verdict—Practice—There is no power under the Criminal Code to disturb a verdict of guilty where there is any evidence to support it.

3. Same—Where appellant did not claim that he was undertaking to enforce an ordinance of the town against persons being on the streets after 10 o'clock at night without a reasonable excuse, or that he attempted the arrest for that offense, the court did not err in refusing to allow the ordinance to be read to the jury.

Geo. W. Armstrong and G. W. E. Wolford for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Nunn.

Appellant was indicted by the grand jury of Carter county on the 10th of June, 1902, charging him with the willful murder of Owen Leedy. He was tried in June, 1903, convicted of voluntary manslaughter, and sentenced to the penitentiary for the term of five years. From this judgment appellant has appealed.

The appellant in the lower court, filed reasons for a new trial, and assigned

eighteen or twenty grounds therefor. This court is prohibited by section 381 of the Criminal Code from reversing for most of the reasons named. In fact, the attorneys representing appellant do not urge but four or five reasons why this court should reverse this case. They are as follows:

1st. The lower court erred to his prejudice in refusing to grant him a continuance.

2d. That the verdict of the jury was against the evidence.

3d. That the court erred in refusing appellant and witness Rose to prove that when appellant surrendered himself to the officer about five minutes after the killing, he narrated the same facts with reference to the killing as related by him on the witness stand.

4th. That the court refused to allow him to have read to the jury an ordinance of the town of Grayson making it unlawful for any persons to be out on the streets of the town after 10 o'clock, p. m., without a reasonable excuse.

5th. That the court failed in its instructions to give the whole law of the case to the jury.

The substance of the facts of the killing as shown by the record are as follows: Appellant and the deceased, Owen Leedy, resided in the town of Grayson, Ky. Appellant was the marshal of the town, and had previously arrested the deceased for some small offense. On the night of the killing, which occurred about 11 o'clock, the deceased, Leedy, Alva Gee and Millie Melvin were sitting on a plank or bench in front of Black's store, talking and laughing, as claimed by the Commonwealth, and cursing and using obscene language, as claimed by appellant, when appellant arose from the bench situated against the end of the storehouse and walked over to Owen Leedy and grabbed hold of him and pulled him off the plank to his knees, and said to him, "come, go with me." Commonwealth witnesses say that Leedy said to him at that moment, "don't search me here," or "you can't search me," one or the other. Appellant states that Leedy said, "you can't search me." Leedy instantly arose to his feet and jerked loose from appellant and backed down the sidewalk in front of Mr. Mocabee's home. Appellant was with him, and witnesses for the prosecution say they heard Leedy say to appellant, "take that pistol out of my face, George," and then appellant fired three shots in quick succession, and that they then heard Leedy say to appellant, "Oh, George, you have shot me," or "don't shoot me." Appellant states that Leedy had the pistol drawn on him, and that it was he, appellant, that said to Leedy, "take that pistol out of my face," and that he then fired three shots and killed Leedy to save his own life.

Appellant then called Gee and Melvin back, who had started away, and then called Mr. Mocabee, who suggested to appellant to go for a physician.

He left the deceased and went after the doctor and returned to the scene of the killing. Mr. Mocabee had procured a light; the night was dark. Deceased was lying on his back, with his right hand over his body, and a small pistol lying by his side. The Commonwealth attempted to show that Leedy had no pistol and that appellant placed the pistol by the side of the deceased after the shots were fired. The preponderance of the evidence favored appellant on this point. When appellant returned, Mr. Mocabee advised him to leave to prevent further trouble, as word had been sent to Leedy's family,

who were expected to arrive in a short time. Appellant left and went to the office of the sheriff, and surrendered himself to deputy sheriff Rose.

Appellant claimed that he undertook to arrest Leedy, because he used obscene and vulgar language on the streets, and was drunk in his presence. The court told the jury that if this was true, it was not only the right but the duty of appellant to make the arrest. But appellant did not claim that he was undertaking to enforce the ordinance against persons being on the streets after 10 o'clock, p. m., without a reasonable excuse, or that he attempted to arrest Leedy for this offense. Consequently the court did not err in refusing to allow this ordinance to be read to the jury as evidence.

Appellant claims that the court erred in giving instruction No. 4, in the use of these words: "If the jury believe from the evidence that the defendant, George Davis, was marshal of the town of Grayson." * * *

He contends that the Commonwealth in the course of the trial admitted that he was such marshal, and, therefore, there was no proof on this subject. On the facts, as developed on the trial, it would have been proper for the court to have assumed that he was marshal, but the instruction, as presented, could not have prejudiced appellant, as it was admitted that he was marshal at the time of the killing, and in addition, appellant and several witnesses testified, without contradiction, that he was the marshal of the town at that time. Taking the instruction as a whole, it was more favorable to appellant than he was entitled to. There was no error of the court in giving instructions to the jury, prejudicial to appellant. On the contrary, they were favorable to him.

It is urged by counsel that the court erred in refusing to permit appellant to prove by himself and his witness, Rose, that he made to Rose the same statement of the facts of the killing as was given by him on the witness stand, and that these statements were made by appellant within five minutes after the tragedy. It seems to us very clear that this was not admissible, and formed no part of the *res gestæ*. The test of the admissibility of such testimony is, that the act, declaration, or exclamation must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself. Appellant had, after the killing, called Gee and Melvin and Mr. Mocabee; then went after the physician, returned to the scene of the homicide; then in pursuance of the advice of Mocabee left, and went to the sheriff's office, about one block distant. The court was right in rejecting the proposed testimony.

As to the second proposition presented by counsel for appellant, it is sufficient to say, that it has often been decided by this court that it has no power under the Code to disturb a verdict of guilty if there is any evidence to support such a verdict. (See the cases 83 Ky., 193; 86 Ky., 318; 9 Ky. Law Rep., 481-488, and 12 Ky. Law Rep., 835.)

On the calling of this case for trial in the lower court, appellant filed his affidavit for a continuance on account of the absence of several witnesses, naming them, and embracing in his affidavit what he expected to prove by each of them. The Commonwealth agreed that the witnesses, if present, would testify as stated therein, and said statements were read to the jury as evidence. Appellant's complaint is that he was entitled to have his witnesses present; that in their absence, and by merely reading to the jury

Their statements, he did not receive the full force, effect and benefit of their evidence. This question has repeatedly been before this court, and the provisions of the Criminal Code authorizing such procedure have been decided as not in violation of the Constitutional. (*Atkins v. Commonwealth*, 17 Ky. Law Rep., 1098.)

The record shows that appellant was not confined in jail, but was out on bond from the date the indictment was presented in court, until trial. He certainly failed to avail himself of the right to obtain from the court compulsory process to compel the presence of his witnesses at the trial.

Perceiving no error of law prejudicial to the substantial rights of appellant the judgment of the lower court is affirmed.

ILLINOIS CENTRAL R. R. CO. v. BEAUCHAMP.

(Filed January 14, 1904—Not to be reported.)

1. Railroads—Damages—In an action for damages for personal injuries where a verdict and judgment was obtained for appellee it was not error for the trial court to refuse a peremptory instruction for the reason that on a former trial the appellee's action was dismissed because there was no reply filed to the answer charging contributory negligence; the order dismissing the action being set aside upon the appellee showing a want of knowledge of the filing of the amended answer until after the verdict was rendered.

2. Same—Instructions—The words "including any loss of time on account thereof, and expenses incurred in obtaining medical attention," in an instruction were not improper and did not contravene the rule that special damages must be specially pleaded, because the principle contended for did not apply to this case, the appellee not seeking to recover special items of damage, the language of the petition being notice that he expected to prove loss of time and medical expense to enhance the amount of his recovery.

L. B. Handley, Pirtle, Trabue & Cox for appellant.

Noggle & Graham for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Nunn.

• This action was instituted by appellee against the appellant to recover damages for personal injuries.

The facts appear about as follows: Appellee had hauled a load of lumber to appellant's depot, and loaded his wagon with goods to be carried to Green county, for one Lewis Despains, who aided him in loading the goods. The wagon way from the place where the goods were placed on the wagon, passed along by the side of the railroad track for about fifty yards and passed over the track. Appellant's agent had an engine with two cars attached standing about half way between the depot and the point where this wagon way crossed the track. Appellee drove his team of mules along this pass-way by the engine and at the moment he, with his team, was crossing the railroad track, the person in charge of the engine, who was an agent at the depot, the engineer had gone to his dinner, sounded the whistle of the engine, which frightened the team. They started to run, and about the time appellee got them under control, the whistle was sounded again, when the

team became unmanageable and ran away. Despains jumped from the wagon; appellee, the driver, either jumped or was thrown out, and by some means his foot was caught in the wheel, and received severe and painful injuries, by reason of which he was confined to his bed for two months, and was compelled to use crutches in getting about for four months, or more. The evidence tended to show that his injuries were permanent. The question as to whether or not the whistle was sounded negligently or necessarily was submitted to the jury.

At the first term of the court after the petition was filed the appellant filed its answer, which contained a denial of the allegations of the petition, no affirmative matter. The case, by agreement, was continued and set for a day in the next succeeding term. On that day, or the day before, appellant filed an amended answer, in the usual and proper form, charging contributory negligence on the part of appellee. The trial of the case was entered into, and resulted in a verdict for appellee in the sum of \$750. Appellant, however, at the conclusion of appellee's evidence, and also at the conclusion of all the evidence, moved the court to give to the jury a peremptory instruction to find for appellant, which the court in each instance overruled. After the verdict was returned the appellant moved the court to render judgment for it notwithstanding the verdict, for the reason that no reply was filed to its amended answer, charging contributory negligence. The court sustained this motion, dismissed appellant's petition, and rendered judgment against him for the costs of the action. Appellee entered motion and filed reasons for setting aside this judgment, alleging and proving surprise, and a want of knowledge or information of the filing of this amended answer until after the verdict of the jury. Counter affidavits were filed. The court sustained this motion and set aside the judgment, and of this the appellant complains.

At the next term of the court another trial was had, and resulted in a verdict in favor of appellee for \$845. Of this appellant complains, and contends that the court erred in not giving a peremptory instruction, for the reason that on the former trial the judgment was in its favor, and the court's action in setting it aside was void, and for the further reason that the court erred in one of its instructions. We can not understand why the lower court had not the power and authority to set aside the judgment in favor of appellant. An application for a new trial on the ground of surprise or peculiarly addressed to the discretion of the trial court, and that discretion will not be disturbed unless palpably abused, especially when the new trial has been granted, as the court is more inclined to sustain a judgment granting than one refusing a new trial. (*Vought Machine Co. v. Penn. Iron Works Co.*, 23 Ky. Law Rep., 263; *L. & N. R. R. Co. v. Coniff*, 16 Ky. Law Rep., 296, and *E. H. Taylor, Jr. v. Louisville Public Warehouse Co.*, 24 Ky. Law Rep., 1656.)

The appellant complains of this language used by the court in its first instruction: "Including any loss of time on account thereof, and expenses incurred in obtaining medical attention," etc., for the reason, as its counsel claim, that "It is a well-settled rule, and one repeatedly adhered to by this court, that special damages must be especially pleaded," and refers to two cases to support its contention. (*L. & N. R. R. Co. v. Mason*, 24 Ky. Law Rep., 1655.)

The principle contended for by appellant is correct, but it does not apply to this case. Appellee, by his petition, did not seek to recover special items of damage. In his petition he used this language: "Thereby throwing the plaintiff from his wagon, and greatly injuring the plaintiff, by bruising, spraining and maiming the plaintiff's foot and leg, and arm and hand, causing the plaintiff much pain and suffering and loss of time, and causing him to expend considerable money for medical attention, and permanently injuring the plaintiff, to his damage in the sum of \$1,500."

This was notice to the appellant that he expected to prove loss of time and medical expense to enhance the amount of recovery. If the appellant desired it could have moved the court to have appellee make his petition more specific, and name the amount that he expected to recover for loss of time and medical expense, but instead, it traversed these allegations, and made an issue.

In the case of *L. & N. R. R. Co. v. Reynolds*, 24 Ky. Law Rep., 1405, the petition alleged that the plaintiff was badly bruised and injured in his person, and his ability to walk with ease and comfort greatly and permanently decreased, and was for a long time incapable of attending to his business, whereby he was damaged in the sum of \$10,000. Appellee was permitted to prove over the objections of appellant that at the time he was injured it was the busy season for his work, he being a specialist of diseases of the eye, ear, nose and throat, and that his income would average \$100 per day. The proof showed that he was not able to sit up for seventeen or eighteen days after his injury, and at the end of three months was not able to ride on a street car. The court, in its instruction, allowed the jury to find, among other things, such an amount as would fairly and reasonably compensate appellee for the value of the time lost. This court said: "Where special damages are not such as the defendant would naturally anticipate from the injury, they must be pleaded with sufficient particularity as fairly to apprise him of the charge he is to meet. In 2 Greenleaf on Evidence, section 254, after a statement of the rule as to general damages, it is said: 'But when the damages, though natural consequences of the act complained of are not the necessary result of it, they are termed special damages, which the law does not imply; and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of this at the trial. * * * The petition in this case was not sufficient to admit the evidence in question under the above rule. The fact that this was the best season of the year for the plaintiff in the practice of his specialty, and that the time he lost was so valuable, was not to be inferred from his injury, or the bare allegation that he lost time, and to justify a recovery of items so unusual the fact should have been specially pleaded.' To the same effect is *L. & N. R. R. Co. v. Mason*, *supra*.

Perceiving no error prejudicial to appellant the judgment of the lower court is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. VANARSDELL'S ADM'R.

(Filed January 14, 1904—Not to be reported.)

1. Railroads—Second appeal—Damages—Upon a second appeal from a judgment awarding damages where there was no material change in the facts, nor material error in the instructions of the court, the verdict will not be disturbed.

2. Master and servant—Where a train could have been stopped in a given distance, but was not stopped until it had been run twice that distance, the engineer may have made a mistake of judgment in not stopping the train, but it was such a mistake as rendered the master liable.

C. R. McDowell, J. W. Alcorn and B. D. Warfield for appellant.

Rawlings & Voris and Robt. Harding for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge O'Rear.

This is the second appeal of this case. The opinion upon the first appeal which states the facts as they appeared substantially on the last trial so far as the proof for appellee is concerned, may be found in 23 Ky. Law Rep., 1666.

The jury found a verdict of \$2,500 for appellee. There is no material error to be found in the instructions of the court. The evidence objected to was considered upon the former appeal, and the objections to it there disposed of. The criticism urged against the same evidence upon this appeal goes more, in our opinion, to affect the weight than the competency of the evidence. After all it was a matter for the jury. Perhaps the weight of the evidence is for appellant, and the physical facts, taken in connection with appellant's evidence, barring one exception, are strongly persuasive that the verdict is not sustained by the proof in the case. The exception is that under all of the evidence it is clearly shown that by the proper application of the means at hand by the servants in charge of appellants' train, after they had discovered the peril of the child upon the bridge, the train could have been stopped anyhow within 1,200 or 1,800 feet. As a matter of fact the train was not stopped at all until it had run more than twice that distance. This is not explained satisfactorily, and doubtless convinced the jury that the application of the brakes and other means to control the train, was not made until the locomotive was so close to the bridge upon which the child was killed, that they were then unavailing. This does not find that the engineer in charge purposely ran over the child. He may have at the time thought that she would be able to get off of the bridge as the other children did, and, therefore, did not take every precaution that the subsequent developments have shown was necessary to save the child's life. This was a mistake of judgment, doubtless an honest mistake. But it is a mistake of that character for which the court is of opinion that the master is liable to the person injured. Under the circumstances shown we do not feel warranted in saying that the verdict of the jury is palpably against the weight of the evidence.

Judgment affirmed, with damages.

GENTRY, &c. v. GENTRY, &c.

(Filed January 15, 1904—Not to be reported.)

Wills—Where a father devised to a son "that part of my farm on which I now reside and bounded as follows to have and to hold to him and his heirs forever," and by another clause devised to his widow "full and undivided control of my farm on which I now reside so long as she lives or remains my widow," it can not be presumed that he used the words in a different sense and parol evidence is incompetent to vary the terms of the will or to show that the testator did not intend what he declared. The words "full and undivided control" in the devise to the widow vested her with a life estate and she is entitled to use the land free from the claims of any one during her life or widowhood, and the son took the land subject to the life estate of his mother.

J. E. Fogle for appellants.

Glenn & Ringo for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hobson.

David Gentry owned a tract of 185 acres of land on which he resided in Ohio county. Some years ago his son, Darius, married and went to the State of Illinois to reside, but the father desiring him to return to Kentucky proposed that if he would accept it and build on it and live there, the father would give him a certain portion of the farm; the son accepted the arrangement, and the father put him in possession of the land; the son built a residence, outhouses, fencing, etc., enhancing the value of the land and occupied it up to the death of the father, claiming it as his own under the gift, the father saying that he would make the son a deed to the property, but this he failed to do, and died leaving a will by which he devised to the son the property referred to, subject to a charge of \$50 and a provision for his widow. The son saved up the \$50 and was ready to pay it when it came due, but died a few years after his father, leaving a widow and two little children in possession of the land given to him. The widow of the father has filed this suit against the widow of the son and his two infant children for the possession of the land on the ground that under the will of the husband, she is entitled to hold the land for her life. The court having adjudged in her favor the defendants appeal.

Neither the mother nor son renounced the provisions of the will. Its material provisions are as follows:

"I, David Gentry, of the county of Ohio, State of Kentucky, being of sound mind and memory and understanding, do make my last will and testament in manner and form following:

"1st. I give and bequeath to my son, Darius Gentry, that part of my farm on which I now reside and bounded as follows (here follows boundary of land in dispute) to have and to hold to him and his heirs forever.

"2d. I give and bequeath to my son, S. B. Gentry, a part of my farm on which I reside bounded as follows (here follows boundary) to have and to hold to him and his heirs forever.

"3d. I also give and bequeath to my son, S. B. Gentry (here follows description of other property).

"4th. I give and bequeath to my daughter, Claudia Baker, the remainder of my farm on which I now reside (here follows description) to have and to hold to her and her heirs forever.

"5th. I give and bequeath to my granddaughter, Ethel Wilson, \$150, said sum to be paid her by my sons, Darlus Gentry, S. B. Gentry and my daughter, Claudia Baker, or their heirs equally, viz., \$50 each, when my granddaughter is married or reaches her majority; said sum is secured to her by retaining a lien on all my land bequeathed until said sum is paid.

"6th. I give and bequeath to my wife, Cassander Gentry, full and undivided control of my farm on which I now reside so long as she lives or remains my widow.

"7th. I also give and bequeath to my wife all of the household goods, farming implements, stock of all description and crop now on hand on my farm or so much thereof as remains after paying all of my indebtedness.

"8th. I appoint my wife, Cassander, sole executrix of this my last will and testament."

It is insisted for appellants that in the sixth clause of the will the testator referred only to the land that was then in his possession, and not to the land upon which his son had settled and which he then held. But it will be observed that in the first clause of the will in which the land claimed by the son is devised to him, it is referred to as "that part of my farm on which I now reside." The same words in substance are used in the second clause of the will in the devise to S. B. Gentry and in the fourth clause in the devise to Claudia Baker. The same words are again used in the sixth clause by which his wife is given "full and undivided control of my farm on which I now reside so long as she lives or remains my widow." It can not be presumed that the testator used the words "my farm on which I now reside," in the sixth clause of his will in a different sense from that in which the same words are used in the first, second and fourth clauses. In those clauses they evidently refer to the entire tract of 185 acres for the whole of it is devised thereby and the same meaning must be given to the sixth clause where the identical words are again employed. There is no latent ambiguity as to what the testator meant by the words, "My farm on which I now reside;" for taking the will as a whole, it unmistakably shows what property was intended and parol evidence is incompetent to vary the will or to show that the testator did not intend what the will plainly declares. When the testator gave his wife full and undivided control of the farm as long as she lived or remained his widow he necessarily devised to her a life estate, for the words "full and undivided control," necessarily mean that she is to have the entire use of the land free from the claims of any one during her life or widowhood.

By the will the son gets the land subject to the life estate of his mother.

He can not claim the remainder under the will and also claim compensation for his improvements against the will. If compensation is claimed for improvements, the right to take anything under the will is renounced and the property devised in this clause of the will, will pass as undivided estate to the heirs at law of the testator subject to the statute requiring heirs to be equalized in the division of the undivided estate considering what each has heretofore received under the will or otherwise. If compensation is allowed

for the improvements it must be on the principles applicable to parol vendees of landmaking improvements. We do not see that the son in his lifetime did any overt act or followed any course of conduct that could have misled anybody. He remained in possession of his land claiming and improving it as his own, the widow acquiescing in his claim. The case is here on demurrer, and on the face of the answer there is not enough to show that the son waived his right or elected to take under the will. He, not having waived his rights, his widow and children succeeded to them and may make the same plea that he could have made. Their answer is substantially good as to the enhancement of the land by his improvements. The plaintiff may have it made more specific if she desires. On the return of the case the personal representative of Darius Gentry should be made a party defendant, so that any money that may be allowed may be paid to him and he can litigate the amount due on account of the betterments placed on the land by his intestate. The court on final hearing will protect the interests of the infants as far as it may be done under the evidence, by such judgment as seems proper.

Judgment reversed and cause remanded for further proceedings on the question of the enhancement of the land by the improvements of the intestate not inconsistent with this opinion.

SMALLHOUSE v. AMERICAN NATIONAL BANK.

(Filed January 15, 1904—Not to be reported.)

Bills and notes—In an action by a bank seeking to hold an assignor upon a promissory note a defense that the bank failed to prosecute the makers to insolvency within a reasonable time will not avail where it is shown that assignor repeatedly promised and assured the bank that he would see the makers of the note and either have it paid or secured, such assurances being calculated to throw the bank off its guard and induce it to delay the institution of a suit against the makers.

C. P. Motley and W. B. Gaines for appellant.

Wright & McElroy for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the American National Bank against C. G. Smallhouse, seeking to hold him liable, as assignor, upon a promissory note for \$5,500, payable to the appellee. The defense was failure on the part of the bank to prosecute the makers of the note to insolvency within a reasonable time.

This is the second time this case has been here on appeal. Upon the original trial in the court below, after all the appellee's (plaintiff's) evidence was in, the court, deeming that the evidence did not show reasonable diligence, gave a peremptory instruction to the jury to find for the defendant (appellee on first appeal). The bank brought the record up to this court on appeal, where it was reversed, in an opinion to be found in the 23 Ky. Law Rep., 2882. The opinion, on the first appeal, elaborately sets forth all the

facts, making it unnecessary to repeat them here. Upon return of the case, a retrial was had, which resulted in a verdict for the appellee for the full amount sued for; from which appellant is prosecuting this appeal. To overcome the plea of negligence in prosecuting the makers of the note to insolvency within a reasonable time, the bank pleaded that it was induced to bring suit by the request of the assignor, and, in support of this plea, introduced several letters from it to him, on the subject of the note, and his replies thereto. Nearly all of the material evidence upon this issue was contained in this correspondence. As to its weight, it was said in the original opinion: "It is apparent that the repeated promises and assurances made by the appellee, Smallhouse, to the appellant that he would see the makers of the note, and either have it paid or secured, were calculated, whether so intended or not, to throw appellants off their guard, and to induce them to delay the institution of a suit against the makers. This was especially true in view of the close and intimate business relations which had existed between the parties for such a long period of time, and thus having both by words and acts induce the appellee to postpone resorting to the courts, he can not rely upon their delay as an act of negligence to escape liability."

The same correspondence, which was introduced upon the original trial in the court below, was introduced in the second trial, and the only additional evidence heard was the testimony of C. G. Smallhouse himself, which, when examined and analyzed, does not seriously militate against that of the appellee. The correspondence was the same, and speaks for itself. These letters show that the indulgence granted was at the request of Smallhouse, and as their genuineness was not denied by him, it seems to us that he is concluded by the effect given them in the opinion on the first appeal, and that, if a motion had been made therefor appellee would have been entitled to a peremptory instruction at the close of all the evidence in the case; but, waiving this, the court properly overruled the motion of appellant for a peremptory instruction, and gave the jury the whole law of the case in the instructions.

Perceiving no error in the record the judgment is affirmed.

JABINE, &c. v. SAWYER, &c.

(Filed January 15, 1904—Not to be reported.)

Wills—Construction—Where a testator devised his property to his wife for life, and provided that at her death it shall be equally divided among his children and a grandson, and that at their death it should descend to their children, upon the death of the widow who held the life estate, the children and grandson took a vested life estate in the devised real property with remainder over in fee to their children.

Jos. T. Noe and J. A. Dean for appellants.

Wilfred Carico for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

James S. Sawyer died, testate, at his residence in Owensboro, Davless county, Ky. His will, which was admitted to probate, is as follows:

"Owensboro, Feb. 21st, 1893.—I, James Sawyer, of Owensboro, Ky., being as I believe of sound and disposing mind, and realizing my time here on earth must necessarily be short, do make and declare this to be my last will and testament:

"Item 1st. After my funeral expenses and other few debts are paid, and by agreement with my wife and desiring that she should enjoy the same comforts which she has received during my lifetime. I hereby bequeath to her during her lifetime, or so long as she remains my widow, the income of all my property, real, personal and mixed, to be used by her to support herself and our children, assuming she would prefer this to the one-third of my estate allowed by law.

"Item 2d. At her death it is my wish that said property shall be equally divided, share and share alike, amongst our own children and little grandson, James S. Jabine, if then surviving, or to those who may survive in equal shares. I refrain from making any division of the property now, as values of same may be altogether different at time of apportionment, and not wishing there should be any partiality shown, devise that the division be made at their mother's death, and when this shall be done it is my wish, so far as the real estate goes, it shall be given to them and held by each one of my children as well as my grandson as separate estate, and to be free from the control (so far as my daughters are concerned) from any husband they may have, for their support and that their children and at the parent's death descend to said children.

"Item 3d. And it is also my wish that the real estate my son and grandson shall acquire by this instrument shall be devised for their own use and that of their children also, and it is understood that in the event of any of our children or grandson dying without issue their share or shares of my estate shall be divided equally amongst those remaining. Should all die, however, which is not at all probable, it is my wish then that such property as may be left shall go to my own family in England or wherever they may be.

"Item 4th. I give to my wife authority, on the advice of her best friends, in the event of its appearing that any of my present investments can be substituted for others offering greater inducements, that she may make a change whenever that is best, always, of course, looking fully to safety of principal.

"This will being written in my own handwriting and in testimony whereof I have signed my name the above day and date.

(Signed) "JAMES SAWYER.

"All other disposition of my property previously made is hereby cancelled.

(Signed) "JAMES SAWYER."

This action was instituted to obtain a construction of this will. The widow is now dead, and neither of his children, nor his grandson, James S. Jabine, have any children, and the question is, what estate these named devisees take under the will? The cardinal rule for the construction of wills is to ascertain, and carry into effect, the intention of the testator, and, as these instruments are frequently written under the stress of illness on the part of the testator, and often, of necessity, by persons unskilled in the

drafting of legal documents, it results that the courts, in order to reach the intention of the testator, place a popular, rather than a technical, construction upon the meaning of the words used, and, viewing the instrument as a whole, seek to effectuate his intentions by giving a reasonable construction to every part.

The court below "adjudged that the testator, James Sawyer, by his will, invested his children, C. A. Sawyer, Virginia Sawyer and Ann Luckett, and his grandson, J. S. Jabine, with a defeasible fee, subject to the life estate of his widow in all the real estate owned by the testator, and that the period of defeasance was the death of his widow. It is further adjudged that, the said three children and grandson of testator having survived the widow and life tenant, upon her death became vested with an indefeasible fee in all the real estate owned by the testator, taking a separate estate therein."

In this conclusion, we think the learned chancellor erred. There is no dispute that the testator's widow took a life estate, but, it seems to us, considering the instrument as a whole, that, instead of a defeasible fee, the children and the grandson of the testator took only a contingent remainder for life, with remainder in fee to their children, the contingency being whether they died childless during the life of the testator's widow. After the death of the first life tenant the estate of the children and grandchildren became vested. The position that the children and grandson took a defeasible fee, is not upheld by the line of authorities cited, wherein the testator devised his estate to his "children," and "to their heirs," or to "the heirs of their body," and wherein this court held that the language used vested the children with a fee-simple estate. Ordinarily, the word "heirs," or "heirs of their body," are words of limitation, and, by their own force, convey the idea of a fee-simple estate. On the contrary, the word "children," when used in a like connection, is a word of purchase, and shows an intention to invest the first devisee with a particular estate, with remainder over to the "children" in question. We do not mean to say that this in an unalterable rule as to these words; there are cases, when, in order to effectuate the manifest intention of the testator, the word "children" is construed as if the word "heirs" was used. (*Williams v. Duncan*, 92 Ky., 125.)

But, unless it is necessary to effectuate the manifest intention of the testator after a survey of the whole will, the word "heirs" is a word of limitation, and the word "children" is a word of purchase.

By the second item the testator, after providing that his property shall be divided after the death of his widow, because of the uncertain values, and expressing the desire for an impartial division to be made between his children and grandson, uses this language: "It is my wish, so far as the real estate goes, it shall be given to them (children and grandson) and held by each one of my children as well as my grandson, as separate estate, and to be free from the control (so far as my daughters are concerned) from any husband they may have for their support and that of their children, and at the parent's death descend to said children."

In the case of *Calmes v. Eubanks*, 19 Ky. Law Rep., 327, the testator conveyed certain real estate to his daughter, and, at her death, to descend to her children. It was held that the daughter took an estate for life, with re-

mainder to the children in fee at her death. In the case of Bedford v. Bedford's Adm'r, 18 Ky. Law Rep., 194, real property was devised to the testator's daughter, the property to go to her child, or children, at her death. It was held that the daughter took a life estate, with remainder in fee to her child, or children. This is a very instructive case, as affording an apt illustration of the difference between the use of the words "heirs" and "children" in wills. The testator left other real estate than that above mentioned, to his daughter, Elizabeth Bedford, and her heirs forever. This language was held to invest the daughter with a fee simple estate in the devised property.

We conclude, then, that, since the death of the testator's widow, his children and grandson have a vested life estate in the devised real property, with remainder over, in fee, to their children.

For the reasons above indicated the judgment is reversed for proceedings consistent with this opinion.

CITY OF OWENSBORO v. YORK'S ADM'R.

(Filed January 15, 1904.)

Original opinion, ante, 1397.

G. W. Jolly for appellant.

Winfred Carico and Burkhead & Clements for appellee.

Appeal from Davless Circuit Court.

Judge Barker delivered the following dissenting opinion:

Finding myself unable to concur in the conclusions reached by the majority of the court in this case, I respectfully submit the following reasons therefor:

I have no fault to find with the rule at law, that an infant is to be held to no higher standard of responsibility for his acts, than is commensurate with his age and experience. There is little or no difference between my brethren of the majority and myself, as to the facts in this case; the divergence of our views begins with the application of those facts, or rather, the conclusions of law to be deduced therefrom.

The infant decedent, James P. York, was one of a number of boys who were playing at the corner of Cherry and Elm streets in Owensboro, Ky., on the night of his death. It had been discovered by the boys that the wire rope which was used to lower and elevate the electric lamp at the corner in question had become charged with electricity, or, to use the language of the boys themselves, "it was hot." This rope was not dangling in the street, or over the sidewalk, where one might come in contact with it by inadvertance, or accident, but was securely locked on the electric light pole, about four feet from the pavement. Just prior to the accident, a man, passing along, had warned the boys not to touch the rope, and that, if they did, it would kill them. It is not clear that the decedent was there at the time this warning was given, but it is certain that he arrived on the ground within a few minutes thereafter, and heard the boys discussing, in boyish fashion, the danger of touching the rope, and playfully daring each other to

do so. one boy saying that he would give a nickle to any of the other boys who would touch the rope.

At this time the decedent was sitting on a fence along the property line next to the street, in easy conversational distance of the boys on the pavement, discussing the danger of touching the wire; and while this discussion was going on, he jumped down to the pavement, and said that he was not afraid to touch it, provided he could get a plank to stand upon. There was a house being built in the immediate neighborhood, and, from the debris around it, a plank was obtained, either by the decedent, or one of the boys for him. This plank being placed on the pavement, the decedent stepped upon it, grasped the charged wire, and was instantly killed. Just before he stepped on the plank, one of the boys said to him, "Don't touch it, Jimmy, it will kill you." Another one said, "Oh, he's got rubber in his shoes."

Admitting the negligence of the municipality, in permitting the wire rope to become charged with electricity, it seems to me clear that the decedent was guilty of such contributory negligence as entitled the appellant municipality to a peremptory instruction. When all of the facts are admitted, the question of contributory negligence becomes a rule of law to be applied by the court. That the decedent knew the wire was charged with electricity appears from the uncontradicted testimony; that he was especially warned, if he touched it he would be killed; that he fully appreciated the danger, is clearly demonstrated by the fact that he would not touch it without attempting to insulate himself from the effect of the current by placing a plank on the pavement, upon which he proposed to stand while performing the act which caused his death. Jimmy York knew that the rope was charged with electricity, and he knew that unless he insulated himself against the current with which it was charged, if he touched it, he would lose his life. There was no contrariety of evidence on this point. The mistake the decedent made was in the defectiveness of the insulation which he selected. It is a well-known fact that a dry plank, free from nails, affords at least fair insulation from electricity, when placed under the feet of one proposing to come in contact with it. It is also known that a damp plank, or one containing nails driven through it, will not afford such immunity from danger. The plank selected in this case for some reason was not a nonconductor of electricity, hence the death of Jimmy York.

I do not know how appellant could bring home to the decedent the knowledge of the danger of touching the wire more completely than was done in this case, where all of the evidence, both that of appellant and that for appellee, shows that he was told of the fact that the wire was charged with electricity, and solemnly warned that if he touched it he would be killed; nor do I know how his appreciation of that danger could be brought home to him more completely than by showing, as was done in this case by the uncontradicted evidence, that, before he would touch the rope he undertook to insulate himself against the effect of the current. His act was one of deliberation, not of inadvertence or accident; it was done with a due appreciation on his part of the danger involved in the act. Now, what is the difference between the responsibility of an adult, and a boy twelve years old, in a case like this? As to the former, it is well stated in the opinion of the majority of the court, his guilt of contributory negligence, from the admitted

facts, would be conclusive. The only difference in the case of the latter, arises from the uncertainty as to whether or not he had sufficient understanding to appreciate the known danger. When this fact is clearly established against an infant, there is no difference in the rule of law with regard to responsibility between him and an adult; and, in this case, the decedent demonstrated beyond doubt that he did both know and appreciate the danger of touching the charged rope in question.

It may be instructive to refer to some of the evidence of the little boys on the subject of the decedent's knowledge of the danger of touching the wire. John Garrett, one of the boys present at the time of the accident, was asked this question:

"Q. Did you hear any conversation about the time just before Jimmy York touched the wire, about the wire in any way, and while Jimmy was there?"

"A. They all knew the wire would shock them if they touched it."

Claude Jarboe was asked:

"Q. Did you boys know it was dangerous?"

"A. Yes, sir."

The uncontradicted testimony of the witnesses present at the time of the accident, and his own action in taking measures to insulate himself from the known danger, conclusively show that Jimmy York knew of the presence of the electricity in the wire, and knew the danger that would accrue to him if he touched it without being properly insulated; that he made a miscalculation as to the serviceableness of the method of insulation adopted was no fault of appellant; he could not, legally, coquette with death at its expense.

In all of the cases cited in the opinion, holding that the question of the responsibility of youth is a fact for the determination of the jury, the question, as to whether or not the youth knew of the existence of the danger, or appreciated it, if known, was in dispute, and, of necessity, this was an issue for the decision of the jury; but, where the facts, as in this case, without contradiction, show both the knowledge and its appreciation by the youth, then, the appellant was entitled to the rule of law arising from the admitted facts, and, therefore, to a peremptory instruction; unless it be determined that no amount of uncontradicted testimony is sufficient to convict an infant of contributory negligence.

Much is said, in the opinion, on the subject of the subtle danger attending the use of electricity; this is true; an electric current is not only dangerous, but, being invisible, noiseless and odorless, it is often impossible to detect its presence until its deadly work is done; and, for this reason, a higher measure of responsibility rests upon those who use it as a means of commerce, than arises from the use of any other known power; but, when actual knowledge of the existence of this danger, and a due appreciation thereof, is established by all the evidence, the difference between it and any other danger vanishes.

It seems to me that this case records the high-water mark thus far reached by that everflooding tide of speculative litigation, which threatens to overwhelm the courts of the country; litigation wherein sufferers from the consequences of their own wanton and reckless negligence seek remuneration

from those upon whose property they have trespassed, and which enables juries to constitute themselves vicarious almoners for the distribution of charity among petitioners whose misfortunes excite their sympathy.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed January 15, 1904.)

Railroads--Separate coach law--Where a railroad company was indicted for discrimination in the quality, convenience and accommodation of the cars and coaches set apart for colored people, and a colored passenger alleged that he was forced to travel in a baggage car, it was not a case of discrimination, because there is no charge in the indictment that there was no separate coach, but it charges a difference in the quality, convenience and accommodations of the car that a colored man was forced to ride in. In this prosecution a demurrer should have been sustained to the indictment, because if the conductor forced the colored man to ride in the baggage car, the conductor, and not the company, violated the statute.

2. Same--Where a train had no caboose, but used the combination car described as a caboose, and was a freight train, and under section 801, Kentucky Statutes, although it carried a caboose for employes and passengers, the railroad company was under no obligation to provide separate coaches for white and colored passengers, the law does not prescribe that such a car shall be so constructed.

C. J. Waddill, E. W. Hines and D. B. Warfield for appellant.

John L. Grayot and N. B. Hays for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Paynter.

The trial under the indictment resulted in the imposition of a fine of \$500. The indictment reads as follows: "The grand jurors of the county of Hopkins, in the name and by the authority of the Commonwealth of Kentucky, accuse the Louisville & Nashville R. R. Co. of the offense of making a difference and discrimination in the quality, convenience and accommodation in the cars, coaches and partitions set apart for white and colored passengers, committed in manner and form as follows, to wit: The said Louisville & Nashville R. R. Co., in the said county of Hopkins, on the — day of September, 1903, and before the finding of this indictment, did make a difference and discrimination in the quality, convenience and accommodations in a car, coach and partition set apart for white and colored passengers, in this, that a colored passenger was forced and compelled to travel and remain in the baggage car or partition from Madisonville, Ky., to Providence, Ky., which had no fire, seats or other accommodations, like those of the car or partition set apart for the white passengers."

The court held the indictment good on demurrer. The first question for review is, the action of the court on the question raised by demurrer, to determine which requires a brief review of the separate coach law. By section 795, Kentucky Statutes, railroad companies are required to furnish separate coaches for white and colored passengers, and it is provided therein that each compartment divided by a substantial wooden partition with a door therein,

shall be deemed a separate coach. By section 796, Kentucky Statutes, it is provided that railroad companies shall make no discrimination in the quality, convenience or accommodations in the cars or coaches, or partitions set apart for white and colored passengers. Section 799, Kentucky Statutes, requires conductors to assign a white or colored passenger to his or her respective car or coach or compartment. For a failure of such duty, section 800, Kentucky Statutes, imposes a penalty upon the conductor. Section 801, Kentucky Statutes, excepts from the operation of the separate coach law, "the transportation of passengers in any caboose car attached to a freight train." The railroad company is finable for the failure to provide separate coaches or compartments for white and colored passengers. The failure to do so is in violation of section 796, Kentucky Statutes. If it provides the separate coaches or compartments and is guilty of discrimination in quality, convenience or accommodations in the cars thus provided, it is guilty under section 796. The indictment in this case is not under section 795, Kentucky Statutes, for the failure to provide separate coaches or compartments for white and colored passengers, but is under section 796 for discrimination. A case of discrimination arises when the railroad company has provided the separate coaches or compartments for white and colored passengers respectively, for if no separate coaches are provided, the offense is not for discrimination, but for the failure to provide separate coaches or compartments. The indictment does not charge that there was no separate coach or compartment provided for colored passengers, but that there was a difference and discrimination in the quality, convenience and accommodations in the cars set apart for white and colored passengers. The discrimination alleged in the language of the indictment is: "That a colored passenger was forced and compelled to travel and remain in the baggage car from Madisonville, Ky., to Providence, Ky., which had no fire, seats or other accommodations, like those of the car or partition set apart for the white passengers."

It is not charged that the baggage car was set apart for the use of colored passengers, but that a colored passenger was forced and compelled to travel therein. If the conductor wrongfully compelled the colored passenger to ride in the baggage car, the conductor, and not the railway company, violated the statute. (*Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky., 668.) The averment that the colored passenger was forced to ride in the baggage car is not equivalent of a charge that the railroad company failed to provide a car or compartment for colored passengers like that provided for white passengers. While the indictment charges discrimination in general terms, yet when the acts constituting the offense are described, they do not show a discrimination in providing a car or compartment for colored passengers. The demurrer should have been sustained to the indictment.

The evidence shows that the train in question was scheduled to run as a passenger train between Providence and Earlington, except Sundays. When so run it consisted of two coaches, one of which was a combination baggage and passenger car, divided by a partition into two compartments, one of which was used for baggage, mail and express, and the other compartment for colored passengers. The train was not scheduled to run on Sundays, but on that day was run as a coal train. It had no caboose, but used the combination car described as a caboose. It was so run on the day the colored

passenger was put in the baggage compartment. It was a freight train. Under section 801, although it carried a caboose for employes and passengers, the railroad company was under no duty to provide separate coaches for white and colored passengers. The law does not prescribe how a "caboose car" shall be constructed. It may be constructed with or without compartments; it may have one or more compartments. A caboose car is a car attached to the rear of a freight train fitted up for the accommodation of the conductor, brakemen and chance passengers. The combination car in this case was used for the brakemen and chance passengers. The legislature evidently intended to relieve railroad companies from furnishing separate coaches where a freight train is operated, although it carries passengers in the caboose car. We are of the opinion that the company was under no obligation to carry a separate coach or have separate compartments for white and colored passengers in the train in question, for it was a freight train carrying a combination car used as a caboose.

The judgment is reversed for proceedings consistent with this opinion.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. HALCOMB.

(Filed January 15, 1904—Not to be reported.)

Railroads—Damages—Evidence—In an action for damages against a railroad company charging that the conductor shoved appellee off the train causing her to fall and to be injured, the fact that appellee walked two and one half miles with an escort without saying anything about the treatment of the conductor and never spoke of it at her boarding house until some time after she had reached it, renders her statement improbable and the verdict of the jury awarding her damages is palpably against the weight of evidence.

O. H. Waddell and John Graham for appellant.

Edwin P. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Paynter.

The appellee boarded appellant's train at Somerset as a passenger for Tateville, and claimed that immediately after passing Burnside, the station north of Tateville, and about two miles therefrom, the conductor called out Tateville, came back and took her telescope, carried it forward to the door of the car, motioned her to follow, which she declined to do; thereupon he returned to where she sat, took her by the hand, pulled her out of her seat, led her to the platform, and while the train was in motion shoved her arm so as to cause her to fall from the train while in motion, the train not having reached the station of Tateville, which fall caused her to receive painful injuries and bruises about her stomach and hips. The foregoing statement is the substance of the averments of the petition and appellee's evidence. The jury awarded her \$500 in damages, and from a judgment on this verdict this appeal is prosecuted.

No one seems to have seen appellee fall from the train, if she did so, nor did she make any complaint to any one about being thrown from the train.

or about having been injured, until she had walked two and one-half miles to the house where she was boarding, and not then until some time after her arrival, although she had an escort from the depot, and met a party with whom she engaged in conversation on the way from the train. If she fell from the train, it occurred near the depot, and it is strange that no one saw her fall. Besides, it is most remarkable that she would pass by the depot and walk two and one-half miles without a murmur as to the alleged brutal treatment of the conductor. Without any motive, it is incomprehensible that a conductor of twenty-two years' experience should treat an inoffensive woman so brutally, and imperil her life without the slightest provocation. The statements of the appellee as to how the alleged injury was inflicted are so improbable, and her long delay in telling about it, makes the impression on the court that she certainly at least is mistaken in her claim, that she was pushed by the conductor from a moving train. When the court considers the improbable evidence of appellee, and that no possible motive for the alleged outrageous conduct of the conductor was shown, together with his reasonable and consistent statement as to how he aided appellee in alighting from the train, it is at "first blush" impressed with the belief that the verdict of the jury is probably against the weight of the evidence.

Appellee claims she was shoved from the train. Appellant denies that she was shoved from the train, or even fell when she was being assisted from it. The theory upon which the trial was conducted by the defendant was that its servant did not shove appellee from the train, and that she did not fall in alighting therefrom. So there is no evidence by either party from which it might be inferred that appellee was guilty of a negligent act, hence there was no evidence upon which to base an instruction on contributory negligence. It would have been error to have given such an instruction. (*Thurman v. Louisville & Nashville R. R. Co.*, 17 Ky. Law Rep., 1843.)

The judgment is reversed for proceedings consistent with this opinion.

WALLACE, &c. v. KNOXVILLE WOOLEN MILLS.

(Filed January 27, 1904.)

1. **Contracts—Sales—Damages**—In an action by appellee, a yarn manufacturer, against appellants for the purchase price of a lot of yarn, upon a counterclaim for damages because the yarn was defective and not according to contract, where appellee acknowledged the defects and promised to remedy them and compensate appellant for the loss, the counterclaim was maintainable.

2. **Same—Measure of damages**—In an action for damages for the sale of yarn and for injury to machinery in manufacturing it, the measure of damages is the difference in the value of the yarn for the purpose for which it was bought and the yarn as it in fact was, and such damage may be allowed as was done to the machinery in giving it a fair trial, provided ordinary care was exercised by the defendant in making a trial of the yarn.

Quigley & Mocquot for appellants.

Wheeler & Hughes and Smrall & Doolan for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, the Knoxville Woolen Mills, instituted this action against appellants to recover \$2,712.39, the balance due on an account for a lot of cotton yarn sold and delivered by it to them, appellee being a manufacturer of yarn in Knoxville, Tenn., and appellants being manufacturers of hosiery at Paducah, Ky., and buying the yarn for use in their factory. After the suit was brought, appellants paid appellee \$2,015.05 on the account, and filed an answer and counterclaim as to the remainder of the account, in which they alleged these facts: They have a large plant employing regularly about a hundred persons and a great number of machines engaged in the manufacture of hosiery, their weekly expenses being about \$500; they are engaged in selling their products to retail dealers throughout the county, all of which was well known to the plaintiff when the contract was made. On or about October 1, 1902, they received from the plaintiff the first shipment of the yarn in contest, the contract being for the purchase of 50,000 pounds of yarn to be delivered in weekly installments of eight cases until all was shipped. After receiving the first shipment and running it into their machines in their plant, they ascertained that the yarns were not of the character, quality and kind agreed to be furnished them by plaintiff under its contract, which fact could not be ascertained until each cone was run into the machine; they at once notified the plaintiff of the defective character and quality of the yarn, complaining to plaintiff of the quality of yarns that were being shipped; the plaintiff continued to make shipments and the defendants repeatedly made complaint, and insisted that they should be reimbursed on account of the defective quality of the yarn. On November 3, or about thirty days after plaintiff began to ship the yarn, in answer to complaints of defendant the plaintiff wrote them the following letter:

"Knoxville, Tenn., Nov. 3, 1902.

"The Alden Knitting Mills,

"Paducah, Ky. :

"Gentlemen—Yours of the 1st inst. received. I regret exceedingly that our yarns have not been giving satisfaction. This is the first complaint we have had for some time, but the samples of yarn you submitted is certainly not very good. In one place it looks like a No. 6 had been wound on to No. 11 or No. 12s. And in another place, especially that of the knit sample, it looks like it had been caused by a bad roller in the cotton mill.

"Our Mr. McKeldin wrote you last Saturday that he hopes to be over early this week. He expects to leave tonight or tomorrow night, and I hope you will have no trouble in getting our differences reconciled, and our business relations continue pleasant. We know we can make good yarn, and are doing it to-day.

"I have the pleasure of knowing your Mr. Toof, and am obliged to him for his interest in the matter. I assure you, when our Mr. McKeldin sees you, he will make everything satisfactory.

"Very truly yours,

(Signed) "R. P. GETTYS, V. P."

The officer of the plaintiff came to Paducah in a few days, and admitted that the yarns were not of the character, quality and kind contracted to be shipped, and represented to defendants that he would undertake to adjust

the claim for damages made by the defendants. By reason of the representations of the plaintiff, the defendants were kept from making other contracts for the purchase of good yarn for their knitting as they would have done but for this misrepresentation; there is no market in the city of Paducah for the purchase of yarns. The defendants made every effort to procure yarns for use in their plant when they ascertained that plaintiff would not comply with its contract; they would not have used the yarn shipped by plaintiff, but for the representations of the plaintiff that it would make good yarns to comply with its contract, and that the defendants would be compensated for damages by reason of the defective character of the yarns. It was further alleged that the plaintiff made these representations to the defendant with a fraudulent intent to mislead them and to induce them to keep and use the portion of said yarns that were used, and to prevent them from exercising their rights under the contract, and that thereby the plaintiff practiced a fraud upon them and lulled them into the belief that their claim for damages would be adjusted and paid. The damages were fixed at \$850, and it was alleged that by reason of the nonresidence of the plaintiff, the defendants would be irreparably damaged unless allowed to make their counterclaim in this action. The court sustained the demurrer to this part of the answer, and entered judgment in favor of the plaintiff on the account for the yarn.

In support of the judgment we are referred to *Jones v. McEwan*, 91 Ky., 378, and *Duckwall v. Brooke*, 23 Ky. Law Rep., 1459. In the first case the wheat was inspected and received and thereafter a counterclaim was presented on the idea that the wheat was not as it was supposed to be. The court applied the rule that where the purchaser receives the goods in discharge of the contract after inspecting them, or after a fair opportunity to do so, he can not sue the vendor to recover damages upon the ground that the goods did not come up to the contract. In the second case, five carloads of corn were shipped. Two were rejected, and three were risked out. Two other cars were sent in place of the two that were rejected, and it was held that the purchaser took the risk of the three which he sent out after inspecting them and knowing the condition of the corn. This case followed *Jones v. McEwan*, and is on all fours with it. On the other hand, in *National Oak Leather Co. v. Armour, Cudahy Packing Co.*, 99 Ky., 667, suit was brought to recover the price of certain hides, and a counterclaim was pleaded for damages on account of their defective condition. The defendant paid for the first carload of hides before they were received and the defective condition of the hides was discovered while they were being fleshed. They were received in July, and the defects were discovered in the beam house early in August. They could not have been discovered before in the ordinary run of their business. Notice of the defects were at once forwarded to the seller, and damages demanded. It responded, admitting the inferior condition of the hides, and promising a better showing on the second carload. In a few days the second car arrived, and the hides were found in a worse condition than the first. The purchaser offered to surrender the hides, except eighty, which it proposed to keep to pay the damages. This offer was refused, and it becoming apparent that the hides were about to spoil, it sent to the seller the price of the hides as stipulated in the contract, less its claim for dam-

ages, and proceeded to use them in order to save them. It was held that the counterclaim was maintainable and judgment was entered for the defendant. The case before us falls within the principle of this case, and is not governed by the rule laid down in *Jones v. McEwan*. The first shipment of the yarn sued for was made October 1. The last shipment was made on November 12. The yarn was rolled on cones and its condition could not be ascertained until the cones would be unwound. In the ordinary course of business this would be when the cones were placed in the machines, and the yarn was unwound for use. The rule relied on for appellee applies only to such things as may be inspected in the ordinary course of business before they are accepted. It does not apply to defects which could not be discovered by ordinary care in the usual course of business when the goods are received. When appellants received the yarn in contest, they had a right to presume that it was such as the contract required, and were not required to anticipate defects which could not be ascertained by ordinary care in the usual course of business before using the yarn. Complaint having been made promptly, and the seller promising to remedy the defects and to compensate the purchaser for the loss, the counterclaim is maintainable. The letter of the plaintiff shows that there had been previous correspondence. It recognizes the defectiveness of the yarn, and is a promise that Mr. McKeldin will make everything satisfactory.

In setting out their damages, the defendants alleged that by reason of the defective quality of the yarn their machinery was damaged in passing the yarn through it, in the sum of \$200; that they were further damaged by reason of their inability to do full work with their machinery, on account of the yarn's being defective, in the sum of \$450, and that by reason of the failure of the plaintiff to deliver yarns of the quality, character and kind contracted to be furnished, they were damaged in the sum of \$200. It is earnestly argued for appellees that the damages to the machinery, or by reason of appellee's failure to do full work with the machinery, are remote, and that the other item of damage is so vague and indefinite that it should be disregarded.

Ordinarily the measure of damages on the sale of a chattel is the difference in value between the article contracted for and that delivered. But where an article is sold for a particular purpose the purchaser may be entitled to recover such special damages as may be considered within the reasonable contemplation of the parties as the natural and probable result of the breach of the contract, it being the duty of the purchaser to make his damages as small as he can by the exercise of ordinary care. (24 Am. & Eng. Ency. of Law, pages 1155-1156.) The yarn sued for was sold to the defendants to be manufactured in their plant into hosiery. The measure of damages is the difference in value of the yarn for the purposes for which it was bought as it was contracted to be delivered and the yarn as it in fact was, and in addition to this the jury may also allow such damage as was done to the machinery in giving the yarn a fair trial, or such damage as occurred from loss of time in making the trial, provided, ordinary care was exercised by the defendant in making the trial, and no loss which might have been avoided by the exercise of ordinary care in the proper course of business should be allowed. The case is here on demurrer to the answer, and taking its allega-

tions to be true, as we must on demurrer, we conclude it sufficiently states a cause of action. The pleader might have made simply a general allegation of damage in the sum of \$850 by reason of the defectiveness of the yarn, as he did in the amended answer, and under this he could have recovered general damages, but the special damages on account of the injury to the machinery and loss of time were properly specially pleaded. Such damages are not too remote, and are often allowed in cases of this character. (2 Sedgwick on Damages, section 742; 2 Sutherland on Damages, section 662, 2 edition.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

DAY v. EXCHANGE BANK OF KENTUCKY.

(Filed January 19, 1904.)

1. Principal and agent—Where D., through an agent, purchased shares of stock in appellee bank and subsequently sold to others who in suits against him compelled him to pay them the difference between the value of the stock as represented and the true value of the same. In an action by him against the bank alleging that he had been induced to buy the stock by false and fraudulent statements which it published and by the fraudulent representations of its agent in making the sale to him, a plea of limitation by the bank will not avail where it is not shown that he had actual knowledge of the financial condition of the bank after his purchase of the stock for more than five years before the institution of the action.

2. Same—Instructions—In an action to recover of a bank for the fraud of its agent in a sale of its stock instructions of the court charging plaintiff with any knowledge which his agent had, when he avers that he relied upon the representations of the bank's agent, were erroneous and prejudicial.

A. T. Wood, W. M. Beckner and Beckner & Jouett for appellant.

Henry R. Prewitt for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 2d day of January, 1883, the appellant, J. T. Day, who lived in Campton, Ky., purchased from the Exchange Bank of Kentucky, a banking corporation doing business in Mt. Sterling, Ky., through his agent, J. G. Trimble, twenty five shares of its capital stock at the price of \$2,750. And on the 2d day of January, 1884, he purchased from the bank, through the same agency, forty shares of its stock at the price of \$4,800. J. G. Trimble, who represented him in these transactions, lived in Mt. Sterling, was a director of the bank, and the father-in-law of appellant. Appellant held this stock and drew the dividends which were regularly declared thereon semi annually until 1887. During the year 1887, he sold out his entire holding in the bank to different parties, his father-in law, Trimble, who was at that time president of the bank, acting as his agent. Twenty-five shares were sold by J. G. Trimble to E. S. Cunningham, and twenty shares to Mrs. E. C. Ward. Subsequently these vendees instituted suit against both Trimble and Day, alleging that they were induced to make these purchases by false statements made to them by Trimble as to the condition of the

bank at the date of the purchase, and by false statements published by the bank as to its condition, when Trimble was a director, and recovered thereon. In these suits appellant was compelled to refund to Cunningham and to Mrs. Ward the difference between the value of the stock of the bank as represented and as subsequent developments established its true value to be. On the 20th of December, 1892, J. T. Day brought this suit against the bank, alleging that he had been induced to purchase the stock from them by the publication of false reports as to the financial condition, and also by false and fraudulent statements of W. W. Thompson, cashier of the bank, who represented it as its agent in making the sales of the stock to him. The only defense relied on by the bank in its answer is a plea of the lapse of time and the statute of limitation.

In support of this plea it alleges that J. G. Trimble was the agent of the appellant, J. T. Day, both in the purchase and sale of the stock, and continued to act as his agent between these respective dates; and that Trimble knew of and was familiar with the true condition of the bank, both at the date of the purchase and sale; and that his knowledge should be imputed to his principal, the plaintiff. They also allege that Trimble, as the agent of the defendant, actually communicated to plaintiff information as to the true condition of the bank more than five years before the institution of this suit; and that the cause of action was barred under section 2519 of the Kentucky Statutes, which provides that: "In action for relief for fraud or mistake or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. But no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

Both of these allegations were controverted by reply, and a trial before a jury resulted in a verdict and judgment for the defendant bank. Upon the trial the court instructed the jury as follows:

"3d. The court instructs the jury that if either plaintiff, J. T. Day, or his agent, in the transaction of buying and selling the stock in question, to wit: J. G. Trimble, actually knew of the discrepancies complained of as impairing the value of the bank stock, and had such knowledge more than five years before the bringing of this suit, the law is for the defendant, and the jury will so find, provided such agent's knowledge was acquired by him while engaged in the transactions affecting said stock, or had previously been acquired by him, and was in mind at that time.

"4th. The court instructs the jury that the law imputes to the principal, J. T. Day, and charges him with all notice or knowledge relating to the subject-matter of the agency, which the agent, J. G. Trimble, acquired or obtained while acting as such agent, and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it.

"5th. The court instructs the jury that if they believe from the evidence that the plaintiff, J. T. Day, did not know, and that his agent at the time of and in the course of his agency, did not know, of the discrepancies in the condition of the Exchange Bank of Kentucky, for more than five years before the bringing of this suit, then they will find for the plaintiff.

"6th. The court instructs the jury that before they can find for the plaintiff, they must believe and find from the evidence that plaintiff did not know, for more than five years before the bringing of this suit, and that his agent, Trimble, at the time and in the course of his agency, in the buying and selling of plaintiff's said stock, did not know of the discrepancies in the condition of the Exchange Bank of Kentucky.

"7th. Reasonable diligence is such diligence as ordinary and prudent persons exercise in the management of their own affairs."

These instructions charge the plaintiff with any knowledge which J. G. Trimble may have had as to the true condition of the bank at any time between his original purchase for the plaintiff in January, 1883, until the final sale of the last twenty shares of plaintiff's stock by him to Mrs. Ward in July, 1887, and are in this respect, in our opinion, erroneous and prejudicial to the rights of the plaintiff. It may be stated as a general proposition that notice to an agent while acting for his principal of facts affecting the transaction in which he is at the time engaged, is constructive notice to the principal, as it is his duty to communicate such fact to his principal, and the law presumes that he has done so. (*Bramlett v. Henderson*, 19 Ky. Law Rep., 692.)

"But notice must be given to or the information acquired by the agent in the course of the same transaction which is sought to be affected by the constructive notice. That is, the same transaction from which the principal's rights and liabilities arise, which it is claimed depend upon or which are modified by the constructive notice imputed to him." (*Pomeroy on Equity Jurisprudence*, volume 2, section 671.)

The rule is stated by Mechem on Agency, 718, as follows: "The notice which shall be imputed to the principal is that one which relates to the subject-matter of the agent's authority. Or, in other words, is that one which relates to the business or transaction in reference to which the agent is authorized to act by and for the principal."

Perry on Trusts, volume 1, section 22, says: "The general rule is that notice to an agent is notice to his principal. But the notice, if to an agent, must be to an agent for the purpose of the purchase, and the notice must be to him while engaged in the transaction."

Whilst the appellant, Day, is chargeable with any knowledge possessed by Trimble of the condition of the bank at the time he bought the stock in 1883 and 1884, when he seeks to recover from the bank for alleged fraudulent misrepresentations made to him as to its condition; and he would also be chargeable with the knowledge of Trimble when he sold the stock to Cunningham and Mrs. Ward in a controversy with those vendees growing out of misrepresentations made to them by Trimble to induce the purchase of the stock. But we know of no principle of law which would impute to Day the knowledge of Trimble at the date of these transactions so as to put in operation the statute of limitations in so far as the bank is concerned. There was no connection between the two transactions, and there is no evidence in the record which conduces to show that Trimble represented Day as an agent in so far as this stock was concerned, except in its purchase and sale. If it can be shown that Day had actual knowledge of the true financial condition of the bank after his purchase of the stock in controversy for more

than five years before the institution of this suit, the plea of limitation relied upon by the bank would effectually defeat recovery.

For reasons indicated the court erred in instructions 3, 4, 5 and 6, in the particulars pointed out, and the judgment is, therefore, reversed and cause remanded for a new trial consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed January 19, 1904.)

Railroads—Nuisance—Indictment—An indictment against a railroad company charging it with committing a nuisance by obstructing a public street, was defective because it did not identify the street charged to have been obstructed and was, therefore, lacking in certainty.

C. J. Waddill and B. D. Warfield for appellant.

John L. Grayot and N. B. Hays, Attorney General, for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was indicted for a common nuisance. The indictment charges that it was committed as follows: "The said Louisville & Nashville R. R. Co. in the said county of Hopkins, on the 16th day of May, 1903, and on many other days before the finding of this indictment, did create, suffer and maintain a common nuisance in the city of Earlington, Hopkins county Kentucky, by placing and running railroad cars, flats, box cars and steam engines, and making up trains and switching cars and changing cars unnecessarily and for unreasonable lengths of time in, on and across a public street and highway of said city of Earlington where the track and side track of said railroad company crosses said street or highway near said railroad company's depot in said city, thereby obstructing said public street and highway for unreasonable lengths of time and causing the people who pass over and drive teams over said public street and highway great inconvenience and trouble and delays, and making and causing said street and highway at said crossing to be dangerous and unsafe to all people traveling along same, and to the common nuisance of all the people of the Commonwealth."

The court overruled the demurrer to the indictment. He also allowed proof to be given of various obstructions to the highway by different trains on different days within a year before the indictment was found, refusing to limit the Commonwealth to one day or one obstruction. He also refused to allow the defendant to read to the jury the ordinance of the town imposing a fine if a locomotive or train remained across a street of the town for a longer period than ten minutes, and instructed the jury substantially in the language of the indictment that if they believed from the evidence beyond a reasonable doubt the defendant had obstructed the street within twelve months, they should find it guilty. The jury found the defendant guilty and fixed the fine at \$585.

The ground of the demurrer to the indictment is that it does not identify the highway charged to have been obstructed. The only allegation is that it was a public street or highway in Earlington, which crossed the railroad

track near the company's depot. In *Wood on Nuisances*, section 857, it is said: "So, too, in an indictment for an obstruction of a public street or highway, the street or highway should be definitely described, as well as the nature and extent of the obstruction." Unless the highway is identified, the judgment on the indictment could not be relied on as a bar to another prosecution, nor would the indictment inform the defendant of the nature of the accusation against him. Presumably there are other streets of the town crossing the railroad track near the depot. The proof heard on the trial shows there is another crossing two hundred yards from this one. We, therefore, conclude that the indictment lacked certainty, and the demurrer to it should have been sustained.

In *Cincinnati Railroad Co. v. Commonwealth*, 60 Ky., 187, which was like this, an indictment for obstructing a public road, it was held that it was not necessary that the road should be obstructed repeatedly or continuously, but that each obstruction of it was a separate offense. In *Chesapeake & Ohio Railroad v. Commonwealth*, 68 Ky., 388, two indictments were found against the defendant on the same day charging it with obstructing a certain road with its cars. Each charged that the offense was committed at the same time, substantially in the same language. The defendant was acquitted under one of the indictments, and being placed on trial under the other, pleaded the judgment in the former case in bar. It was held that the judgment under the first indictment was not a bar to the proceeding under the second, unless the same obstruction which was relied on in the second case was proved or attempted to be proved in the first case. The court said: "It is true the indictments were found upon the same day; they were for the same character of offense; they covered the same period of time, because the statutory limitation under our law to such a prosecution is one year; but the time named in them as being that when the offense was committed was not material, and each obstruction was a distinct offense. The State was not confined to any particular time, but had the right to show that the appellant had so offended at any time within a year previous to the finding of the indictment. This being so, a conviction or an acquittal would not, ipso facto, bar another indictment found at the same time and charging the same character of offense. Whether the same act was proven or attempted to be proven upon the trial of the other one would be a question of fact; and the first trial would only be a bar to a further prosecution for such offenses as were then proven or attempted to be proven. This would, of course, have to be shown by extrinsic evidence." (88 Ky., 370.)

Further on in the same opinion the court also said: "In this character of case the State could, upon the trial of one indictment, elect one particular act or offense and proceed for it, and under the other indictment, although found at the same time, it could prove a different one."

Any obstruction of a highway is a common law nuisance and is none the less a nuisance if confined to one day. Thus it has been held an indictable nuisance for one traveler on a highway unreasonably to obstruct the passage of another by constantly interposing his team as an obstacle. (*Wood on Nuisances*, section 292.) So it is a nuisance to feed hogs near a highway, or to keep a ferocious dog near by to the interruption of travel. (*Wood on Nuisances*, section 292.) Where each of several acts which terminates in

itself is itself a nuisance, each is a separate offense. (See cases above cited.) When a train of the defendant unreasonably obstructed the highway on one day this was a complete offense, and the fact that another train at other time unreasonably obstructed it, added nothing to the offense. The Commonwealth, therefore, could not prove all unreasonable obstructions by different trains within a year and inflict under one indictment punishment for them all, for there was no continuity of the obstruction. The court should have required the Commonwealth to elect which offense it would prosecute for. This subject was fully considered in *Smith v. Commonwealth*, 100 Ky., 685, and to the rule announced in that case we adhere.

Section 768, Kentucky Statutes, makes it unlawful for a railroad company to obstruct any public highway or street by cars or trains for more than five minutes at one time. This provision is not restricted to the construction of the road, but applies to obstruction by cars or train. The town is only authorized to make ordinances inconsistent with the statute of the State. Its ordinance, so far as it conflicts with the statute, is void. The circuit court had jurisdiction of the common law offense of obstructing a highway. The case of *I. C. R. R. Co. v. Commonwealth*, 104 Ky., 362, only involved the question of variance. We have been referred to no statute, and can find none, relating to fifth class cities affecting the common law jurisdiction of the circuit courts to punish for nuisances.

Judgment reversed and cause remanded for further proceedings consistent herewith.

HEY v. HARDING.

(Filed January 19, 1904—Not to be reported.)

Attachments — Supersedeas — A judgment discharging an attachment, under section 228, Civil Code, entitles the return of the property, or its proceeds, and in this action appellant having failed to supersede the judgment was not entitled to the proceeds of the sale of the attached property.

J. T. Simon and W. S. Pryor for appellant.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Barker.

This action is here on appeal for the second time. It was instituted by appellant in the Harrison Circuit Court, to recover of appellee C. M. Harding judgment on tree bills of exchange aggregating \$1,623.15. Harding pleading, among other things, that these notes were a partnership matter existing between himself and Hey; that the partnership had not been settled, and that he did not then know how the partners stood with reference to the final settlement of their accounts, and prayed that the cause be referred to the commissioner to settle the partnership. On final hearing, the court below dismissed the petition without prejudice, and discharged an attachment which had been sued out by appellant against C. M. Harding, who was a nonresident of this State. From this judgment, an appeal was prayed by appellant Hey, and the case was reversed, the court delivering the opinion to be found in the 21st Ky. Law Rep., 771, where the facts are elaborately set forth, and which obviates any further statement here. Upon the

return of the case to the court below, a settlement of the partnership accounts was had, and, upon final submission a judgment was rendered in favor of appellant for the sum of \$2,598.86, with 6 per cent. interest from April 1, 1896, until paid, and the attachment sued out at the commencement of the action was sustained.

This attachment had been levied upon certain horses belonging to C. M. Harding, which were sold at sheriff's sale, for sums aggregating \$4,000, Mrs. C. M. Harding, the wife of appellee, being the purchaser; and for the purchase price executed bond with surety. After the final judgment in appellant's favor, he entered a motion, June 7, 1902, for a rule against Mrs. Harding, the principal, and John Dunlap, administrator of N. M. Frazier, deceased, J. T. Blanton and B. D. Berry, sureties on the sale bond herein, requiring them to pay into the court the amount of the judgment and costs, which was overruled, from which this appeal is prosecuted.

The sale under the attachment was had prior to the entry of the original judgment on June 13, 1896. After the original judgment dismissing the petition without prejudice, and discharging the attachment, C. M. Harding on June 21, 1896, entered an order of satisfaction of the sale bond in question. Afterwards, on July 9, 1896, appellant filed the record in the clerk's office of the Court of Appeals, prayed an appeal, executed bond and superseded the judgment. The order of satisfaction was entered, however, before judgment was superseded. Section 228 of the Code is as follows: "If a judgment be rendered in the action for the defendant, or if the attachment be discharged, first, the property attached, or its proceeds, shall be returned to him."

Section 747. "An appeal shall not stay proceedings on the judgment unless supersedeas be issued."

The judgment discharging the attachment under section 228 of the Code, entitled Harding to the return of the attached property, or its proceeds. If appellant desired to prevent this from being done, it was incumbent upon him to supersede the judgment. Having failed to do this, Harding became entitled to the proceeds of the sale of the attached horses. As this was made to him before the supersedeas, the appeal of the supersedeas afterwards had no retroactive effect upon the validity of the payment. In the case of *Runyon v. Bennett*, 4 Dana, 598, it was said: "A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded being done without authority from the judgment which is then powerless and against the authority and mandate of the supersedeas should be set aside as improperly and irregularly done; but that whatever is done according to the judgment before the supersedeas takes effect is upheld by the authority of the judgment and is not overreached by the supersedeas."

For the reasons indicated the judgment refusing the rule against Mrs. Harding and her bondsmen is affirmed.

PACIFIC MUTUAL LIFE INS. CO. v. BAILEY.

(Filed January 10, 1904—Not to be reported.)

Insurance policy—Where it was stated by applicant for insurance that his occupation was that of a retail proprietor and a recovery under the policy was contested on the ground that insured also followed the occupation of a lumberman and contractor, and that such duties materially increased the hazard, in the absence of an averment that the disease insured suffered from was brought on by his occupation as a lumberman or contractor, or that such occupation was classed differently from a retail dealer, or that such occupation was more hazardous, or that the company would not have taken the risk had it known that insured was engaged in such other business, a verdict against the insurance company for the amount sued for will not be disturbed.

S. B. Dishman and T. L. Edelen for appellant.

James D. Black, P. D. Black and B. B. Golden for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson.

Appellant issued to appellee on September 2, 1901, a health policy by which it agreed to pay him an indemnity of \$25 a week for a period not exceeding twenty-six weeks, if within a year, among other things, he was continuously disabled and prevented for that length of time from performing any and all kinds of duties pertaining to his occupation by reasons of cerebral apoplexy. In the application for the policy there is this clause:

"5. My occupation and duties required of me are fully described as (state kind of goods): (General merchandise, retail, proprietor.)"

Appellee alleged that he was stricken with cerebral apoplexy on November 8, 1901, and was disabled for the full period of twenty-six weeks. Appellant denied the allegations of the petition and in the second paragraph of its answer set up the clause quoted from the application and alleged that in addition to the general merchandise business the plaintiff "also followed the occupation of a lumber man and contractor with railroad companies in getting out cross ties and other timbers, and that his duties consequent thereto required him to supervise or oversee employes, travel over and through the country in looking after said business and doing other things connected therewith all foreign to the ordinary duties of general merchandise; that the duties connected with the other occupation of the plaintiff, other than those of his occupation of that of general merchandise, very materially increased the risk on the part of the defendant."

The court sustained a demurrer to this paragraph of the answer and the case being submitted to the jury, the plaintiff recovered the amount sued for.

Section 639, Kentucky Statutes, is as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."

It is not averred in the answer that the disease of cerebral apoplexy, with which the plaintiff suffered, was in any manner brought about by his occupation as a lumber man or contractor, or that this contributed in any manner thereto. It is not averred that such an occupation was classed in a

different way from that of general merchandising or that it was a more hazardous occupation. It is not alleged that the defendant would not have taken the risk if it had known that the plaintiff was occupied also in getting out crossties and other timbers. No fact is pleaded showing that his engaging in this business was material in any way to the risk. The bare allegation that it very materially increased the risk is simply a conclusion of the pleader. The facts should have been stated so that the court could see from the pleading that the misrepresentation was material to the risk.

Were the rule otherwise any omission in the application, however trifling or unimportant, might be pleaded in an answer in bar of an action on the policy. This would defeat the purpose of the statute. To make a good answer the defendant must state in its answer facts showing that the misrepresentation was material. This not being done the court properly sustained the demurrer. The proof by the defendant on the trial tended to show that the plaintiff suffered from facial paralysis, while the proof for the plaintiff tended to show that the disease was cerebral apoplexy. The great weight of the evidence and the circumstances show by it sustain the verdict of the jury. There was no evidence on the trial conducing in any way to show that the plaintiff's failure to state that he dealt in railroad ties and timber was in any manner material to the risk. In the brief filed in this court reliance is placed on the fact that it is shown by the evidence that the plaintiff had had typhoid fever in the spring of the year 1901, and this was not disclosed in the application. But there was no plea of this fact or of the clause in the application relating to the subject.

Judgment affirmed.

DEMOCRAT PUBLISHING CO. v. PATTERSON, CLERK.

(Filed January 19, 1904—Not to be reported.)

Official newspaper—Term of—Where an original act directed the appointment of an official newspaper on the first Monday in April of each year, and the act was amended so as to make the appointment for one year, but the amendment was silent as to the time the appointment was to be made, the natural construction is that the legislature intended that the new appointment should be made at the expiration of the current term.

J. C. Flournoy, Wheeler & Hughes and Flournoy & Harrison for appellant.

Bloomfield & Crice for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

The question involved in this case is whether the term of the official newspaper in second class cities is for one year from the time the appointment is made or until the first Monday in April the next year. The question turns upon the proper construction of the statutes. Section 12, article 5 of the original act for the government of second class cities was, so far as material, in these words: "The mayor, on the first Monday in April of each year, shall hear such proof as may be offered to him by sworn statement, oral and

written, as may enable him to determine the daily newspaper having the largest bona fide circulation in the city, and the newspaper having such circulation shall be selected and known as the official newspaper of the city, and in such official newspaper for the term of one year shall regularly and promptly publish a correct and full abstract of the proceedings of both boards of the general council and of all ordinances, resolutions and notices which, under this act, or the ordinances of the city, may be required to be published; but the price for such printing shall not exceed the regular advertising rates of such newspaper. The mayor may examine the subscription books and other evidences offered by competitors to enable him to reach a just determination; and the determination of the mayor shall be final." (Acts 1894, page 268.)

By section 1 of an amendatory act passed in 1898, it was provided as follows: "That section 12 of article 5 of the act mentioned in the title of this act be amended and re-enacted so as to read as follows: 'The mayor shall annually select a daily newspaper to be known as the official newspaper of the city, and in such official newspaper for the term of one year shall be regularly and promptly published a correct and full abstract of the proceedings of both boards of the general council, and of all other ordinances, resolutions and notices which, under this act, or by the ordinances of the city, may be required to be published; but the price for such publication shall not exceed the regular advertising rates for such newspaper. The mayor may examine the subscription books, and other evidences offered by competitors, to enable him to reach a just determination, and the determination of the mayor shall be final.' " (See Acts 1898, page 154.)

This was in turn again amended as follows:

"Section 1. That section 1 of an act which became a law March 25, 1898, and is entitled 'An act to amend an act, entitled 'An act for the government of cities of the second class in the Commonwealth of Kentucky,' approved March 19, 1894, and now being section 3117 of the Kentucky Statutes, be amended and re-enacted so as to read as follows:

"That the city attorney shall annually select a daily newspaper, to be known as the official newspaper of the city, and in such official newspaper for the term of one year shall be regularly and promptly published a correct and full abstract of the proceedings of both boards of the general council, and all ordinances, resolutions and notices which, under this act, or the ordinances of the city, may be required to be published; but the price for such publication shall not exceed the regular advertising rates for such newspaper. The city attorney may examine the subscription books and other evidence offered by competitors to enable him to reach a just determination, and his determination shall be final. No ordinance or resolution appropriating or paying less than \$50 shall be published, nor shall ordinances for street or other public improvements or proposals or bids for such improvements include details of specifications, but these shall in the proper office be open to examination, and the notices shall so state.

"Sec. 2. All acts or parts of acts inconsistent herewith are hereby repealed.

"Sec. 3. Whereas the selection of the official newspaper under the present law will occur before ninety days after the adjournment of this session of the general assembly, therefore an emergency is declared to exist, and this

act shall take effect from and after its passage and approval by the governor." (See Acts 1902, pages 70-71.)

Appellant was appointed on July 6, 1902, and claims its term continued for one year from that time, while appellee maintains that it expired on the first Monday in April, 1903, when another appointment was made.

By the original act the appointment was directed to be made by the mayor on the first Monday in April of each year for the term of one year. By the act of 1898, it was provided that the mayor should annually make the appointment for the term of one year, and while this act was silent as to the time when the appointment was to be made, it was enacted four years after the preceding act, under which the term of the incumbent would expire on the first Monday in April, and as no change is made in the time of the appointment the natural construction is that the legislature contemplated that the new appointment should be made at the expiration of the current term. The act of 1902 makes no substantial change in the preceding act except to substitute the city attorney for the mayor as the person to make the appointment so far as the questions involved in this case go. By the third section of that act the reason for the emergency requiring that the act should take effect from its passage, is that "the selection of the official newspaper will occur before ninety days after the adjournment of this session of the general assembly." The act was approved March 18, and the assembly adjourned shortly thereafter. The act, therefore, in the reason given for its taking effect from its passage, recognized that the selection was to be made at the time named in the original act. Taking the three acts together, we conclude that the legislature did not contemplate changing the time when the selection was to be made, and that appellant's term expired when the new appointment was made by the city attorney on the first Monday in April, 1903. (Hoke v. Richie, 100 Ky. 66.)

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SMITH, &c.

(Filed January 19, 1904.)

1. Railroads—Injunctions—In an action to compel a railroad to restore a crossing over its track where such a crossing had existed for many years between intervening lands, a mandatory injunction will not lie where there was an agreement that an outlet should be made at a point 1,400 feet from the original crossing which would afford an entrance into a pike leading to the land without crossing the railroad track.

2. Same—Where the benefit secured by the party applying for an injunction would be small, and it would operate oppressively to the other party and to the public, unless the wrong complained of was wanton and unprovoked, an injunction will not be granted to restrain it.

Fairleigh, Strauss & Eagles, E. W. Hines and B. D. Warfield for appellant.
Chapeze & Halstead for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellees for a mandatory injunction re-

quiring the appellant to restore a railroad crossing over its tracks and right of way near Gap in Knob station, in Bullitt county, Kentucky, which it had destroyed in changing the grade of its road at that point.

In their petition the appellees allege, in substance, that they own property in Bullitt county, within a mile or two of the crossing in question; that theretofore, and for many years in excess of the statutory period, they had used and occupied, under a claim of right, a passway from their lands across intervening lands to the railroad crossing in question, and over said crossing to the Louisville and Shepherdsville turnpike road; that this exercise by them of the easement in question had been continuous and adverse to all the world for more than fifteen years next before the injury complained of.

Appellant, by its answer, controverted appellees' title to the passway, and pleaded in estoppel an agreement on its part with appellees whereby it acquired land, and made for them an outlet to the turnpike in question, at a point some 1,400 feet further south than the original crossing over its right of way, which afforded an entrance into the pike without crossing over its line; that appellees stood by and saw it change the grade of its tracks at great expense, and acquire, by purchase, the right of way, and the building of a road, which secured to appellees an outlet to the turnpike without crossing the railroad track. Without setting forth the allegations of the pleadings in detail, we think they sufficiently present, first, the title of appellees to the easement claimed by them, and, second, the question of estoppel of appellees, by their conduct with reference to the change of grade, and the destruction of the crossing in question. The evidence shows that the passway in question, from the lands now owned by the appellees across all intervening lands to the turnpike at or near the crossing in question, have been exercised by them, their tenants and grantors, and the public, generally, under a claim of right, continuously for forty or fifty years. This, in our opinion, sufficiently established their title by prescription to the easement.

About two years before the institution of this action, appellant found it necessary, in order to transport along its line from Louisville to the South the enormous traffic committed to its care, to double-track its line from Louisville to Shepherdsville, and, to overcome a steep grade existing in its line at and in the neighborhood of the crossing in question, to make a cut and lower its tracks some eight or ten feet below the level of the original crossing, thus effectually destroying it. When this work was in progress, W. A. Foreman, one of the appellees, visited appellant's superintendent, Daniel Breck, who was in charge of the work, and interviewed him on the subject of the destruction of the passway, and while the superintendent did not, in terms, recognize appellees' legal right to the crossing in question, he said to Foreman that he would secure the necessary right of way, and make a road from the passway where the old crossing on appellees' side existed along the line of appellant's track, so that the new road would strike the Louisville and Shepherdsville turnpike at a point 1,400 feet north of the old crossing, and thus obviate the crossing of appellant's line at all. It is admitted by both Foreman and his cousin, Helen Clay Smith, that they acquiesced in this proposition, whether or not they affirmatively agreed to it;

or, to use Miss Smith's own language: "If he made a good road, she would not be stubborn about it." With this understanding, at great expense, appellant finished the work by which it changed the grade of its line, lowered its tracks, and destroyed the crossing. It also obtained the right of way, and made a road along the route indicated in the conversation between Breck and Foreman, thus affording appellees an exit into the turnpike without crossing its track.

Appellees were not satisfied with the new road, as made, claiming that, by reason of the steepness of its grade, it is impassible. The evidence on this point is contradictory; the weight, perhaps, being in favor of appellant. The evidence conclusively shows that it would be impossible to restore the crossing, except at an enormous expense in labor and money to appellant, and that, even then, it would be an exceedingly dangerous one, because of the fact that, in order to make it at all, it would be necessary to make a deep cut, so as to get down to the grade of the track, and as appellant's road, even when lowered as it is at present, is on a steep grade, it would be almost impossible, according to the testimony, to overcome, or guard against, the danger of accident. We think the appellees are estopped from invoking the extraordinary remedy of a mandatory injunction against appellant, requiring it to restore the crossing, under these circumstances, and that they should have been remitted to an action at law for damages for whatever wrong or injury they may have suffered.

In the case of *Byron v. Louisville & Nashville R. R. Co.*, 29 Ky. Law Rep., 1007, a somewhat similar question in principle arose, and this court said: "The proof shows that appellant stood by and saw that the appellee was building the wall to hold the filling, and thus expended large sums, without complaint or proceeding to stop the work, and when the work was nearing completion, he seeks an injunction. If he had a right to an injunction, he should have asserted it earlier, and before appellee had expended so much on the work. To grant an injunction when applied for would have necessarily damaged appellee greater than to refuse would damage appellant. There is no claim for damage made, and hence no question of recovery of damages before us."

For the reason given, among others, the judgment refusing the injunction was affirmed. And in the case of *Herr, &c. v. Central Kentucky Lunatic Asylum*, 22 Ky. Law Rep., 1723, which was an action instituted by property holders to enjoin the asylum from polluting the waters of Goose creek by emptying its sewerage into it, it was said:

"The question first to be determined under this state of facts is whether appellant has an adequate remedy at law for the injuries complained of by an action for damages, as the rule is settled that an injunction will not be granted where the remedy at law is full, adequate and complete. It was held in *Hauns v. Appellee*, 20 Ky. Law Rep., 246, that an individual could maintain a common-law action against appellee for injuries identical in character with those herein complained of; and that an execution sued out upon a judgment in such a proceeding could be levied upon the property of appellee, unless the sale of such property would render the corporation wholly unable to care for the insane under its charge. And even if it be conceded that appellee had no property, which came under this head, that

would be liable to such an execution, we think it must be conclusively presumed that the legislature would make suitable provision for the payment of such a judgment, as it is in reality a claim against the State, when it has been properly ascertained and determined in the courts of the State. But even if it be conceded that appellant's claim for an injunction would not be defeated on this ground alone, 'it is a rule, practically without exception, that a court of equity will not grant relief by injunction, where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him; but lies by and suffers his adversary to incur expenses, which would render the granting of the injunction a great injury to him. This rule is especially applicable where the granting of the injunction will operate injuriously to the public as well as to the party against whom the injunction is sought.' (Am. & Eng. Encycl. of Law, volume 16, page 356, and authorities there cited)

"Pomeroy, in his work on Equity Jurisprudence, sections 816 and 817, announces the general doctrine as follows: 'Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxim, 'He who seeks equity, must do equity, and he who comes into equity, must come with clean hands.' * * * Acquiescence in the wrongful conduct of another by which one's rights are invaded may operate often upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law; it simply bars his equitable relief and leaves him to his legal action alone.

"Mr. High, in his work on Injunctions, section 786, says: 'He who seeks relief against a nuisance must show due diligence in the assertion of his rights, and where complainant has allowed the defendant for a long period to continue in the erection of his obnoxious structure, at great expense, equity will not interfere. * * * Complainants who have long slept on their rights will not be allowed to enjoin the nuisance, and thus put themselves in a position from which their own laches had debarred them.'

"This principle was applied in *Southard v. Morris*, Saxt., 516; *Logansport v. Uhl*, 99 Ind., 531; *Attorney General v. N. Y. R. R. Co.*, 24 H. J., 49; *Trafagan v. Jersey City*, 29 N. J., 206; *Swaine v. Great Northern R'y Co.*, 9 Jurist., 1196. It has also been frequently applied by this court. (*Stanford Water, Light and Ice Co. v. Murphy*, 20 Ky. Law Rep., 2001.)

"An injunction ought not to be granted where the benefit secured by the party applying therefor is comparatively small, whilst it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless the wrong complained of was so wanton and unprovoked as to properly deprive the wrongdoer of all consideration for its injurious consequences." (*Jones v. City of Newark* 3 Stockt., 552.)

The case of the *Stanford Water, Light and Ice Co. v. Murphy*, 20 Ky. Law Rep., 2001, was instituted to obtain an injunction to prevent the diversion of water from its natural channel, to the injury of the plaintiffs. The facts established the wrong complained of. This court affirmed the judgment refusing a perpetual injunction, and said: "If the appellants' damage is clearly shown to be caused by the appellee, still, we think there is an

ample legal remedy, and this great public benefit should not be crippled or hindered, unless it be absolutely necessary to protect appellants' rights."

High, in his work on Injunctions, section 643, says: "As in all cases of the exercise of the strong arm of equity by injunction, the right to the relief may be lost by one's own negligence and delay in seeking protection. And where the owner of land over which a railway has been constructed has stood quietly by and neglected to insist upon compensation at the time his land was taken, and has waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation. In such cases, an injunction, if granted at all, should only be allowed as a last resort, and after all ordinary means of relief have proved ineffective."

Section 640. "Where the owner of lands has conveyed to a railway company a right of way through his premises, upon a verbal assurance that the company would construct the necessary cattle gaps for the passage of cattle, a failure on the part of the company to comply with such an agreement will not warrant an injunction to prevent the operation of its road until the agreement is complied with, since the indirect effect of such relief would be to compel the company to construct the cattle gaps, and the power to thus enforce a specific construction is one which is rarely exercised by a court of equity."

In the case at bar, appellant is engaged in carrying on a great railway system; in its successful operation the general public is deeply interested. It is neither alleged nor proved that appellees have suffered irreparable injury by reason of the wrong complained of. They stood by and saw the enormous outlay of money, time and labor on the part of appellant, in order to improve its track, and facilitate the necessities of commerce and travel. They have an adequate remedy at law for whatever damage they may sustain by reason of the injury complained of, and, under all the circumstances of this case, under the principles announced in the authorities supra, we think that they should have been confined to compensation for the injury, which may be presented upon the return of the case.

For the reasons above indicated the judgment is reversed for proceedings consistent with this opinion.

SHARP, &c. v. HARRIS, &c.

(Filed January 19, 1904—Not to be reported.)

Religious bodies—Control of church property—Where the title and control of a church building is in one denomination with the provision that any other protestant denomination shall use it when not occupied by the church owning it, reasonable notice of such intended use shall be necessary, and other denominations using the church shall make reasonable contributions to keep it in repair.

C. F. Burnam and Burnam & Moberly for appellants.

W. B. Smith for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Barker.

The appellants are the trustees of the Church of Missionary Baptists at

Panola, Madison county, Kentucky. The appellees are members of the Christian Church, living in and near Panola. The matter in dispute is the respective rights of the parties litigant in a church building in Panola. This is the second time this case had been here on appeal. The opinion on the first appeal was delivered in the case of *Sharp, &c. v. Benton, &c.*, 23 Ky. Law Rep., 876, and in an extended opinion, *idem.*, 1254.

On the former appeal this court held that the title and control of the church building was in appellants, as trustees, etc., for the use and benefit, first, of the Missionary Baptist Church at Panola, and, second, with the right of any other Protestant denomination to worship in the building when it was not being occupied by the Missionary Baptist Church; that appellants, who hold the legal title to the property, and are its custodians, are entitled to reasonable notice of the time when other Protestant denominations desire to occupy the building for religious purposes, and that, if they receive notices that more than one other Protestant denomination desires to occupy the building at the same time, they may determine which applicant is entitled to so use it; and they may also require the other religious denominations using the building to make reasonable contributions to keep it in repair. But they (appellants) have not the right to determine the character of religious services which may be conducted in the building when so occupied by other denominations.

This litigation grows out of a misunderstanding as to what was decided on the former appeal. After the opinion in the former case was rendered, it was read in an open meeting by the Baptist congregation, and an order entered in their church-book, requiring, as reasonable and proper, that one week's notice should be given them by the other religious bodies desiring to use the house for church purposes. It seems that the appellees, and those with whom they are associated, and who constitute the Christian Church at Panola, selected the first Sunday in each month as the day upon which to hold their religious services in the building in question, and claimed the right to go into the building at their own will, and had a key made, with which to unlock the door when they saw fit. In order to restrain the appellees from so doing, this action was instituted.

It is not necessary to minutely set forth the allegations pleaded, or to analyze the evidence. It is sufficient to say that the annoyance and distress of which the appellants complain are more sentimental than real. It is not shown, or even pretended, that the appellees have in any way interfered with the appellants in the use of the building. The record shows that the Baptist congregation worship in the building on the third Sunday in the month, and have no desire to use it on the first. Nor is any other congregation desirous of using the building on the first Sunday. The record fails to show any instance of a clash between the parties litigant, so far as the desire to use the building is concerned. But appellants insist that they are entitled, each week, to notice and request on the part of appellees, of their desire to use the building, and they also complain of the possession on the part of appellees of a key, by which they can enter the church without notice or request.

The chancellor below held that while the Missionary Baptist Church has the first right to the use of the property, the appellees' right was not per

missive, merely, and appellants have no right to arbitrarily exclude them from the use of the property, as this would be contrary to the letter and spirit of the subscription paper and deed; that, as each of the congregations interested in this controversy had a regular time to meet, which did not conflict, and, as no other denomination was complaining, that the giving of further notice by appellees to appellants, for the use of the church building at the regular time which they had selected, was unnecessary; but that, when appellees desired the use of the church building at other than the regular times, they must give appellants one week's notice, at least; and, upon so doing, they are entitled to the use of the property for that purpose, unless previous application had been made for its use by some other parties entitled thereto, or unless appellants had, themselves, previously determined to use it at the same time; that if appellees decided to use the building for the holding of a protracted meeting, they should give appellants at least four days' notice of their desire to use the building for such specific purpose, and appellants should, in like manner, inform appellees four days in advance of the desired time, whether the church would be then idle, and subject to their use.

It was also held that, while it would be less annoying to all parties for both the Baptist and the Christian churches to have a key to the building, yet, as appellants are the legal custodians of the building, appellees, under this state of facts, are not entitled to have a key, but that the appellants shall either open, or cause to be opened, the church for them, from time to time, or give them the key whenever they are entitled to its use, which appellees shall return to appellants.

This judgment is in accordance with the opinion heretofore rendered and is affirmed.

CUMBERLAND TELEPHONE AND TELEGRAPH CO. v. FOSTER.

(Filed January 20, 1904.)

Damages—Injury to dower—A widow in possession of real estate left by her deceased husband, in which she has not been allotted dower, may recover of a stranger, damages for injury to the walls of a building without making the remainderman a party to the action, as she is responsible to him for any waste or injury to the property committed by another, while in her possession.

John McChord for appellant.

Noggle & Graham for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Settle.

Appellant seeks the reversal of a judgment of \$400, recovered against it by the appellee in the Green Circuit Court, in an action wherein it was averred in the petition that it had, without her consent, injured a brick building, of which she is the owner, to her damage in the sum of \$1,000, by negligently digging into the ground on her lot adjacent to the foundation thereof, and sinking a log anchor for the support of its poles and wires, whereby the natural lateral support of the wall was weakened, causing the foundation to

give away, and the wall of the building to crack and become so shattered, as to render it unsafe and greatly impair its value.

The averments of the petition, except as to appellee's ownership of the house and lot, were specifically denied by the appellant's answer, which, in addition admitted that there was slight injury to the building, but that such injury was caused alone by the defective construction of the building and a violent windstorm. The affirmative matter contained in the answer was controverted by reply, and upon the issues thus formed the parties proceeded to trial, with the result mentioned.

Numerous grounds were urged in support of the motion for a new trial, all of which were regarded by the lower court as insufficient, consequently a new trial was refused. One of the grounds was that the verdict of the jury was flagrantly against the evidence and the amount thereof excessive. Another that the court erroneously refused to give the peremptory instruction asked by the appellant, and instead, misinstructed the jury. Another that the court further erred in refusing to permit the filing of an amended answer, offered by the appellant at the conclusion of all the evidence, and before the beginning of the argument to the jury.

As to the first ground it is sufficient to say that all the witnesses for appellee testified fully and intelligently as to the nature and extent of the injury to her building. Some of them were the builders of the house, and many of them testified that the cost of repairing and restoring it to its former state, would amount to \$600, and others to not less than \$400, the sum allowed by the jury. And practically all of them agreed in their testimony as to the fact that the work of appellant's servants in digging the hole, and placing the anchor near the foundation of the building, had produced the injury complained of.

It is true that the witnesses introduced in behalf of the appellant testified to the effect that the building was defectively constructed, and that its defective construction, together with a violent windstorm, caused the injury complained of. Furthermore, that the cost of replacing it would fall far short of the amount fixed by the appellee's witnesses. In fact some of appellant's witnesses fixed the cost of repairing the building as low as \$50. It will be seen, therefore, that the evidence was conflicting. But it was the province of the jury to reconcile it, and to determine the weight and effect to be given to the testimony of each set of witnesses, or any one, or more of them, and besides they were permitted to view the building and premises in charge of an officer of the court, whereby they were the better enabled to arrive at a correct verdict. But while the evidence was conflicting as to the cause of the injury to appellee's building, there can be no doubt that it was injured to such an extent as to render it unsafe for occupancy. It appears from the evidence that the ground floor of the building was used by appellee, her father and brother as an office, and the second floor by appellant as an office and telephone "exchange," and further that the latter's servants in charge of the exchange realized that the building was unsafe, and communicated that fact to appellant, for it gave appellee written notice thereof, and that it would remove its office and exchange therefrom unless the building was immediately repaired, and in fact did remove the same without allowing appellee opportunity to make the repairs necessary to restore the building.

Under such circumstances we think it would have been improper for the trial court to have disturbed the verdict upon the ground that it was unsupported by the evidence, or that the amount thereof was excessive. It is equally clear that a peremptory instruction would have been improper. Such an instruction in behalf of the defendant is proper only when there is no evidence upon which to base a verdict for the plaintiff. As to the refusal of the court to give instruction "A., B. and C.," asked by the appellant, it may be said that instruction "A." would have been unobjectionable but for the use therein of the word "independent." Instruction "B. and C." properly expressed the law, but as both were fully included in the language of instructions 1, 2 and 3, given by the court on his own motion, it was not error to reject them. The instructions that were given covered every aspect of the case, contained all the law necessary to be presented to the jury, and were doubtless readily understood by them. But appellant's principal contention is that the lower court erred in refusing to permit it to file the amended answer offered.

The amended answer was not offered until all the evidence was in and the argument to the jury was about to begin. It in substance denied the appellee's sole ownership of the building in controversy, and averred that it had been owned by her husband who died intestate, leaving an infant child, a son, and that this building, together with such other real estate as was left by the husband descended under the statute to his infant son subject to appellee's right of dower; that dower had not been allotted to her out of the realty left by her husband, and that her only interest in the building, for injury to which she was suing in this action, was that of dower, and further that these facts were first discovered by appellant during the hearing of the evidence.

As will be seen from the authorities cited further on in this opinion, the fact set up by the amended answer would not have defeated a recovery by the appellee. The court did not err, therefore, in refusing to allow it to be filed. It is admitted by counsel for appellant that appellee is entitled to dower in the house and lot in controversy, that she is now in the possession and control of the property, and that dower has not been allotted her from any of the real estate owned by her husband at his death. We may assume, therefore, that she is legally in possession of the house and lot and will be entitled to its possession until dower is assigned her. If so it was her duty to protect the same from injury at the hands of appellant and all others.

In Washburn on Real Property, volume 1, section 294, it is said: "With the above exception (injuries resulting from accident, by the act of God, public enemies or of the law) the tenant is bound to protect the premises from waste, even against strangers, or is responsible to the reversioner for the same, and may have his remedy against the wrongdoer." * * *

"Tenant by curtesy," says Lord Cook, "tenant in dower: tenant for life, years, etc., shall answer for the waste done by stranger and shall take their remedy over." (Lat. Inst., a54; 2d 145-303.)

In Cook v. The Champlain Transportation Co., 1 Denio, 91, which was an action on the case, by the assignees of an unexpired lease for a term of years, for negligently destroying a mill erected by the plaintiffs on the premises, it was held that "the destruction of such building by means of the negligent

acts of a third party was waste for which the tenant was responsible to the lessor, and that, the lessee or his assignee was entitled to recover the whole value of such building in an action against the party guilty of the negligence." The same rule was followed in *Austin v. Hudson River R. R. Co.*, 25 N. Y., 331.

"The tenant by curtesy and in dower, and for life or years, are answerable for waste committed by a stranger and they take their remedy over against him, and it is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste, done to the premises during his term, by whomsoever the injuries may have been committed." * * * Kent's Com., volume 4, 77.)

"The tenant is not responsible for damages done by the act of God, the public enemies, or by the law. But he is obliged to protect the premises from waste by strangers, and for the acts of such persons he is responsible to the reversioner." (Tiedeman on Real Property, section 78.)

Foster T. Foster, the infant son of appellee and her deceased husband, lives with her. She is his statutory guardian, and owes to him the duty of caring for him, and the property which he inherited from his father, in which she is entitled to dower. Though he might properly have been made a party to the action, he was not a necessary party. For any injury that may be done the property by others she, as tenant in dower, and also by virtue of section 2328, Kentucky Statutes, will be responsible to the reversioner, consequently the person inflicting injury to the property will be responsible to her therefor. The injury to the property for which she recovered a verdict and judgment in this case was not so much an injury to the inheritance, for which an action might have been brought by infant heir or for him, but rather an injury which affected appellee's enjoyment and use of the property as tenant in dower, and upon this principle, as well as upon the theory of responsibility to the reversioner, we think she was entitled to recover in this case. The injury to the building, though serious, is one that can be repaired, and it is to be presumed will be repaired by her out of the sum which may be paid her in satisfaction of her judgment against the appellant. At any rate if such repairs are not made, she and not the appellant, will be liable to the infant heir.

For the reasons herein given the judgment is affirmed.

POWERS, EX'OR v. POWERS, &c.

(Filed January 20, 1904—Not to be reported.)

Wills—Undue influence—Where it was shown upon the trial in the lower court that the wife, with her two daughters and younger son were the legatees under the husband's will to the exclusion of their two sons who, over the objection of their mother, had married Protestant women, and where the mother told her son John that "If he married that Jane Waller, a Protestant, who eats meat on Good Friday," he should never get a dollar of their wealth, and that she would see to it that "it was put in black and white," and the husband had stated that he had made his will and left William and John out, and that he had to do it to keep down hell at home.

Held—That the evidence is sufficient to show that the wife was so biggoted in her religious belief that it induced her to believe that her children were apostates and should not share in their father's property and she brought such influence to bear upon him that he yielded to her importunities and made a will different to what he would have made, if left to his own inclination.

Clore, Dickerson & Clayton, J. M. Lassing, M. D. Gray and Edson Riddell for appellants.

J. S. Gaunt and S. W. Tolin for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge O'Rear.

A paper purporting to be the last will of Jeffrey Powers, bearing date, July 8, 1889, was offered for probate in the Boone County Court. On appeal to the circuit court the paper has been twice rejected by juries empaneled to try the issue of the mental capacity of the testator, and of the undue influence alleged to have been exercised over him by his wife and children who were favored by the will.

The formal execution of the paper is sufficiently proved. Nor are we able to find in the evidence any substantial ground for doubting the testamentary capacity of the testator. The ground upon which the jury evidently rejected the paper was that of undue influence. The instructions given were substantially those approved by this court on the former appeal. It was shown upon the trial that the testator and his wife and daughters were members of the Roman Catholic Church, when the two oldest sons of the testator married in 1872 and 1874, respectively. Those events are shown to have provoked violent opposition on behalf of their mother, the wife of testator. These two sons were disinherited by the will. They each married a Protestant woman. It was in evidence that Mrs. Powers stated to her son John, one of the disinherited, and to others, that if he, John, married that Jane Waller, a Protestant that eats meat on Good Friday, he should never get a dollar of their wealth, and she would see to it that it was put in black and white; that she had rather see John cut his throat than to break the Catholic faith by marrying Janie Waller. Some of these conversations did not occur in the presence of the testator, but it was shown that at one time at least it was said in his presence by his wife. It was also proven that the testator had said that he had made his will and had left his sons, William and John, out, and that he had to do it to keep down bell at home. By other witnesses it was shown that the testator had said, that John was a good boy and deserving. There was undoubtedly an estrangement between the families of these two sons and their father's family from the date that they married and left their home. The first will of the testator was written not a great while after those marriages. When the last will was written, some slight change from the first one was made for the benefit of his wife, but it was left the same as the first one with respect to the two disinherited sons. The will gave all the estate to the wife, two daughters and the youngest son, all of whom remained at home and were unmarried.

It is complained for appellants that this evidence was inadmissible because it was immaterial, and because it was too remote from the time of the mak-

ing of the will in dispute. The character of evidence, that is the admissions of devisees against their interest, and statements by the testator that he had been influenced, have been so often held by this court to be competent in the trial of the issue of undue influence that we do not deem it necessary to again state the reasons that support the rule. The last case in which the relevancy of this evidence is discussed is *Wall v. Dimmitt*, 24 Ky. Law Rep., 1749, where the previous cases on the subject are cited.

We do not regard the fact that the influence is not shown to have been exerted with reference to the execution of this particular will at the time when it was prepared as material, because the evidence does show that when the original will was prepared, of which this one is a copy in the particular of disinheriting these two sons, the influence of the wife is shown to have been exerted. If the testator had conceived that on account of the infidelity or apostasy of his sons they were not fit subjects of his bounty, his right to exclude them by his will is not doubted. But it is not shown in this case that the testator had such views of his own, but there was evidence to the effect that his wife was so bigoted in her religious belief that it induced her to believe that her children who were apostates, ought not to share in the distribution of their father's property, and that actuated by this belief she brought her influence to bear upon her husband so that he yielded to her importunities and made a will different from what he himself would have done if left to his own inclination.

The discrimination was not just. The testator himself did not so regard it, but he yielded according to some of the evidence to influences which he could not withstand. The fact that this occurred many years ago, instead of weakening the case against the will, seems to us rather to strengthen it, because it tends to show the weight and the persistence of the influence that was brought to bear against the paternal instinct of affection and justice, so as not only to overturn it at the time, but to keep it suppressed until the last. The question is not so much whether the testator's disposition of his property is equitable, but whether it is his own arrangement; not whether the reasons upon which the discrimination rests are in themselves sound, but whether they are his reasons. The question of religious prejudice against which counsel for appellants so earnestly and eloquently inveighes, is a material matter only when it is to be decided whether the alleged prejudice was that of the testator, or that of some one else, who because of it put into effect an influence over the mind of the testator which his will power was unable to resist.

We have not stated nor discussed all of the evidence. We have thought it necessary to discuss only that which was especially objected to at the trial. The ground of misconduct of counsel in the argument to the jury appears to us to be immaterial, and that the digression complained of and quoted in the bill of evidence could not probably have any effect in shaping the verdict.

The judgment of the circuit court overruling the grounds for a new trial is affirmed.

HALLEY, &c. v. SCOTT COUNTY FISCAL COURT.

(Filed January 20, 1904—Not to be reported.)

1. Land—Turnpike company—In an action to recover possession of a lot which had been dedicated by appellant's ancestor to a turnpike company on condition that it was to be used in connection with the company and when it came to be no longer used it should revert to the former owner, the turnpike company sold and conveyed its road to Scott county when the lot was then abandoned and no longer used by the company. It was error to adjudge the fiscal court to be the owner of the lot upon the theory of long-continued possession.

2. Parol dedication—Where the circumstances show that the dedication was by parol. In the absence of a showing to the contrary, the dedication must be presumed to be of an easement only, and being an easement it was not necessary that a reverter should have been provided for by grant.

S. M. Wilson for appellants.

Thos. S. Gaines for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

The Frankfort, Georgetown and Paris Turnpike Road Co., formerly owning a turnpike road running from Georgetown to Paris, was sued by appellants to recover the possession of a small lot of land, it being alleged that the lot had been dedicated by appellants' ancestor to the turnpike company for a tollhouse site, upon the condition that it was to be used as such in connection with the operation of that road and that when it came to be no longer used for that purpose, it was to revert to the former owner. It was alleged that the turnpike company had sold and conveyed its road in Scott county to the fiscal court of that county, and that the tollhouse was abandoned and no longer used for the purposes of the turnpike. Pending the suit the Scott County Fiscal Court was substituted as the real defendant and claimed the lot by its purchase and conveyance from the turnpike company, which latter it was alleged had acquired the fee-simple title by an adverse possession of more than fifteen years. An issue was joined whether the possession of the turnpike company had been adverse or amicable. The circuit court adjudged the case in favor of the appellee upon the theory that as no deed or grant was shown, the long-continued possession of the road company, for more than forty years in fact, gave it the fee-simple title.

It was not shown that the fiscal court was either using the lot, or had use for it, or contemplated using it, in connection with the operation of the road. It was merely renting it to tenants for \$5 per month. The abandonment is shown by the evidence. But whether it was or not, the fiscal court did not in its answer deny the abandonment. The sole issues tendered were upon the nature of the dedication made by appellants' ancestor, James Combs, that is whether it was a fee-simple title, or an easement merely; and then the plea of limitation. James Combs owned the farm of which the lot in controversy is a part, as early as 1829, and continued to live upon it and exercise the ownership of it till his death in 1852. The road was completed about 1840. There is no deed or other writing conveying or dedicating the lot. It was claimed to be, and is admitted to have been, by parol. The

terms of the dedication are not proven. There is no living witness who knows them, so far as the record discloses. But the fact is conceded, at least conclusively shown, that James Combs was the owner of the farm from which the lot was taken. The tollhouse was built upon it and within a quarter or third of a mile from James Combs' residence. He or some member of his household passed through this toll gate nearly every day for a great many years, in fact, till his death. It follows that either the house was built there and used for the road company's purposes by his permission, or it was a hostile and adverse user. The latter is improbable. Besides, it is shown that James Combs, his family, and servants, so long as he lived, and after his death, his widow and her family, and then his daughter and son-in-law who came to own the farm, all continued to pass through that gate free of toll. No other right is shown than the one claimed by them, viz., that it was in consideration of the use of the lot by the turnpike company. This would imply an amicable arrangement, under which the possession of the turnpike company was begun and continued from year to year. As stated, the express terms of that arrangement are not shown. But the circumstances all do show that there was a parol dedication of the use of the lot to the turnpike company. In the absence of a showing to the contrary, this dedication must be presumed to be of an easement only, the only thing the company required. If it had wanted a greater title it would have taken a deed showing its character. A lawful dedication of an easement to a public use may be by parol. Being an easement only, it was not necessary that the reverter should have been provided for by the grant; the law implied it. When the property was abandoned, and no longer used for the purpose for which the easement was granted, by operation of law the title and right of possession reverted to the grantor and his assigns. The principles herein applied are to be found stated in *Harrison v. Lexington & Frankfort R. R. Co.*, 9 B. Mon., 470; *Mitchell v. Bourbon county*, 25 Ky. Law Rep., 512; *Cynthiana and Raven Creek T. P. Co. v. Hutchinson*, 22 Ky. Law Rep., 1238; *Kendall v. Hillsboro and Poplar Plains T. P. Co.*, 23 Ky. Law Rep., 2372; *Green v. Irvine*, 23 Ky. Law Rep., 1762; *Hawkins v. Nicholas County*, 25 Ky. Law Rep., 704.

The judgment of the circuit court is reversed and cause remanded, with directions to enter a judgment for appellants for the possession of the lot and for proceedings not inconsistent herewith.

GARDNER v. WINTER & CO.

(Filed January 20, 1904.)

1. Warranty—Appellant alleging that he bought eighteen bushels of what was represented to him by appellees as Western German Millet seed which they warranted to him as such seed when it was not and was so known by them, that the seed they sold him were worthless and he seeks to recover \$600 damages in consequence of the alleged fraud and deceit, the only issue between the parties being to which variety of millet the seed belonged, and it appearing clear that appellant relied on his own judgment and past experience, there was no implied warranty that the seed would germinate and produce crops.

2. Same—Where “a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.”

A. D. Cole for appellant.

Clarence L. Sallee and C. D. Newell for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, J. D. Gardner, brought this action against the appellee, T. J. Winter & Co., for a breach of warranty and deceit in the sale of eighteen bushels of Western German Millet seed. In the first paragraph of his petition he relies upon a warranty by the defendants that the seed sold to him was Western German Millet seed, suitable for seed purposes; and alleges that the seed was not of the quality warranted; and that in consequence thereof his crop grown therefrom was worthless, entailing upon him a loss of \$600. In the second paragraph he alleges that the defendant fraudulently represented that the seed was of the best quality of Western German Millet seed, suitable for seed purposes, when in fact it was not Western German Millet seed, or suitable for sowing; and that the defendant knew it was not, alleging special damages as in the first paragraph. The defendants in their answer admit that they sold to the plaintiff eighteen bushels of Western German Millet seed, but deny the alleged warranty and deceit. The trial resulted in a verdict and judgment for the defendant. The plaintiff proved by a number of witnesses that his crop was almost an entire failure; and that this was not due to any defect in the preparation of the ground to receive the seed, or in its subsequent cultivation. He testified that he had had large experience in the growth and cultivation of Western German Millet seed, and that he had uniformly previous to this time had good success with it, that when he purchased the seed from defendant, he asked for Western German Millet; that the defendants showed him two different kind of millet seed, one known as Southern German Millet and the other as Western German Millet, and advised him to purchase Southern Millet, which was higher in price, but that relying upon his previous experience with Western German Millet, he decided to buy that seed; that the defendants, not having enough of this seed on hand, ordered from a wholesale seed house in Cincinnati and had it delivered to him in the packages in which it was put up by the firm in Cincinnati. The testimony of the defendants was to the effect that there were two qualities of German Millet seed, one grown in the South, which was raised almost entirely for seed purposes; that this seed was cultivated in hills like corn; and that the seed was sent West and resown, and produced what was known to the trade as Western German Millet seed to distinguish it from the genuine Southern seed; that after the Western German Millet seed had been resown for several years, it had a tendency to run out and deteriorate, so that it did not produce so luxuriantly as the Southern seed. He also introduced testimony to the effect that the seed had germinated all right, but that early in June a

severe drouth set in, which lasted until November, and that this prevented the millet, a hard crop on land, from growing on this land like the plaintiff's.

At the conclusion of the testimony, plaintiff asked the court to instruct the jury on the warranty set out in the first paragraph of his petition, and also on the alleged deceit practiced upon him set out in the second paragraph. The court thereupon gave to the jury the following instructions:

"1st. The court instructs the jury that if they believe from the evidence that the defendants, Winter & Co., sold to plaintiff, Gardner, a quantity of millet seed as Western German Millet seed, and that said seed was not Western German Millet seed, then they will find for plaintiff such sum as they may believe from the evidence plaintiff has been damaged by reason of the seed not being Western German Millet seed, not exceeding the sum of \$600, the amount claimed in the petition.

"3d. If the jury believe from the evidence that the seed sold and delivered by defendant to plaintiff was of the kind and quality of millet seed commercially known under the description of Western German Millet seed, then they will find for the defendants."

The first question for decision is the refusal of the trial court to require plaintiffs to elect whether they would proceed upon the express or implied warranty relied upon in the first and second paragraphs of the petition. This motion, we think, was properly overruled, as there is nothing inconsistent in the pleas, and we know of no rule of pleading which would estop the plaintiff from relying on both in a suit for damages based upon the same transaction. It is contended for appellant that he was entitled to an instruction based upon the alleged implied warranty set up in the second paragraph of his petition, on the ground that a manufacturer or dealer who sells an article at a fair market price, knowing the purchaser designs to apply it to a particular purpose, impliedly warrants it to be fit for that purpose. The appellant did not testify to the allegations contained in both paragraphs of his petition that the defendants warranted and represented the seed to be "fit and suitable for seed purposes," and for sowing on his land, but only that the seed was warranted or represented by the defendants to be Western German Millet seed. The general rule applicable to the question is well settled by all the leading text writers. In 2 Benjamin on Sales, sections 987 and 988, the rule is stated as follows: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. * * * But when a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser, for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." In Leake on Contracts, 404, the same rule is stated thus: "If an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting

that it is so. But if an order be given for a specific article of a recognized kind or description, * * * and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so."

1 Parson on Contracts, 586-587, states the rule thus: "If the thing be ordered of a manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle * * * must be limited to the cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, though this be intended for a special purpose."

Lawson on Contracts, section 57, [subsection 8, states the rule as follows: "Where goods are sold for a particular purpose (that purpose and not any specific article being the essence of the contract,) there is an implied warranty that the article is reasonably fit for that purpose."

There is no evidence in this case of any intended fraud or deceit by the defendants in the sale of the seed to plaintiff. On the contrary, it is quite clear that, relying upon his own judgment and past experience, plaintiff bought of the defendants a specific article, known and recognized as Western German Millet seed. Under these circumstances there was no implied warranty that the seed would germinate, and produce good crops, or that they were reasonably fit for the purpose to which they were to be applied. The only issue between the parties was whether the seed sold actually belonged to the variety of Western German Millet seed. The instructions fairly submitted this issue to the jury. Whether the failure in plaintiff's crop was due to defective seed, or was to be attributed to the poverty of his soil, the scarcity of rain, or the other innumerable risks which attend the sower, is hard to determine. Plaintiff's experience is aptly described in the parable of the sower and the seed: "Behold, a sower went forth to sow; and when he sowed, some seeds fell by the wayside, and the fowls came and devoured them up; some fell upon stony places, where they had not much earth; and forthwith they sprung up, because they had no deepness of earth; and when the sun was up, they were scorched; and because they had no root, they withered away."

For reasons indicated the judgment is affirmed.

NEVIAN v. HERR.

(Filed January 20, 1904—Not to be reported.)

Appeals—Jurisdiction—In an allowance to one under a judgment for \$180, and to another for \$135, an appeal to this court in an action affecting the one-half of these sums will not lie because that amount is less than the jurisdictional amount prescribed by statute.

A. E. Willson for appellant.

J. G. Sachs for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

This appeal is prosecuted from the following judgment, entered in the case

of the New Albany Ice Co., plaintiff, v. John O. Nevian, defendant, pending in the Jefferson Circuit Court, Chancery Branch, Second Division: "This action having been heard and submitted on motion of R. W. Herr, commissioner of this court, and Ben C. Weaver, expert accountant, for allowances respectively for their services, it is considered and ordered by the court, that said Herr, commissioner, be and he is hereby allowed for sixty days services at \$3 per day, and said Weaver for forty-five days' services at \$3 per day, said sum to be taxed as costs herein, one-half to plaintiff and one-half to defendant. To all of which the defendant excepts and prays an appeal to the Court of Appeals of Kentucky, which is granted."

The amount of the allowance to R. W. Herr, under the foregoing judgment, is \$180; that to Ben C. Weaver is \$135. The judgment against appellant was for the payment of one-half of these respective sums. Section 950 of the Kentucky Statutes, in so far as it applies to the case in hand, is as follows: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than \$200, exclusive of interest and cost." * * *

Whether the amounts allowed to the commissioner and the expert accountant be considered separate judgments or added together appellant's one-half thereof is less than the jurisdictional amount prescribed by the statute and, therefore, the appeal is dismissed.

WEBB, &c. v. WEBB, &c.

(Filed January 20, 1904—Not to be reported.)

Wheeler & Morton and E. W. Hines for appellants.

W. I. Clarke and C. W. Watts for appellees.

Appeal from Livingston Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing and extension of opinion:

The attention of the court has been called to an error in the original opinion (23 Ky. Law Rep., 1057) wherein it was stated that Mrs. Irene S. Webb lived some years after the policy was paid up; in fact she lived only about six months after the policy was issued. The error is, however, an immaterial one as affecting the rights of the parties.

The court, in considering this case did not determine, and we do not now decide whether the mistake in issuing the policy alleged by appellants, and which they sought by this action to correct, existed or did not. The court found then and is compelled to adhere to the conclusion that the plea of limitation must prevail. In the original opinion the court merely cited section 2515 of Kentucky Statutes (which is a part of article 3) that an action for relief on the ground of fraud or mistake must be brought within five years from the perpetration of the fraud or mistake, or within five years from its discovery, but in no event later than ten years. Counsel for appellant in their petition for rehearing insist that this section can not be applied to this case because of section 2525, Kentucky Statutes, which reads: "If a person entitled to bring any of the actions mentioned in the third article of

this chapter * * * was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability * * * that is allowed to persons having no such impediment to bring the same after the right accrued."

The policy stated that upon the death of John W. Webb the amount for which his life was insured was to be paid to Irene S. Webb for her sole use if living, and if she was not then living to the children of John W. Webb. It was the contention of appellants that the contract in fact was that the policy was to be payable to Irene S. Webb as the sole beneficiary, and that the mistake consisted in the insertion of the clause, that in the event she was not living at the death of the insured, this sum was to be paid to his children. It is now argued that Mrs. Webb, being under disability or coverture during the whole time of her right to sue to correct this mistake, the statute of limitation did not run. It is also argued that appellants, her children, were under the disability of infancy at the same time and at the time of her death, and that however their right might be derived, whether directly as beneficiaries under the policy, or as taking through their mother under the statute, their disability protected them against the running of the statute during their minority. They did not discover the mistake at all until just before the filing of this suit, which was within less than ten years of the time of their coming to maturity. It is insisted that under section 654, Kentucky Statutes, which is a substantial re-enactment of sections 80 and 81 of the Act of March 12, 1870, the children took under the policy as beneficiaries. The material parts of that section are as follows: "A policy of insurance on the life of any person expressed to be for the benefit of * * * or made payable to any married woman * * * shall inure to her separate use and benefit, and that of her children, free from any claim of her husband or others." * * *

This court had occasion to construe the section of the statute last quoted as affecting the rights of married women as the sole beneficiaries of life insurance policies, and as to what right the children had in the policies. The question arose in the case of *Wigman v. Miller*, 98 Ky., 620. The point under consideration was disposed of as follows: "The statute is not construed as giving any new right to either the wife or children, but as protecting the rights given them by the contract of insurance from subjection to the debts of the husband or father, or any other person. It follows, therefore, that the rights of the children under this contract are exactly what they would have been had the statute not been quoted—that is, they have no interest whatever, for either the contract of insurance nor the charter, so far as this record shows, gives them any interest. The contract gives the wife the right to the proceeds of the policy, conditional upon her survival of her husband. The children of the wife had no more interest in the proceeds than they had in any other personal property of hers."

From this it would seem that the court was of opinion that the only effect of the language was to create a separate estate in the beneficiaries' interest in the policy. If the strictest construction of this opinion be applied it would follow that the children never had an interest under the policy in any event for under the statute then in force, section 11, chapter 31, General

Statutes of Kentucky, a husband inherited the whole of the surplus of the deceased wife's personal estate, including her separate personal estate, unless he was expressly prohibited by the instrument creating it. (Brown v. Alden, 14 Ben Mon., 114.) John Webb would, therefore, have been the heir at law of his wife, and as such have inherited her interest in that policy. But if the other construction be allowed, that the language of the section not only created a separate estate, but was also a statute of descent, controlling the ultimate inheritance of the married woman's interest in the life insurance policy, then her interest in the policy is a chose, which her administrator would have been entitled to, and in whom was the right of action to correct the mistake.

If it be said that no administrator was appointed for Mrs. Webb, and, therefore, there was no person who might have maintained this action, a sufficient response is found in section 2527, Kentucky Statutes, which provides that if a person dies before the time at which the right to bring any action mentioned in the third article of the chapter on limitation would have accrued to him if he had continued alive, and there is an interval of more than three years between his death, and the qualification of his personal representative, such representative or the purpose of that chapter shall be deemed to have qualified on the last day of such period of three years. Applying this section it has been more than thirteen years since the death of Mrs Webb, and, therefore, the action is barred.

The petition for rehearing must be overruled.

CITY OF BARDSTOWN v. NELSON COUNTY.

(Filed January 20, 1904—Not to be reported.)

1. Local board of health—Smallpox—Where the State Board of Health regularly appointed a local board of health, expenses incurred by that board in caring for a smallpox patient must be borne by the fiscal court of the county.

2. Same—Cities of the fifth class—Cities of the fifth class under section 2059, Kentucky Statutes, are not required to have a separate health board.

John A. Fulton, Geo. S. Fulton and R. C. Cherry for appellant.

Nat W. Halstead and F. E. Daugherty for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

Bardstown, in Nelson county, is a city of the fifth class, with less than 2,500 population, and, therefore, is not required to have a separate health board. (Section 2059, Kentucky Statutes.) The State Board of Health regularly appointed three persons as the local health board of Nelson county. A case of smallpox developed in Bardstown. The person was poor, and probably a tramp. The local board of health called upon the town council to take steps to isolate and quarantine the case. A house was provided and guards, medicine, food and clothing were furnished by the town to the amount of something over \$200. The fiscal court of Nelson county was not notified of the case, nor of the incurring of the expense. Afterward Bard-

town presented a bill of expenses incurred as above stated, and asked the fiscal court to pay it, which was refused. Nor would the court allow any part of it. The rejection of the claim does not appear to have been because it was unreasonable or improvident in its charges, but because the court deemed the city and not the county to be liable therefor. The city brought this suit to collect its bill.

The county urges that there is no statute making the county liable for such expenses. Therefore, that it is not liable. The statutes (sections 2047-2072, Kentucky Statutes,) provide a State Board of Health, with large and important duties and powers conferred upon it. Its members, excepting the secretary, are appointed by the governor, and upon the advice and with the consent of the senate. They, besides personal duties devolved, are required to appoint local or county boards of health in each county to assist in the execution of such sanitary and precautionary measures against epidemics and contagious diseases as the State Board may promulgate, or the county boards deem necessary. The powers conferred upon these boards by the statute are extraordinary, and justified, in so far as they will be sustained, only by the extreme exigencies calling for their existence. Among the duties of these boards is to require sanitary cleansing and disinfection of the premises; the isolation and quarantine of persons afflicted with certain highly contagious diseases, such as smallpox. The State Board is composed of doctors of medicine, supposedly qualified to deal intelligently with that particular situation. It is true there is no express provision of the statute for paying any of the expenses necessarily incurred by these county boards except for the services of the members. It can scarcely be supposed that the legislature has done a thing so idle as to provide such an elaborate system for dealing with infectious diseases which threaten the health of the public, without intending that the expenses necessarily incurred by the boards should be paid for. It was competent for the legislature in the exercise of the police power of the State to provide for the detention of persons infected with contagious diseases, and for their treatment at the public expense. If the legislature had required the several counties or cities to do it, as they are with reference to their paupers, it would not be questioned that the counties and cities would be liable for the expenses.

The State Board of Health are State officers, with fixed terms, jurisdiction and duties. The State pays them and provides for their expenses. The county boards of health are county officials, having duties to perform toward the public within their counties; their compensation is required to be fixed and paid through the fiscal courts of the counties. It was competent for the legislature to create these governmental agencies, and to impose upon them the discharge of certain duties to the State and counties. If the legislature sees proper to have the police laws of the State looking to the preservation of the health of the public, executed by a body of officials selected and chosen with reference alone to their fitness for that delicate and important task, instead of imposing it on the fiscal courts, or town councils, it is clearly within their power to do so. But when they do so, the county board becomes an auxiliary department of the county government. The express authority with which they are clothed by statute carries with it every implied authority necessary to execute it. As they could not execute the statute for the

benefit of the county, without incurring a liability to pay it, and as no other means are provided, it follows that the liability must be paid by the county as its other obligations are; by money derived from county taxes, levied by the fiscal court, the only tribunal authorized by statute for levying county taxes. The judgment and action of the county board of health concerning matters within their jurisdiction ought to be and are as conclusively binding upon the county, as would be the judgment and action of the fiscal court in making allowances for paupers. A corrupt abuse of their power would be and ought to be punished as other official corruption is.

Probably it would have been better if the county board of health had called on the fiscal court in the first instance for the necessary aid in executing the quarantine and support of the subject. It was doubtless an honest error of the board as to which municipality would ultimately have the bill to pay that led to their calling on the town council instead of the fiscal court. But that error don't change the liability of the one legally bound for it. It merely subjected the town to the chance of losing part of the bill, if any of it should be unreasonable in its charges. The county board of health seems not to have kept a record of its proceedings at that time. It is urged with much earnestness and force that a body exercising the power and duty of incurring almost unlimited debt against the municipality for whom they were acting, must make and keep a record of it, not only for the protection of the people who must pay it, but as a basis of impeachment, if they act improvidently or dishonestly. It is pointed out that no county or city, or even school district, can become indebted by contract, or act at all save as it speaks through its records and that impliedly this governmental agency, if it would bind the public for whom it acts, must likewise act by record. We would be glad if we could hold that such was the law. But, we find that in all the instances enumerated where the municipality is bound only when its records bind, it is because of an express statute to that effect. It is a singular oversight in legislation, that a similar safeguard, found wise and proper in the instance of every other body that contracts debts on behalf of the public it serves, should have been omitted. But it has not been required, and we can not hold that those furnishing the services and goods for the county at the proper instance of the county board of health should lose their claim because those officials have not done what they were not required to do.

The rulings of the trial court were in accord with the views herein expressed, except that it left the question to the jury to find whether the local board of health "had met and organized as such." On the trial, appellant offered to prove the affirmative of that fact by parol evidence, appellee objecting, insisting that it could be shown by the record of the local board only. The objection was sustained. The action of the county board of health in quarantining the subject, and asking the council to defray the expenses, was also sought to be proved by parol, and rejected by the court. All the evidence was in favor of a verdict for appellant, but the verdict was for appellee. A new trial should have been awarded.

Judgment reversed and cause remanded for proceedings not inconsistent herewith.

The whole court sitting.

SPARKS v. DEPOSIT BANK OF PARIS, &c.

(Filed January 20, 1904.)

Original opinion 24 Ky. Law Rep., 2383.

McMillan & Talbott and Lafferty & King for appellant.

T. E. Ashbrook and J. I. Blanton for appellees.

Appeal from Harrison Circuit Court.

Judge O'Rear delivered the following extension of opinion:

A re-examination of the record discloses that there were in fact forty-four head of cattle of the description contained in the mortgage in this case, i. e., "yearling cattle on the farm of Leonard Draue, now occupied by said Dundon, near Lair Station, Harrison county, Kentucky," whereas the mortgage embraced only thirty six of the number. The mortgage does not disclose that there were any other cattle of that description on that farm. This altered state of facts presents in part a different question from that decided, although the principles announced in the original opinion are adhered to, and are deemed by the court to be pertinent in the consideration of the question now presented.

The first question for decision is, whether the description in the mortgage is in itself sufficient to constitute a valid mortgage. For the reasons heretofore stated in the opinion by Judge Settle, we hold that it is.

The next is, granted that the description is sufficient, will the mortgage be valid if it undertakes by such description to mortgage an unseparated and unidentified number of a greater number of articles. If a mortgage is given to cover only part of a lot or mass of chattels of the same kind and description, it can not be material, as affecting the validity of the mortgage, whether the fact that it discloses only a part of the lot is embraced, or whether that fact is shown otherwise, for it is the fact that affects the mortgage and not the statement of it. The authorities are not uniform as to whether such mortgage is void. As between the parties to it, it is generally held to be valid. (*Call v. Gray*, 37 N. H., 428, 75 Am. Dec., 141; *Williamson v. Steele*, 3 Lea, Tenn., 527; *Stephens v. Tucker*, 13 N. J. L., 600.) In some cases it has been held valid even as against purchasers or creditors when the parties to such mortgage, conceded to be invalid, have designated the property to be included by setting it apart, or separating it from the general bulk, or by the mortgagee's taking possession of a part which the parties thereby show an intention to designate as the part embraced by the mortgage. (*Parsons Savings Bank v. Sargent*, 20 Kansas, 556; *John S. Brittain Dry Goods Co. v. Beauchard*, 60 Kansas, 213; 55 Pac., 474; *Pruett v. Warren*, 87 Mo. App., 566; *Interstate Galloway Cattle Co. v. McLain*, 42 Kansas, 680, 22 Pac., 728.)

A number of cases hold mortgages such as this to be void. Others that they are valid. We are inclined to take the latter view. The reasoning supporting it may be found in the oldest cases, as well as some of the latest. (*Heywood's Case*, 2, Coke on Littleton, 145; *Bacon's Abridgement Election, B.*; *Mervyn v. Lyds*, Dyer, 91; *Wafford v. McKenna*, 23 Texas, 46; *Call v. Gray*, 37 N. H., 428; *Oxsheer v. Watt*, 91 Texas, 124, 66 Am. State Rep., 863; 41 S. W., 466.) It is called the doctrine of selection, or election, for by such

instrument the grantor impliedly invests his grantee with the right to select the stated number or quantity from the greater. Injustice to neither mortgagor nor purchaser nor creditor can result from this rule. For unless the election is made before the rights of the purchaser or creditor intervene, the latter will be entitled to at least the average of the whole; or may be to themselves have choice, leaving enough of the average of the whole to satisfy the mortgagee.

The purpose of the mortgage in this case was to give the mortgagee a lien on thirty-six yearling cattle on the Dundon farm, to secure the debt named; that was the agreement of the parties. It ought to be enforced as between them, and the weight of the best reasoned authorities seems to sustain this statement. The selection of the particular thirty-six cattle in that case, there being forty-four of the same description, would be, and ought to be, with the mortgagee; for the reason that as it was the purpose of the parties to secure the debt, and that only, such cattle as will fulfill that purpose, if any thirty-six will do it, ought to be selected, as, if there should be an excess of value, it belongs or reverts to the mortgagor after the payment of his debt, while if there is a deficit in value the mortgagee would lose, and the object of the mortgage fail. Another reason is that in a chattel mortgage, as in a deed, the grant shall be taken most strongly against the grantor. The purpose of recording the mortgage is to give to intending purchasers or creditors notice of its existence; notice that the owner of the cattle has given the lien mentioned for the purpose stated. The object of the mortgage is to protect the mortgagee, and insure the fulfillment of the original agreement of the parties. The object of the recording is to warn purchasers that they may refrain from buying until the lien is discharged, or until the mortgagor and mortgagee have set apart the particular chattels to be held under the mortgage. The original opinion holds, and is fully sustained by all the text writers and cases, that the mortgage need not of itself identify the mortgaged property; it is enough if it puts the purchaser on inquiry, which, if unreasonably pursued, will result in his obtaining the exact information as to what property the mortgage encumbers. So here, the mortgage notifies the purchaser that the mortgagee, the bank, had a mortgage lien upon thirty-six yearling cattle on the Dundon farm. It is conceded that if there had been only thirty-six cattle of that description there when the mortgage was given, it would have been a sufficient description, even though others of the same description were subsequently added to the lot by the mortgagor. In this last supposed state of case the purchaser would have been bound to inquire as to what thirty six cattle were embraced by the mortgage, and would have been bound to take notice of whatever that inquiry would have led to. In the case as it is, the purchaser's inquiry would have got him the information that Dundon had only eight head of yearling cattle that were not embraced in the mortgage. His next inquiry would have been which eight head are free? The objection of appellant is that no particular eight head could be certainly pointed out, and, therefore, that the purchaser was at liberty to buy not only any eight head of the cattle, but to buy eighteen, or the whole forty-four, for that matter. If he did, he would certainly know that the mortgagee was being defrauded. It would be better if the parties would always execute papers of perfect description. But if they

don't, the penalty is not a forfeiture of their contracts. So long as they can be enforced, the courts will do it. When they are so imperfectly drawn, as that others have been misled thereby to alter their condition, then the party most negligent should suffer most. In this case, the form of the mortgage under the facts, was such that the purchaser, appellant, could not have learned which eight head of the yearling cattle were unencumbered; therefore, he ought to be permitted to buy any eight of them. Beyond that his claim to protection as against even the negligent mortgagee, is absolutely without merit. We conclude that appellant's purchase of eight of the cattle was free from the mortgage lien, and to the extent of their value appellee has no right of action against him. But for the remaining ten, appellee should be adjudged their value, and the costs in the circuit court.

Judgment reversed and cause remanded for proceedings consistent herewith.

In other respects the petition for rehearing is overruled.

The whole court sitting.

Judge Hobson dissents.

MATTINGLY'S ADM'R, &c. v. HAZEL.

(Filed January 20, 1904.)

1. Mortgages—Homestead exemption—A mortgage executed by the husband upon a tract of land of less value than a homestead in which the wife did not join is not valid as against a subsequent mortgage where the wife did join although the homestead exemption was waived in the first mortgage and by a pleading the wife undertook to give effect to the first mortgage.

2. Same—A homestead exemption can only be waived in the manner pointed out by statute.

W. E. Aud and Sweeney, Ellis & Sweeney for appellants.

LaVegas Clements and Birkhead & Clements for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

The owner of a tract of land worth less than \$1,000 undertook to mortgage it to appellee's assignor in 1888 to secure a debt of \$100. The owner was then a married man and with his wife and family occupied the land as a homestead.

The wife was named as a grantor in the mortgage, but failed, she says by oversight, to sign or acknowledge it, though willing and intending to do so. In the mortgage it is stated that the homestead exemption is expressly waived. In 1898 the owner and his wife mortgaged the same land to Aud & Bro., to secure two named debts. This mortgage was duly executed and recorded, and in express terms waived the homestead exemption of the mortgagors. The owner died without paying either of the mortgage debts. There were no infant children. This suit is a contest between appellee, the owner of the \$100 debt secured by the first mortgage, and the second mortgagor as to which has the prior lien upon the land. The widow of the mortgagor has undertaken by a writing signed and acknowledged by her, and

by a pleading filed in the case, to give full effect to the first mortgage, by disclaiming any title or interest in the land, and attempting to relinquish whatever homestead right she had to the first mortgagee.

Kentucky Statutes, section 1702 exempts to a debtor with a family the land on which he resides as a homestead, not exceeding \$1,000 in value. It creates no new estate in the debtor. It merely negatives the right of his creditor to subject that part of the debtor's land to his debts excepting those contracted before the purchase of the land, or the erection of the improvements upon it.

Section 1706 provides the manner for waiving this exemption. It has been frequently held by this court that the exemption can be waived only in the manner pointed out by the statute, that is, the waiver shall be in writing, subscribed by the debtor and his wife, and acknowledged and recorded in the same manner as conveyances of real estate. (*Thorn v. Darlington*, 6 Bush, 448; *Ballinger v. Lester*, 23 Ky. Law Rep., 2353; *Wing v. Hayden*, 10 Bush, 276; *Meade v. Wright*, 21 Ky. Law Rep., 1806; *Hensey v. Hensey*, 92 Ky., 161; *Lear v. Totton*, 14 Bush, 101; *Hemphill v. Haas*, 88 Ky., 492.)

Section 1702 relieves the property known as the homestead from debt absolutely, except for purchase money, debts created prior to the purchase of the land, and for debts created before the erection of the improvements thereon. Those are the only exceptions. But for the provision of section 1706 land so occupied could not be subjected at all for debts. Whether the homestead is an estate or a privilege is not so material to determine. The fact is that the legislature has made such lands not liable for the owner's debts except as stated. By section 1706 a method is provided which, if adopted, will make that land liable for the debts specified in the writing. Unless the method given by section 1706 is taken advantage of, then section 1702, which makes an absolute exemption, remains in force. It is not in the power of the debtor to waive the law in any other manner than that expressly required by the statute.

From this it follows that the first mortgage of 1858, which the wife did not sign, was void in so far as it attempted to create a lien upon the land of the mortgagor which he occupied as a homestead. It being void for that purpose the subsequent mortgage to Aud & Bro., in which the wife did join, and which was executed in strict conformity to section 1706, Kentucky Statutes, constituted the first lien upon the land. It was not competent, thereafter, for the wife of the mortgagor to give the first mortgagee a preference over Aud & Bro., by then signing and acknowledging a conveyance of her homestead right. Aud & Bro.'s lien had attached, and nothing that the mortgagor or his wife could do thereafter, could defeat or diminish the perfect lien of the mortgagees.

The judgment of the circuit court not being in accord herewith is reversed and cause remanded for judgment consistent with this opinion.

OWENS, &c. v. MERIDETH, &c.

(Filed January 21, 1904.)

Ejectment—Evidence—In an action of ejectment where appellants made out a prima facie title, but appellees by eight witnesses who were not contradicted and whose credibility was not questioned proved that appellees, and those under whom they claimed, had been in the actual, continuous and adverse possession for fifteen years, residing upon the land and claiming it, a peremptory instruction for appellees was proper.

J. S. Lay, Wm. Cromwell, Wright & Logan and Wilkins & Lay for appellants.

J. S. Wortham for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Barker.

The appellants instituted this action to recover of the appellees a boundary of land situated in Edmonson county, Kentucky, alleging themselves to be the owners, and entitled to the possession of it, and that appellees were in possession and wrongfully withholding it from them. Appellees denied the title of appellants, and pleaded title in themselves by adverse possession.

Upon trial of the case, appellants introduced in evidence deeds and oral testimony, which, in our opinion, established a prima facie title in them from the Commonwealth of Kentucky, to the land in question. At the close of appellants' evidence, the appellees moved the court for a peremptory instruction to the jury to find for them, as in case of nonsuit. This motion was, evidently, based upon some objection to one or more of the deeds constituting appellants' title, but the record does not show, definitely, which deed, or the objection thereto. The court declined to rule upon the motion, until the close of the testimony; whereupon appellees (who were the defendants below), themselves, testified, and also John Hester, George Sanders, Pleas Priddy, Harding Sanders, John Sanders and Thomas S. Sanders, that the appellees, and those under whom they claimed, had been in the actual, continuous and adverse possession of the land in controversy, residing upon and claiming it as their own to a well-defined marked boundary, against all the world, for more than fifteen years next before the institution of this action. After the introduction of this evidence, the court sustained appellees' motion for a peremptory instruction. Of this action on the part of the court, appellants are complaining.

Having reached the conclusion that appellants by their evidence made out a prima facie title from the Commonwealth of Kentucky to the land in question, it only remains to decide whether or not the court erred in giving the peremptory instruction in favor of appellees at the close of all the testimony in the case. It may be conceded that appellants were entitled to a verdict in their favor, unless appellees made out a sufficient title by adverse possession. This they undertook to do by introducing some eight witnesses, who, without contradiction, testified to facts which showed that appellees had title to the land by adverse possession. No effort was made by appellants to disprove this testimony, or to, in any way, call in question the credibility of the witnesses. It would have, perhaps, been more regular for the court to have submitted the question of appellees' title by possession to the

jury, based upon their belief in the truth of the evidence; but where, as in this case, the evidence is all one way upon a given question, and the number of witnesses so great as to preclude the suggestion, either of the falsity of the testimony, or mistake on the part of the witnesses, the error of the court in assuming the truth of the testimony, and giving an instruction based thereon, if error at all, is not of sufficient magnitude or importance to warrant a reversal of the case based thereon. In the case of *Turpin's Heirs v. McKee's Ex'ors*, 7 Dana, 301, upon a question similar in principle to that in hand, this court said: "Although, therefore, the instruction would have been more formally correct, if it had submitted the assumed facts hypothetically to the jury, and based the conclusion upon their being found true by the jury; yet, as the facts were clearly proven, and there was no countervailing testimony, the plaintiffs were not prejudiced by the assumption of the facts on the part of the court."

In the case of *Chiles v. Boothe, &c.*, 3 Dana, 566, it is said: "There are many cases in which the court may instruct the jury upon the whole evidence to find for one or the other party; and although such a practice is not to be encouraged, yet when a verdict found under such instruction is conformable to law, the evidence and justice of the case, it is rarely disturbed. The instruction in the present case, considering the state of the evidence, was equivalent to a general instruction to find for the defendant, and there being no contrariety of evidence with regard to the nature and effect of the arrangement between Allen and Chiles, which is in fact, the decisive, if not the single question upon which the whole controversy depends, this was a case, if there is any such, in which the court had a right to pronounce at once the conclusion of law upon the evidence, in the form of the peremptory instruction."

And in the case of *Evans' Adm'r v. Spillman*, 6 B. Mon., 334, the rule on this question was thus announced: "The jury then having been bound to find the facts on which the efficacy of the five years' adverse possession by the defendant depended, the assumption of those facts by the court, or the failure to submit them to the jury, does not constitute such an error in the instruction, nor so affect the verdict found under it, as to furnish ground for a new trial."

In the case at bar the testimony for appellees on the question of their title by adverse possession considering the number and evident credibility of the witnesses, having been so overwhelming, and there being no countervailing evidence whatever on this point, the jury were bound to have found this crucial question in their favor; and this being true, we think the court did not err in giving the peremptory instruction.

Wherefore, the judgment is affirmed.

TERRY, &c. v. WARDER.

(Filed January 21, 1904—Not to be reported.)

Board and lodging—In an action by a daughter against the mother to recover for services rendered and in an action by the assignee of the son-in-law to recover against the mother of the wife judgment on notes that she

had executed to her son-in-law, the daughter and the daughter's husband living with her mother, the presumption should be indulged that in the absence of an express contract services rendered by the daughter to the mother were gratuitously rendered and as a member of the family, and there is no reason why the same rule should not apply to the mother in a demand for payment of board.

W. L. Porter for appellants.

Geo. T. Duff for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hobson.

On June 5, 1891, appellee, Mary F. Warder, executed to her daughter, Jeannie, a note for \$150, due in twelve months, with interest from date. Mrs. Warder had two other daughters younger than Jeannie, and was a widow owning for life a farm worth about \$10,000, on which she resided, in Barren county, her daughters owning the remainder. Jeannie had been teaching for some years, and out of her earnings had sent her two younger sisters to school, expending in this way \$700 or \$800. She did not feel able to give all of this to her mother, and the note for \$150 was accordingly executed to her, she giving up all the rest of the amount she had spent. Jeannie continued to teach until she was married to W. A. Terry on August 2, 1893. Terry lived on an adjoining farm in one-third of which his mother held for life, and which subject to this belonged to him and his brother and sister. After they were married Terry continued to take his meals at home as he had done before and slept at night at Mrs. Warder's, where his wife remained. Things ran along in this way until the year 1898, when Terry took charge of the Warder farm and ran it for the years 1898 and 1899. He and his wife in the year 1900 moved to another farm. After they were married, Mrs. Warder borrowed, on November 15, 1893, from Mrs. Terry \$180, and executed to her a note therefor due in one year, with interest from date. In July, 1900, Mrs. Terry assigned both the note which she held on her mother to T. B. Terry, an uncle of her husband's, and he filed suit against Mrs. Warder to recover thereon. By way of defense to the suit Mrs. Warder set up that she had boarded Mrs. Terry and her husband from the time of their marriage until January 1, 1898, under an agreement that they would pay her \$— per week, so long as they remained; that they remained with her until January 1, 1898, their board amounting to \$937, and that the husband had converted the notes of the wife to his own use and was the owner of them. She pleaded the board bill as a set off to the notes. The plaintiff in his reply denied the allegations of the answer, and alleged that Jeannie Terry, while living with her mother after her marriage, did the sewing and dressmaking for the family; also house work, shopping and bookkeeping, and furnished her a buggy and horse to use; also sold her a binder and mower, canned fruit, eggs, etc., while living in her house, in all amounting to \$1,000, which was pleaded as a counterclaim to the set off. Mrs. Warder denied the allegations of the reply and pleaded limitation to it. The plaintiff then offered an amended answer, pleading limitation to the board bill. The court refused to allow the amendment to be filed. W. A. Terry then filed an action against Mrs. Warder, alleging that he had paid for her and

at her request, on the tuition of her daughter, \$160; that he had pastured her cattle and hogs; furnished her the use of a wheat drill; sold and delivered to her hams, beef, molasses and other things; also that he was half owner of a crop of tobacco which she had sold for \$210 in the year 1901, all the items amounting to something over \$500. Mrs. Warder denied the allegations of the petition and again pleaded limitation as to the items over five years old. Mrs. Terry then filed suit against her mother, in which she set up in substance the same items which had been pleaded by T. B. Terry as a counterclaim to the off in the first suit, and there was an answer in this case substantially the same as in the suit by the husband. The three suits were transferred to equity and consolidated. On final hearing the court allowed Mrs. Warder \$491.96 for board, and gave judgment against her in favor of T. B. Terry for \$6.04, the balance of the amount of the notes including interest over and above the amount allowed for board. He gave judgment also against her for one half of the tobacco crop with interest from the time it was sold May 30, 1901. From this judgment the Terrys appeal.

Mrs. Terry, when she was not teaching, lived with her mother as a member of the family up to the time that she married. Between mother and daughter in the absence of an express contract clearly proven the presumption is that all services rendered by the daughter to the mother were rendered gratuitously and as a member of the family. This rule holds good whether the daughter is single or married. The court, therefore, properly dismissed the entire claim of Mrs. Terry against her mother. Mrs. Terry had been very liberal in the education of her sisters, but this matter was settled when the note for \$150 was executed, and no claim can be made now for the balance of the money she expended. The services that she rendered for her mother after her marriage were such as might be expected of a daughter living in her mother's house. The same is true of the services of her husband during the same period. But we see no reason why the same reason should not apply to Mrs. Warder's claim against them for board. To sustain such a claim there must be clear and satisfactory proof of an express contract, for the presumption is as between mother and daughter against the charge where the mother is not keeping a house of entertainment. While the proof is conflicting, it seems to us the circumstances do not sustain the claim. It is evident from the proof that Terry did not take his meals at Mrs. Warder's, because he was unwilling to pay board there. It is also clear from the proof that he was a man of moderate means, and had to keep up the family at home, or help to do so, this family consisting of his mother, brother and a widowed sister. The fact that he came over every night after supper and went away in the morning before breakfast can only be accounted for upon the idea that he had to contribute to the family at home and was unwilling to take his meals at Mrs. Warder's. It is also evident from the proof that Mrs. Terry remained at her mother's because her mother wished it, and she was not on good terms with her husband's widowed sister who lived with him. It is also pretty clear that Mrs. Terry, after her marriage, occupied the same relation to the household as before. One of her sisters was at school and the other went off on visits leaving at times nobody there but her and her mother. Mrs. Terry kept the accounts of the hands, she did the shopping, she cut and fit the girls' clothes, and did

other housework as would be expected of a daughter living with her mother in the country. Her husband paid \$160 on the tuition of one of the girls. He hauled the wood that his wife burned, having it cut at home, and until there was a falling out between them in the year 1900 about some straw, no demand seems ever to have been made for board, although admittedly they had ceased boarding more than two years before, and besides all this, while they were living there in the house under the arrangement, whatever it was, Mrs. Warder borrowed of Mrs. Terry the \$180, and executed a note therefor. We are by no means satisfied that what the daughter and husband did for her mother or furnished to her was not of value as much as it cost her to keep her daughter in her own house during the time referred to, and, under all the evidence, we conclude that the claim for her board should not be allowed to override the written promises of Mrs. Warder to pay her daughter the money stipulated in the notes sued. But aside from this, the notes were the property of the wife. While the husband might, as the law then was reduce his wife's chose in action to possession if he saw proper, there is no evidence that he did so. On the contrary, it would seem that Mrs. Terry always claimed the notes as her own, and so far as the proof shows her husband acquiesced in this claim. If the husband had undertaken to reduce the notes to possession, the chancellor, on the application of the wife, would have decreed to her an equitable settlement, and the fund was so small that the whole of it might have been settled upon her. If there was any contract to pay board it was the contract of the husband, not of the wife. Mrs. Warder, as the creditor of the husband, can not be adjudged the payment of her debt out of the wife's money, when the wife was entitled to hold the fund and have it settled upon her as between her and her husband. We, therefore, conclude that on the facts shown the chancellor should have entered a judgment on the notes subject to the credits endorsed thereon. In other respects the judgment complained of is affirmed.

Judgment reversed and cause remanded for a judgment as herein indicated.

DRAKE, &c. v. HOLBROOK.

(Filed January 21, 1904—Not to be reported.)

1. Damages—Instructions—In an action for damages arising upon a sale of stock in a coal mine, where the false representations alleged to have been made were only as to the debts of the coal company, the intrinsic value of the property had no relevancy to the action and an instruction involving that, was erroneous.

2. Same—Evidence—Where an intended purchaser of stock in a coal company was shown a paper purporting to show a statement of the condition of the company, after stating that the paper was lost, it was error for the lower court to hold that testimony regarding the contents of the paper in an action to recover for damages arising upon the sale of the stock was inadmissible.

Little & Slack and M. L. Heaverin for appellants.

Glenn & Ringo for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barker.

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This is the second appeal in this case. The former opinion of this court is to be found in the 23d volume Ky. Law Rep., 1941. The rulings on the former appeal, in so far as applicable, constitute the law of this, and, as the facts on the two trials were practically the same, it only remains to ascertain what has been decided, in order to dispose of the case before us. The rights of the parties litigant, under the doctrine of *res adjudicata*, are circumscribed by the principles announced in the first opinion.

Appellants allege, in their petition, that the appellee sold to them twenty shares of the capital stock in the Field Coal Co., of the par value of \$100 each, for the sum of \$4,500, and, as an inducement to them to make the purchase, fraudulently represented that the collectible outstanding accounts due the company were sufficient to pay off all its indebtedness, except about the sum of \$700; that they, relying upon these representations of appellee, made the purchase in question; that these representations, as to the financial standing of the corporation, were false and made with the intent to deceive appellants, and to induce them to make the purchase; that the indebtedness of the corporation, at the time these representations were made, exceeded, by far, its collectible assets, and that by reason of the fraud and deceit practiced upon them by appellee, they were damaged in the sum of \$4,500. Appellee denied making the representations as alleged by appellants, or that the representations he actually made were fraudulent or false, or that appellants had been damaged in any sum whatever, and alleged, affirmatively, that they made the purchase in question relying alone upon their own examination into the financial standing of the company. We have not undertaken to state the allegations of the pleading in this case with minute particularity, as their elaborate statement in the original opinion renders this unnecessary.

In the instructions of the court in the original trial below, the liability of appellee was made to turn upon the question as to whether or not he, "as an inducement to appellant to purchase his stock, falsely and fraudulently represented to them that the debts due the company, owed by good and solvent parties, were sufficient to pay all debts owed by said company at the time, etc." Upon this subject, this court said: "It was pleaded, and not denied, that the appellee, Holbrook, was the owner of one-half the stock, and was the secretary and treasurer of the company. This being true, he can not be heard to say he did not know the resources and liabilities of the company. It was his business, as secretary and treasurer, to know the financial condition of the corporation, and any statement made by him, as to the financial condition of the corporation, to the appellants, would authorize them to rely thereon as the truth. Appellee being in condition to know, and it being his business to know, will not be permitted to say he in fact did not know the truth as against his own statements to appellants."

And in the next paragraph, it is said: "We are of opinion that, in addition to the error in the instructions as above indicated, there was also error in the measure of damage."

The error thus pointed out in the instructions, was the fact that it made the liability of appellee to turn upon the question as to whether his representations were false or fraudulent; it being decided that he, from his position in the corporation, was bound to know its condition; and his repre-

sentations were, therefore, in effect, warranties, if appellants relied upon them.

The next error pointed out was the measure of damage, the court saying: "If, under the facts found by the jury, the plaintiffs were entitled to recover at all they were entitled to recover for the difference between the value of the stock with the company in its actual financial condition at the time, and its value if the company had been in the condition represented by the defendant."

It will be observed that the false representations alleged to have been made by appellee were not as to the intrinsic value of the property of the corporation, but only in the amount of the indebtedness owed by it at the time of the purchase of the stock. It follows, therefore, that, with the question involved here, the intrinsic value of the property has no relevancy. To illustrate: If A. sells to B. a farm for \$5,000. and warrants it to be without lien, and, afterwards, it develops that there is a lien on it for \$5,000, it is no answer to an action on the warranty, to show that the farm was really worth \$10,000, and that, after all, the purchaser got the full value of his money. Practically, we have under the first opinion the same question here. Appellants allege that appellee sold them the stock, representing the company to be out of debt; afterwards, it developed that the company owed, say, \$5,000; it is manifest that the whole stock of the company is worth \$5,000 less than it would have been if the representations of appellee had been true, and it is no answer to appellants, to say, that, although there was \$5,000 of indebtedness due from the company more than was represented, still, the intrinsic value of the property, represented by the stock, is so great, that appellants have their money's worth, despite the false statements as to the indebtedness. On this subject, in the former opinion, the court said: "Appellants are entitled to what they were induced to believe they were getting by their purchase. If they actually received less than they were induced to believe they were purchasing, they were damaged. If they were induced to believe they were getting a bargain, it is no answer to say that they got the value of their money. They are entitled to the bargain, the profits actually represented to exist."

It follows, therefore, that all the evidence which the court permitted to be introduced on the subject of the intrinsic value of the property, or tending to show that appellants obtained their money's worth despite the misrepresentations, if any, in regard to the indebtedness, was irrelevant, and improper.

We think the court also erred in refusing to permit appellants to testify as to the paper drawn up by Foster, the bookkeeper of the Field Coal Co., showing the financial status of the corporation. In regard to this, appellant states: "I asked him (appellee) about the standing condition of the company, and he said the company was up in good shape, and he said if I wanted to examine the books, I could do so, and he took me in the store, and told Mr. Foster to show me the books and tell me anything I wanted to know about it, and I started to examine the books after Mr. Foster had thrown them down on the table, and about that time Mr. Foster showed me a piece of paper."

After showing that this paper had been lost or destroyed, appellant was

asked what it contained; upon objection by appellee, the court ruled it inadmissible; whereupon, it was avowed by appellant, "that the witness, if permitted to answer, would state that Mr. Foster exhibited to him a paper containing a statement of the liability of the Field Coal Co., and the collectible accounts due to it, and that by said statement it appeared that the debts of the company amounted to about \$1,200; that the collectible assets due to it amounted to about the same sum, and that Mr. Foster stated he had made said statement from the books of the company, and that the books showed the same to be true and correct."

We think this evidence was admissible. Appellant showed that he had been taken to Mr. Foster by appellee, and the former requested to "tell him anything he wanted to know about it." This paper purported to contain the exact information, which appellant desired to know, and was given to him by Foster, as the agent of appellee, and in pursuance of specific instructions so to do. We are of opinion that the court, in order to make its rulings consonant with those of this court in the former opinion, should have given instructions "A." and "F." asked for by appellant, in lieu of instruction No. 1, and, after striking out the words "and fraudulent" in No. 2, should have given instructions 2, 3 and 4 in the form in which they were given upon the trial.

For the reasons above indicated the judgment is reversed for proceedings consistent with this opinion.

HARRIS, ADM'R v. ADAMS, & CO.

(Filed January 21, 1904.)

Personal property—Trusts—Where, under the rule of the common law, the personality of the wife became vested in the husband at their marriage, but was turned over to an administrator of the wife, under an agreement that it was to be sold and the proceeds applied to the payment of certain debts, and the overplus secured to an infant child of the widow, the appellees in this action are entitled to have the trust enforced.

W. L. Reeves for appellant.

Perkins & Trimble for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Chief Justice Burnam.

P. S. Greenfield died a resident of Todd county, Kentucky, on the 31st day of October, 1885, intestate, leaving a widow and two infant children; a homestead of less value than \$1,000, and a small amount of personal property, all of which, under the statute, was exempt from execution. It consisted of two mules, a cow and a few articles of household furniture. On the 22d of October, 1890, the widow, M. E. Greenfield, married R. L. Harris, and from that time until her death, on the 28th of December, 1891, they occupied the homestead which had belonged to P. S. Greenfield. At the date of her marriage, Mrs. Greenfield had possession of the same personal property which had been set apart to her upon the death of her first husband. One of the infant children had in the meantime died, and the other

lived with her mother, Mrs. Harris, until her death. At his death, P. S. Greenfield owed a little money, and the widow, previous to her marriage to Harris, had also contracted a few debts, and her husband was also chargeable subsequent to her death with her burial expenses and doctor's bills. After the death of Mrs. Harris, her brother, T. H. Stokes, was appointed her administrator, and by agreement with R. L. Harris, took possession of and sold the personal property on hand which had been set apart to his decedent as widow of P. S. Greenfield, realizing therefor in the aggregate \$301.85, \$201.65 of which was applied by him to the discharge of the debts due by P. S. Greenfield and Mrs. Harris above spoken of. The largest items of which were for doctors' bills for services rendered to P. S. Greenfield and Mrs. Harris, and for the burial expenses of Mrs. Harris. After her death, her brother was also appointed statutory guardian for her infant daughter, Bessie Greenfield, and rented her land for one year for \$40. He was subsequently removed, and the appellee, George W. Rudd, appointed guardian in his stead. Bessie shortly before the institution of this suit married G. M. Adams, both of whom were then and are now infants. On the 13th of March, 1902, Rudd, as guardian for Bessie Adams, instituted this suit against the appellant, Thomas H. Stokes, as administrator of Mrs. Harris to surcharge the settlement made by him; and alleged that the personal property which came into his hands as administrator was the same property which had been set apart under subsection 5, of section 1401, of the Kentucky Statutes to the widow and children of P. S. Greenfield; and that at the death of her mother in 1891, the title to this property vested in her under the statute and was not liable to the debts of either her father or mother; and that her stepfather, R. L. Harris, had no interest therein; that the defendant had wrongfully and illegally taken possession of and sold it, and sought a judgment for the entire proceeds thereof.

The defendants answered that at the death of P. S. Greenfield the property in question was set apart to his widow; and that the plaintiff had no interest therein; that by her marriage to R. L. Harris in 1891, it vested in him as her husband, and he had taken possession thereof by virtue of this right, and had subsequently turned it over to the defendant with direction to sell it, pay the indebtedness of P. S. Greenfield and Mrs. Harris, and turn the surplus over to the plaintiff. The question presented for decision by the appeal is to whom, where the father and husband dies, intestate, leaving a widow and infant children, does the personal property directed by the statute to be set part to the "widow or infant child or children" belong. In construing section 11 of chapter 30 of the Revised Statutes, which reads as follows: "If an intestate leaves a widow, the following property shall be set apart by the appraisers of his estate and vest in such widow for the use and benefit of herself and the infant children of the intestate, if any, residing in the family, one work beast, * * * but if there are no such infant children residing with the widow, and there are adult or infant children not residing with her, the provision contained in this section for the widow or the value of such portion thereof as she receives, shall be charged to her in the distribution," the superior court in *Burgett v. Clark*, 4 Ky. Law Rep., 518, decided that the property passed jointly to the widow and the infant children residing with her to be held in trust by the widow while she lived, with power of dis-

position, use and control for the purposes named in the statute, but at her death such of the property as had not been consumed or disposed of, and such as was the product by increase or exchange of the exempt property vests in the surviving child in preference to the surviving husband. The decision in this case was followed in *Price's Guardian v. Nichols*, 12 Ky. Law Rep., 421, by the Superior Court.

The statute was subsequently changed by the general assembly, and the rights of the parties must be determined by the provisions of the new statute, which reads as follows: "The following list of articles are exempt from distribution and sale, and shall be set apart to the widow or infant children or child, by the appraisers of the estate, to wit: * * * If there is an infant child or children and no mother surviving, they shall set apart for the separate sue of such infant child or children the articles aforesaid."

In *Alexander's Guardian v. Alexander's Adm'r*, 86 Ky., 688, it was decided that the property set apart by this statute belonged exclusively to the widow. And in *Mallory's Adm'r v. Mallory's Adm'r*, 92 Ky., 814, A. W. Mallory, the appellee's intestate, was a widower with children, and C. L. Mallory, the appellant's intestate, was a widow with one child, a son. Both of these persons owned property and married each other. The husband died, and in a few days thereafter, and before the personal property that the statute gives to the widow and which is to be set apart to her, was set apart, the wife died. Suit was then instituted by appellant to recover of the appellee the value of this personal property on hand at the death of A. W. Mallory, but disposed of by appellee. The claim was reslated, and in the decision of the case, the court said: "It is a mistake to say that the property that chapter 31, section 11, of the General Statutes, directs to be set apart to the widow, only vests in the widow upon the setting the same apart to her. By said statute the right to a certain kind of property, if on hand, if not on hand, its value, etc., vests 'eo instanti' by operation of law, in the widow upon the death of her husband. The setting apart of said property is merely for the purpose of designating the individual pieces of property and valuing them, and supplying their places with other property, etc., when required. Said property vests in the widow and must be set apart to her, whether or not she has any infant children, the only difference being that if there are no children residing in the family, there shall be nothing set apart for her support."

In *Commonwealth, By, &c. v. Bracken, &c.*, 17 Ky. Law Rep., 785, it was expressly decided that the widow took the exempt property or money set apart in lieu thereof against both the creditor and heirs at law, and one-third of the rest of the estate after deduction of debts and the exempt property. In *Nall, &c. v. Wueriley, &c.*, 17 Ky. Law Rep., 115, it was decided that the widow could devise a note for the price of a horse sold by her, which had been set apart to her out of her husband's estate.

The decisions cited above, coupled with the change in the phraseology of the statute by the general assembly, leaves no doubt in our mind that the setting apart is to the widow alone, and she is vested with the complete title to the property. In the event there is no widow, then the property goes under the statute to the surviving infant children, and it was decided in *Wilson v. Parsons' Adm'r*, 20 Ky. Law Rep., 1931, that the proceeds of this

property, having been set apart for the support of two infant children, on the death of one of them, its share went to the surviving child, and not to the administrator of the deceased infant. But in this case there was no widow. The widow, being named first, became the sole owner of the property, and after her marriage to her second husband, R. L. Harris, under the rule of the common law, the title passed with the possession to him. (Hall v. New Farmers Bank, 17 Ky. Law Rep., 702; Brewer v. Hobbs, 19 Ky. Law Rep., 1992; McKay v. Mayes, &c., 16 Ky. Law Rep., 862; Carpenter v. Hazelrigg, 103 Ky., 588.) The property having been turned over by him to the appellant, Stokes, under an agreement that it was to be sold and the proceeds applied to the payment of certain debts, and the overplus secured to Bessie Adams, appellees were entitled to have the provisions of this trust enforced, and after the payment of the debts enumerated to have the surplus paid to her.

For reasons indicated herein the judgment is reversed and cause remanded for proceedings consistent herewith.

ELLISON, &c. v. DUNLAP, ASS'EE, &c.

(Filed January 21, 1904—Not to be reported.)

1. Building and loan association—Guaranty—Where a building and loan association lent money to purchasers of property upon a guarantee that the loan would be paid and the association held harmless should the property not be sufficient to pay the loan, a judgment upholding the guaranty will not be disturbed.

2. Same—Parol evidence—Where a written contract was lost, parol evidence was properly admitted to prove its contents, and where a minute was made accepting a contract, it is not presumable that the contract was set out in the minutes according to its words, and the minute being only evidence of what the contract was and there being no issue as to the acceptance of the contract it was not necessary to produce the minute book.

Forcht & Field and O'Neal & O'Neal for appellants.

Clayton Blakey for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

In May, 1896, as found by the circuit judge, appellants made a contract with the Mechanic's Building and Loan Association to the effect that in consideration of the association lending money to purchasers for property in the Ellison subdivision with which to build houses, appellees would guarantee the loans and hold the association harmless from loss thereon. The property lay in the outskirts of Louisville, and the association was unwilling to lend the money on the property as it was so far out. The purchasers failed to pay the association the money borrowed, and the property when sold was insufficient to cover the debts. This suit was then filed upon the guaranty and judgment having been rendered in favor of the plaintiff, the defendants appeal.

The circuit court properly transferred the action to the equity docket. By subsection 4 of section 10 of the Code of Practice an ordinary action may be

transferred to the equity docket when the case involves accounts so complicated or such detail of facts as to render it impracticable for a jury to try the case intelligently. As the action stood at the time the transfer was made by the court it involved a complicated account, and the transfer was properly ordered. It is true that by a subsequent agreement of parties, the account was very much simplified, but no motion was then made to remand the case to the ordinary docket, or for a jury to determine the issue of fact as to the nature of the contract between the parties.

While it is true that there is a variance between the allegations of the petition as amended and the testimony of August Allmond as to what the contract was, the contract as alleged in the pleading is substantially proved by the witness, Giltner. Section 129 of the Code provides that no variance between pleading and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits; also that a party relying on the variance must show to the satisfaction of the court that he was misled, and then the court may order the pleading to be amended upon such terms as may be just. By section 130 it is provided that if the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment. By section 134 it is further provided that the court must, in every stage of the action, disregard any error which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed by reason of such error. Under these provisions of the Code, if the circuit court had concluded that there was a variance between the terms of the contract alleged in the petition and that shown by the evidence, as the variance was not material and did not mislead the defendants in maintaining their defense upon the merits, it would have been the duty of the court to order an immediate amendment and direct the facts to be found according to the evidence. The question seems not to have been presented to the circuit court, and if the judgment was reversed here therefor it would be with directions to the circuit court to order an immediate amendment and find the facts according to the evidence. But this is unnecessary, as the substantial rights of appellants were not affected, and no judgment shall be reversed for an error not affecting the substantial rights of the party complaining.

The written contract having been lost, parol evidence as to its contents was properly admitted. The minute made by the board of directors accepting the contract would only have shown, if produced, that the company had accepted the contract. It is not presumable that the contract was set out in the minutes according to its words; and the minute would only be evidence for the company of what the contract was, even if it set out the contract in full, upon proof of the person who made the minute that he made it from the contract. The defendants might have produced the minute if they had desired it as evidence on their behalf of what the contract was. But there being no issue as to the acceptance of the contract by the corporation, there was no necessity for the plaintiff to produce it. The weight of the evidence sustains the chancellor's conclusion on the facts, and on the whole case we see no reason for disturbing it.

Judgment affirmed.

HARTFORD FIRE INSURANCE CO. v. TRIMBLE.

(Filed February 10, 1904.)

1. Insurance—In an action against an insurance company for loss by fire, it was error for the lower court to render a judgment against the company where there was no proof that at the date of the application for insurance there was any agreement on the part of the agent that it was to be placed with a certain company, the contract fails for lack of identity in the parties to it.

2. Same—It is a well settled principle that where a third person has actual notice of the limitation upon the power of an agent, the principal is not bound by any act of the agent done in contravention of his authority.

Wilbur F. Brower, Browder & Browder, J. C. Browder and Barger & Hicks for appellant.

W. P. Sandige and Perkins & Trimble for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, S. Y. Trimble, brought this action on the 2d of March, 1901, in the Logan Circuit Court against the Hartford Fire Insurance Co., of Hartford, Conn., the Commercial Union Assurance Co., of London, Eng., and H. B. Caldwell, alleging that the defendant, Caldwell, was the agent of both of the defendant insurance companies at Russellville, Ky., during the year 1898; that during the latter part of August or the first part of September, 1898, he made, through his agent, H. L. Trimble, a verbal contract with the defendant, Caldwell, as agent of his codefendants, to issue to him a policy of insurance on a brick dwelling house owned by him, which was located on Morgantown street, for \$400; that the policy was to be issued at the expiration of a policy which he then held on the same property for the same amount in another insurance company, which expired on the 21st of July, 1899; but, he alleges, the defendant, Caldwell, who was at the time the cashier of the Logan County Bank at Russellville, Ky., in which he kept an account, failed to comply with the alleged verbal contract, or to execute, issue or deliver, the policy of insurance contracted for; that on the 4th of March, 1900, during the period which was to have been covered by the policy, the house burned up; and he alleges that he is entitled to recover under the parol contract made with Caldwell the stipulated insurance, \$400, with interest from the 4th day of March, 1900.

On motion of defendants, plaintiff was required to elect against which of the defendants he would prosecute his alleged action. This he declined to do; thereupon the court electing for him, dismissed the petition against H. B. Caldwell and the Commercial Union Assurance Co., and permitted the action to proceed against the Hartford Fire Insurance Co. The plaintiff thereupon filed an amended petition, in which he made the same allegations against the Hartford Fire Insurance Co. as were made in the original petition against each of the defendants therein; and alleged that the amount of the premium contracted to be paid for the insurance policy was to be charged by Caldwell to the account of H. L. Trimble in the bank when the policy was to be issued in July, 1899. The defendant interposed a general demurrer to the petition as amended, and filed an answer denying every allegation of

the amended petition. The case was subsequently transferred by consent to the equity docket, and was decided by a special judge in May, 1902, who gave judgment against the Hartford Fire Insurance Co. for \$400, with interest from March 2, 1901, until paid, and the defendant prosecutes an appeal from that judgment, and asks a reversal.

The facts in the record relied on to establish the alleged verbal contract of insurance are in substance as follows: Plaintiff, Trimble, was the owner of four dwelling houses in Russellville, which were covered by insurance policies issued by Edward Sinclair. He also owned a house in connection with J. S. Stanley, which was insured by John Long, agent. The house which burned was located on Morgantown street, and was one of those insured through the agency of Sinclair. The policy on this house expired on the 21st of July, 1899, and was for \$400. Sinclair also held policies on a dwelling house on Center street, occupied by Mr. Lyne, a brother-in-law of the plaintiff; on another on Nashville street, and on another on Spring street. Another house on Spring street was insured in the Long agency for \$800. The plaintiff resided in Elkton, Ky., and the alleged parol contract with defendant was made for him by his brother, H. L. Trimble, who at that time resided in Russellville, but who shortly afterwards moved to Elkton. To support his contention, plaintiff introduced H. L. Trimble, who testified in substance that in the latter part of the summer, or the early part of the fall of 1898, he made a parol contract with H. B. Caldwell to insure in companies represented by him every house belonging to his brother or himself in Russellville; that the insurance on these houses was at that time carried by other agencies, but that Caldwell agreed to ascertain the dates of the expiration of the existing policies from these agencies, and at their expiration to renew them in companies represented by him, and to charge the premium to the joint account of S. Y. and H. L. Trimble, carried in the name of H. L. Trimble in the bank of which he was cashier, and that he was to keep the policies in his vault; that he supposed these policies had been regularly issued under the contract; that on the morning after the fire he called up Caldwell over the telephone, and asked him in regard to the policy on the house which had burned, and for the first time learned from him that he did not have that house insured in either of his companies. S. Y. Trimble testified that he had a conversation with Caldwell in May, 1899, about the insurance upon these houses, in which he informed him that he had understood from his brother that he had made a trade with him to renew all the policies of insurance upon the houses owned by him at the date of their expiration in the companies represented by Sinclair and Long, and that Caldwell admitted that he had made such a contract. Neither of the Trimbles, however, testified that Caldwell stated to them that the insurance was to be placed with the Hartford Insurance Co. S. Y. Trimble filed with his deposition a letter dated on the 26th of November, 1898, addressed to him at Elkton by Mrs. C. E. Sinclair, from Russellville, in which she informed him that she had furnished H. B. Caldwell with a list of the property insured in their agency for him with the date of the expiration of the policies and the amount of insurance and rate of insurance, which included the house which burned. Selden Lyne, a brother-in-law of appellee, testified that some time in the fall of 1898, or spring of 1899, he had a conversation

with H. B. Caldwell, in which Caldwell informed him that he had been employed to insure these houses, and made inquiries as to their location, by whom they were occupied, etc., that he had a list of these houses which had been furnished to him by Mrs. Sinclair; and that the house which burned was included in the number; that he told him that this house was occupied by different families of negroes; that after the fire at the instance of appellant, he had called upon Caldwell and procured from him all the policies belonging to the plaintiff which had been previously issued on the property. H. B. Caldwell testified that he was the agent of the companies originally sued by plaintiff, and that he was cashier of the Logan County Bank, in which H. L. Trimble kept an account, and in which the rents accruing upon the real estate owned by himself and S. Y. Trimble were deposited; that in August, 1898, H. L. Trimble, as agent for S. Y. Trimble, asked him to insure a house in Russellville occupied by a negro, Elvira Angel, as tenant; that he informed him that it was not his custom, or that of the insurance companies represented by him, to insure property owned or occupied by negroes, but that he had issued a policy in favor of the negro janitor of the bank on a house which was located in a white settlement; and that as a personal favor to him he would take the risk, with the understanding that if the company declined to write it, that he would immediately cancel it, and get Cap Morton to write it in a company represented by him which would take such risks; that when he reported this risk to the company, he wrote them asking that as a personal favor it be accepted, but that the company immediately declined the policy, and directed that it should be cancelled, which he did; that he informed H. L. Trimble of this action of the company and took out a policy, as he agreed, in the Aetna Insurance Co., which was represented by Mr. Morton. He admits that it was agreed with H. L. Trimble and himself that he was to issue policies of insurance upon the houses owned by him and his brother as the policies then in existence held by other agents expired, occupied by white people; that H. L. Trimble shortly afterwards removed to Elkton, and that on October 12, 1898, he addressed him the following communication:

"Russellville, Ky., October 12, 1898.

"Prof. H. L. Trimble,

Elkton, Ky.:

"Dear Henry—I trust that you will not forget your promise to allow me to renew the insurance on the various houses owned by you and Selden. Would it not be best for you to send me a list of the amounts, locations, companies, and expirations, so that I may then put same on my 'tickler,' and in this way none of them will be overlooked by me or renewed by the other fellow.

Yours truly,

"H. B. C."

That H. L. Trimble responded to this letter as follows:

"Elkton, Ky., October 25, '98.

"Dear Barclay—Please go to see John Long and ask him when my policy expires on brick cottage in which Withers lives, and renew for the same amount; also ask McCuddy to look on Sinclair's books and see when policies expire on house, frame, rear of saddler's shop, Mrs. Connelly occupy-

ing; frame on Center street and frame rear of T. C. Clark, occupied by Vomberg. Write me about them. Remember, no policy fees on all this.

"Yours,

"H. L. TRIMBLE.

"H. B. Caldwell, Russellville."

That after the receipt of this letter he procured from Sinclair the list of the insurance held by him, and also from Long; that he had a conversation with Lyne, the brother-in-law of Trimble, who occupied one of the cottages, and that after this conversation he made a memoranda that the houses which he was to insure were those occupied by Coneley, Withers, Lyne and Vomberg; that the letter of H. L. Trimble contained no reference to the Morgantown house occupied by the negroes; that he issued policies of insurance on such of these four houses as the policies held by other agents expired; that after the Morgantown house was burned, on March 4, he delivered to the plaintiff all of his policies of insurance in his custody, and all business relations between them were broken off; that no demand was ever made upon him to pay the damages on the property, and it was never reported to the company. H. L. Trimble does not controvert this statement of Caldwell as to the refusal of the appellant company to take the policy of insurance on the Angel house in August, 1898, on the ground that it was their policy not to take insurance upon property occupied by negroes. The testimony also shows that the house on Morgantown street was in a very dilapidated condition, and had been rented exclusively to negroes for some years.

It is well settled law in this State that a parol contract of insurance is valid and enforceable. (*Baldwin v. Phoenix Insurance Co.*, 21 Ky. Law Rep., 1090.)

"But to entitle one to the specific performance of a verbal agreement to insure, or to issue a policy, he must prove an oral contract possessing all the essentials of a written contract of insurance, namely, the subject-matter, the risk insured against, the amount of insurance, the rate of premium, the duration of the risk, and the identity of the parties. If the application be made to an agent representing several companies, the particular company or companies to carry the risk must be designated with the amount each is to carry, and each must, by its agent or otherwise, agree to assume liability upon the terms and conditions proposed and acceded to by the applicant. Until this is done, there can be no binding contract. And it must also appear that the agent had authority to bind the company sought to be held to the payment of the risk." (*Kerr on Insurance*, pages 57, 46 and 60.)

This principle is well stated in *Pomeroy's Equity Jurisprudence*, section 1405, as follows: "Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity, others its equitable character. It must be upon a valuable consideration. It must be reasonably certain as to its subject-matter, its stipulations, its purpose, its parties, and the circumstances under which it was made."

And this court has uniformly held that specific performance can only be decreed in cases where the contract is complete in all its parts, and nothing

for construction is left to the chancellor. (9 Ky., 409; 10 Ky., 445; 26 Ky., 885; Ray v. Talbert, 23 Ky. Law Rep., 572.)

Tested by the above authorities, the evidence of appellee fails to establish an enforceable contract of insurance against appellant, the Hartford Insurance Co., for several reasons: First, there is no proof or claim that at the date of the application for insurance there was any agreement on the part of their agent, that it was to be placed with the Hartford Fire Insurance Co. The contract, therefore, falls under all the rules of construction for lack of identity in the parties to the contract. But, even if Caldwell had actually agreed with H. L. Trimble to insure the house which burned in the appellant company, it would have been unenforceable, because the uncontradicted evidence shows that Trimble had actual notice that Caldwell had no authority from the company to insure houses owned or occupied by negroes. No principle is better settled than where a third person has actual notice of the limitation upon the power of the agent, that the principal is not bound by any act of the agent done in contravention of his authority, or in violation of his instructions in dealing with such persons. We recognize the difference between parol contracts of insurance in praesenti, and in futuro, but deem it unnecessary to consider this question in the decision of this appeal.

But for reasons indicated the judgment is reversed and cause remanded, with instructions to dismiss plaintiff's petition.

CONTINENTAL INS. CO. v. DANIEL.

(Filed February 17, 1904—Not to be reported.)

1. Insurance—Proof of loss—In an action to recover upon policy of insurance where the pleading and proof of the company showed that it denied liability on the policy from the date of the fire to the time of trial, there was no necessity or proof of loss as required by the policy.

2. Same—Cancellation of policy—Where a policy of insurance provided that it might be cancelled by the company giving five days notice, and the company contended that the notice must be given preceding the cancellation and the insured contending that it should be given after cancellation, the provision being somewhat ambiguous, and the rule being that the policy should be construed most strongly against the company, a verdict against the company will not be disturbed.

Breathitt & Fowler for appellant.

L. Yonts and J. T. Hanberry for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment of \$250 in favor of appellee on an insurance policy which covered household property which was destroyed by fire. Appellant's contention is that it is not liable because the appellee failed to make and present proof of his loss within sixty days from the destruction of his property, as required by the policy, and also that it was not liable under this policy for any amount, as it had been cancelled before the date of the fire, and denied all liability thereon.

As to the contention that appellee failed to make the proof of loss, it is

sufficient to say that the pleading of appellant and the proof, as it appears in the record, show that it denied all liability on this policy from the date of the fire to the time of trial, and under such circumstances the proof required by the policy would have been vain and useless. (Penn. Fire Ins. Co. v. C. D. Young & Co., ante, 1350; Home Ins. Co. v. Gaddis, 3 Ky. Law Rep., 161; 101 Ky., 16.)

The other question raised by appellant as to the cancellation of this policy is a more serious one. The facts with reference thereto as they appear of record are in substance as follows: Some weeks prior to the fire, appellant's agent at Hopkinsville met appellee upon the streets on one or two occasions and informed him that appellant desired to cancel his policy and asked him to bring it to the agent's office and get his premium that he had paid. At first appellee appeared inclined to accede to the proposition, but on the last occasion he declined. Two witnesses for appellant, Garner Dalton, an agent of the company, and James Russell, testify that after that and on the 29th of July, Dalton called appellee across the street and in the presence of Russell tendered him \$4.50 in money, and informed him that his policy No. 488 was cancelled from that date; that appellee refused to accept the money; that at the same time and place the following notice was read to him by Dalton:

"Hopkinsville, Ky., July 29, 1901.

"Elijah Daniel, City.

"Dear Sir—You are hereby notified in accordance with the conditions of policy No. 488 that the Continental Insurance Co. of the City of New York, desires to cancel policy No. 488, issued to you at Hopkinsville, Ky., by agents of said company, dated May 20, 1901, insuring dwelling house, situated on the north side of Clarksville pike. You are, therefore, demanded to return said policy to G. E. Dalton & Co., agents at Hopkinsville, Ky., and receive by them the sum of \$4.50, the amount paid by you on said policy.

(Signed) "CONTINENTAL INSURANCE CO.,

"By G. E. DALTON, Agent."

It was also proven by this agent, Dalton, that he went immediately from this place to his office and entered upon the books of the company the word "cancelled" opposite or on the margin of the record of this policy. It was also proven by Dalton that on the 10th of August, 1901, that he, as the agent of the appellant, prepared another notice and addressed it to "Elijah Daniel, City," in the same words and figures as the above copied notice, except the difference in date and the following words in addition: "This being the third notice served on you, your policy is hereby cancelled, premium being at your demand at G. E. Dalton & Co.'s office, in the city of Hopkinsville."

This notice was signed in the same way as the other one; that he placed this notice in an envelope with \$4.50 in cash, sealed it, registered it, and placed it in the postoffice at Hopkinsville, Ky.

It was proven by the postmistress that appellee was notified of the fact that a registered letter was there for him; that he came to the office and the letter was tendered to him and that he refused to accept it. Appellee's property which was covered by the policy was destroyed on the morning of August 14, 1901, about 2 o'clock, a. m.

Appellee testified, admitting the conversations related by appellant's

agent, Mrs. Wash, with reference to the company's desire to cancel the policy, and also admitted that he had the conversation with Dalton in the presence of Russell, but denied in positive terms that he was tendered \$4.50, or any sum in money at that time or at any time, or that Dalton at that time, or at any time, informed him that his policy was cancelled, but admitted that Dalton at that time read to him the notice first copied herein, and also admitted that the postmistress tendered him the registered letter, which he refused, but stated that he did not know at the time that it was from Dalton & Co., but that he refused to accept it because he was afraid it would get him into a scrape.

Upon this evidence the court gave to the jury one instruction, which was as follows: "The court says to the jury that they will find for the plaintiff the sum of \$250 unless they shall believe from the evidence that five days or more before plaintiff's house was burned, defendant, by its agent, Mrs. Wash, or Garner Dalton, had given the plaintiff written or verbal notice that said policy No. 488 had been cancelled, and shall further believe that five days or more before the loss complained of, the premium paid for said policy had been paid or tendered back to plaintiff; in that event they will find for the defendant."

The provision of the policy with reference to cancellation is as follows: "This policy shall be cancelled at any time at the request of the insured; or by the company giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void, or cease, the premium actually paid, the unearned portion shall be returned on the surrender of this policy or last renewal, this company retaining the customary short rate, except when this policy is cancelled by this company by giving notice it shall retain only the pro rata premiums."

The difference between the contentions of appellant and appellee is this: The appellant contends that the notice and tender must be given and made five days preceding the cancellation which takes effect immediately. The appellee contends that the act of cancellation should take place and notice and tender be given and made and five days after this, the cancellation takes effect, and the policy is then no longer in force. The lower court took appellee's view of the matter, and we are not prepared to say that the court erred. This provision of the policy is somewhat ambiguous. This court has repeatedly decided in such cases that the policy should be construed most strongly against the company, as it prepared it. This language of the policy seems to support the construction contended for by appellee, to wit: "This policy shall be cancelled at any time * * * by the company, giving five days notice of such cancellation." * * * This seems to imply that the act of cancellation precedes the notice, but the cancellation is not to take effect until five days after the giving of the notice of the cancellation and the tender of the premium. The purpose of allowing the assured five days notice and to have his premium five days before the cancellation takes place is to permit or give him the opportunity to re-insure in some other company if he so desires.

Under the instruction of the court, if the jury had believed from the evidence that the tender of this premium was made on July 29th, and that he was then informed that the policy was cancelled and would be no longer in

force from that date, the jury must have found for appellant, but it seems that the jury believed the statement of appellee, corroborated by the notice and tender of August 10, in which it was stated that the policy was cancelled on that date, which was less than five days prior to the burning of the house. It was the province of the jury to weigh and determine the effect of the evidence, and we do not feel disposed to disturb its finding.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting

WILLIAMS v. COMMONWEALTH.

(Filed January 22, 1904—Not to be reported.)

1. Murder—Evidence—Upon a trial for murder the testimony of a witness as to a fight between accused and deceased a year before the latter's death, could not have been prejudicial to accused in view of overwhelming testimony of a similar altercation on the night preceding the discovery of the dead body of accused.

2. Same—Instructions—An instruction upon voluntary manslaughter and self-defense was not erroneous in a prosecution for murder, where the evidence was altogether circumstantial, because the jury should be instructed on every phase of the law.

Geo. Denny for appellant.

N. B. Hayes and L. Mix for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Ed. Williams, having been indicted and convicted of the murder of Bettie Green and sentenced to the penitentiary for life, has appealed to this court, and asks a reversal upon several grounds.

Appellant and the deceased had lived together as husband and wife for eight or nine years, but they had never been legally married. The facts shown by the testimony are that on the evening of the 9th day of August, 1903, the appellant came to the house of the deceased about half past ten o'clock at night, and found her absent; that he crossed the street and engaged in conversation with Mary Hawkins for a short time, and whilst so engaged the deceased came home, went into the house and lighted the lamp. She was not friendly with the Hawkins woman, and called to the appellant to come to her. It also appears that while appellant was talking to the Hawkins woman the name of the deceased was called, but it does not appear in what connection. The testimony for the Commonwealth is to the effect that immediately after appellant entered the house of the deceased, there was heard groans, cries for help, mercy, etc., and the witness, Eva Marshall, who lived in the next house, testifies that she ran over to the house of deceased, and looked in the window, and saw that appellant had the deceased down on the floor, beating her, and that the deceased begged her to come to her assistance, but that she could not get him to stop; that she went for deceased's brother, and that upon her return she found both the appellant and deceased sitting in the front door, the deceased rubbing the side of her face, and that she asked her for some witch hazel or arnica; that about fifteen

minutes after 3 o'clock she heard noise in the room where appellant and deceased were sleeping; that she went to the front door, and tried to get in, but that it was locked. Another witness testified that she heard groans and cries for help way in the night, and that she notified the police. Julia Anderson, a sister of the deceased, testified that she went to the house about half past six o'clock the next morning, and found the shutters of the room occupied by the deceased slightly ajar; that she opened the window and saw appellant standing up in the floor with his hat on, in his night clothes, with his pants in his hand; that he called to her to come in, and said, "Bettie has taken something and killed herself;" and that the deceased was lying on the bed dead.

An autopsy, held by the coroner, discloses clots of blood on either side of the larynx, which indicated that she had met her death from strangulation. The appellant testified that when he crossed, after talking to the Hawkins woman, the deceased met him in the hall and immediately struck him over the head with an empty water pitcher; that he slapped her and pushed her down, but that peace was soon made between them, and they retired to bed; that some time during the night he heard her move about; and that he discovered an empty bottle the next morning which the testimony discloses contained oil of cloves; that no further trouble occurred between them during the night; that he offered her no violence of any sort, and was greatly surprised to find her dead the next morning. There was also testimony conducing to show that she was the subject of indigestion and a species of heart failure. The jury were instructed upon the law of murder, and voluntary and involuntary manslaughter.

Upon the trial the Commonwealth proved by the witness, Julia Anderson, that she had witnessed a fight between appellant and the deceased about a year before her death. There was also evidence conducing to show that the domestic life of the parties was not always peaceable, although in the main their relations seem to have been kind and affectionate. Appellant complains that the court erred to his prejudice in the admission of the testimony of Julia Anderson detailed by her. While there may be some doubt about the competency of this testimony, it clearly could not have been prejudicial to the appellant in view of the overwhelming testimony that a similar altercation had occurred between them at 11 o'clock on the night preceding the discovery of her dead body. Appellant also objects to the phraseology of the first instruction, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant * * * killed Bettie Green by choking, etc., and that such violence was not necessary and did not to the defendant at the time reasonably appear to be necessary."

It is insisted that the words "at the time" were too indefinite, that they might as well have referred to the fight twelve months before, or to the difficulty in the early part of the evening, as to the time when the alleged strangulation which produced the death of the deceased occurred. The criticism is hypocritical; the time referred to is manifestly the time when the deceased was killed by choking, strangling or suffocation. Appellant also complains because the court instructed the jury upon the law of voluntary manslaughter and self-defense, on the ground that there was no proof on which to base such an instruction. As the evidence of the Commonwealth

in this case was altogether circumstantial, we think the court properly instructed the jury on every phase of the law, and on the whole case we see no error in the record to the substantial prejudice of the accused

Judgment affirmed..

SPECHT v. LOUISVILLE WATER CO.

(Filed January 22, 1904.)

Injunctions—Where appellant by means of an underground pipe which was unknown to appellee supplied his four cottages with water, the rule of the company requiring water to be paid for upon the assessment plan, or by the meter plan was a reasonable one, and a mandatory injunction to compel appellee to violate its rule will not lie though a different rate had theretofore been paid.

Lane & Harrison and H. M. Lane for appellant.

Bennett & Bennett for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

The purpose of this suit was to obtain a mandatory injunction against the appellee, the Louisville Water Co., requiring it to deliver by and through a meter belonging to and constructed by it in the month of May, 1901, opposite the lot of appellant into the pipe of the appellant on his premises, water with which to sprinkle and clean the streets in front of his saloon, hall, residence and four cottages, all located upon a lot of land owned by appellant; the saloon, hall and residence occupied by appellant, and the four cottages by his tenants.

The appellant contends that appellee, as a quasi public corporation, should be compelled to furnish him water for the uses named at the price he had been paying for eight or nine years, to wit, 10 cents per day for not exceeding 700 gallons per day, and if he used exceeding that amount, he was to pay in proportion. He further contends that having received and paid for the water under the meter system, he was entitled to use it as he saw fit, or at least for the benefit of his tenants.

Appellee contends that it had the right to establish, under its charter, reasonable rules and regulations in the conduct of its business in supplying all persons along the line of its mains without discrimination and that all persons along the line of its mains were entitled to the same service at uniform rates. That having such right it adopted two methods for its customers to purchase water. One the assessment and the other the meter plan. The assessment plan is estimated by the number of rooms in the house, the number of bath tubs, sinks, closets, faucets and the size and depth of the lot upon which the building is located. The meter plan is to measure the amount of water and charge for the amount used. In either plan the reference is to one building or residence. It appears from this record without material contradiction that appellant in the year 1901 received water from the appellee under the meter system, and that a hose box was situated in front of or by his saloon to which he attached his hose for his individual use and also attached a pipe under the ground and near the bottom of the hose

box (this seems to have been attached without the knowledge of the water company), and extended this pipe along in front of and into the yards of his four cottages and attached a water faucet about eighteen inches from the ground in each cottage yard within easy access to the inmates thereof and to the general public.

In the year 1902 the appellee refused to renew the contract with appellant and furnish him water that year unless he would detach the pipe that extended along the front of the four cottages and agree not to furnish water from this hose box to his tenants in the cottage, it having previously extended from its main service pipes into the yards of these cottages. Appellant refused to accede to this demand, and instituted this action. The lower court refused appellant the injunction, and dismissed his petition. We are of the opinion that he had no right to connect the pipes to his cottages and supply them with water from the service to his house for dwelling purposes, and we think the rule of the company complained of by appellant is a reasonable one. There is no allegation in the pleadings nor evidence showing that appellee had violated its rules and regulations in any particular or had discriminated against appellant in any manner. The substance and effect of his contention is, that it would not violate its rules and furnish him and his tenants all the water he desired through this one horse box by the meter plan; in other words, to discriminate in his favor.

Wherefore, the judgment is affirmed.

BREATHITT COAL, IRON AND LUMBER CO. v. GREGORY.

(Filed January 22, 1904—Not to be reported.)

1. Attorneys—Instructions—In a suit by an attorney to recover for legal services rendered, an instruction which told the jury "to find a verdict for plaintiff in the sum of the reasonable value of his services" was prejudicial where it was alleged that the action was not prosecuted to a successful termination, and the jury should have been instructed to find for the appellee what would have been a reasonable compensation for his services before notice of his discharge, and they should consider, in estimating such services, the amount rendered allowing the contract price to be abated by the sum represented by the unperformed part of the labor.

2. Same—A stockholder of a corporation has no power to employ an attorney to represent it, and an instruction authorizing a recovery under such employment is erroneous.

S. D. Rouse and W. A. Price for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought by appellee against the appellant to recover attorney's fees.

He alleged that he was employed by appellant to assist in the prosecution of two suits in the United States Court at Covington, Ky., in each of which actions the appellant was plaintiff, and in one of the suits E. H. McTrain was defendant, and in the other Arthur D. Bright; with reference to his

services he alleged as follows: "He says it was thereupon agreed between the defendant and the plaintiff that in case defendant succeeded in the actions it was to pay this plaintiff for his services the sum of \$500, and in case the actions were decided adversely to defendant, then defendant was to pay this plaintiff the sum of \$150. The defendant did thereupon pay to plaintiff as a retainer the sum of \$100." He further averred that before the termination of these suits in the United States Court he was superseded by other attorneys, and was prevented from carrying out his contract in prosecuting these two actions, and asked judgment for \$400, the balance due him on this contract. In another paragraph he alleged that the appellant, by its president, employed him to aid in making a sale of the company's property to a syndicate, that it was about to sell and convey by deed, when under his advice the stockholders were induced to sell and transfer their stock and in this way avoided making a conveyance which was greatly to the interest of the company as it owned 129,000 acres of land in Breathitt and Knox counties and several thousand acres of it were in the actual possession of persons who professed to have some kind of a claim on same, and if a conveyance by deed had been made the plea of champerty could have been interposed and maintained; that he gave much of his time and attention to this matter for appellant from about the 1st of May to the 15th of July, and drew the contract of the sale of stock which realized for the company \$70,000, and that the syndicate, "Unger & Co.," not only paid the \$70,000, but also agreed to assume and pay all the liabilities of the company, including all attorney's fees; that for his services as attorney in this matter, considering the successful termination of same, he claimed and asked judgment for \$5,000.

Appellant answered admitting the contract as alleged in the first paragraph of the petition, but denied that it was indebted to appellee in the sum of \$400, or any sum in excess of \$50, but alleged that appellee did not prosecute the two actions named to a successful termination. Appellant denied that appellee was employed to represent it in the matter of disposing of its property or that he represented it in that matter, and alleged that his only employment was with reference to the two suits named in the first paragraph.

The issues were completed, a jury trial was had, and resulted in a verdict and judgment for appellee in the sum of \$400 on the first paragraph of the petition and \$3,000 on the second paragraph of which appellant complains and asks a reversal for the following reasons:

1st. That the court refused to give a peremptory instruction to the jury to find for it, except for \$50.

2d. The court erred in giving instructions Nos. 1 and 2 to the jury.

3d. The court erred to its prejudice in refusing to allow it to prove that the two actions in the United States Court could not have been prosecuted to a successful termination on its behalf.

The court did not err in refusing the peremptory instruction because there was evidence introduced which supported appellee's cause of action.

The court only gave two instructions, Nos. 1 and 2, which read as follows:

"1st. The jury is instructed to find a verdict for plaintiff in the sum of the reasonable value of his services to defendant in the two suits in the United States court, provided the jury finds his said services to be of the

reasonable value of more than \$100; and if the jury so find, the jury will credit its verdict for said services with the sum of \$100 paid to said plaintiff.

"3d. If the jury believe from all the evidence that the plaintiff, from May to July, 1902, rendered legal services to the defendant, concerning the sale and transfer of the stock of said company, and that he advised and counseled with said company in said matter, or with its officers, or any of them, or that he performed any other legal services in connection with the sale and transfer of said stock, in attending meetings for that purpose, or in advising as to the mode and method of said sale and transfer, or in preparing contract in reference thereto, and further believe that the said plaintiff was employed or requested to perform said services by the president of said company, or believe that the performance of said services was received and accepted by the said defendant company's president, or its directors or stockholders, then the jury should find a verdict for plaintiff in the sum of the reasonable value of services rendered, as the jury, from all the evidence, may find such value to be not exceeding the sum of \$5,000."

We are of the opinion that the court in these instructions erred to the prejudice of the appellant.

The case of *Henry v. S. B. and R. D. Vance*, 23 Ky. Law Rep., 493, was one where the attorneys agreed to perform services for a sum equal to 85 per cent. of the amount recovered, which amounted to \$19,000. The attorneys sued for the contract price, and Henry answered, and averred that they did not perform any services under the contract; that within a few days after the execution of the contract he discharged them. The attorneys replied that the discharge was without any fault on their part. The court decided that the client had the right at any time to discharge his attorney with or without cause even in a case where a contingent fee has been agreed upon, and then said: "The question should be submitted to the jury as to what, under the circumstances, would be a reasonable compensation to appellees for the services actually rendered before notice of their discharge. And in estimating such value the jury should consider the extent of services rendered and those to be rendered allowing the contract price, abated by such sum as is reasonably represented by the unperformed part of the labor."

Tested by this rule, the first instruction is erroneous. The court should have, in its second instruction, said in substance to the jury that if they believed from the evidence that appellee was employed or requested by the appellant's president, or its board of directors, to perform the services or that appellee performed such services with the intention at the time to charge therefor and that appellant company's president or directors received and accepted such services with reason at the time to believe that appellee would charge therefor, then they should find for him, etc. A stockholder has no power to employ an attorney to represent the corporation. The instruction, except as herein indicated, is correct. The court was right in rejecting the evidence as to what in the opinion of the witnesses, would have been the result of the cases in the United States Court, provided appellee had been permitted to continue in the prosecution of them.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HUNZIKER v. SUPREME LODGE KNIGHTS OF PYTHIAS.

(Filed January 22, 1904.)

1. Insurance—Suicide of insured—In an action to recover upon a policy of insurance the fact that the insured took his own life while insane is not a defense where there was no provision in the policy that it should not be paid in the event the insured took his own life while insane.

2. Same—By-laws—Fraternal orders—Where, subsequent to the taking out of a policy of insurance, a by-law was adopted by the company providing that in case of suicide, voluntary or involuntary, whether such member should be sane or insane, the amount to be paid should be a sum in proportion to the whole amount as the matured life expectancy might be to the entire expectancy at the date of admission, such by law can not affect the policy where it was never attached to the certificate of membership in a fraternal order as provided by section 679 of Kentucky Statutes.

3. Same—Insanity—Upon an averment in a pleading that the insured was insane at the time he took his own life, it was error to sustain a demurrer to such pleading, because the question as to whether the insured was sane or insane at the time he took his life was one of fact and should have gone to the jury under proper instructions.

Robbins & Thomas for appellant.

B. T. Davis and C. S. Hardy for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Settle.

Gustave Hunziker died in the city of Hickman, Fulton county, this State, November 30, 1902, of pistol shot wounds inflicted by his own hand. He left surviving him a wife, Louisa Hunziker, and a daughter, Linda Hunziker, who is his only child.

Many years before his death, Gustave Hunziker, then, as at the time of his death, a resident of Hickman, became a member of a lodge in that city of the secret fraternal order known as the Knights of Pythias, the governing or chief body of which is styled "Supreme Lodge Knights of Pythias." This governing body is in control of all subordinate lodges of the order, and of what is known as the "Endowment Rank," which provides insurance for its members.

On December 27, 1888, Gustave Hunziker became a member of this Endowment Rank, and by signing the necessary application and paying to the Supreme Lodge Knights of Pythias the required membership fee, he received of it a certificate or policy of insurance, No. 21,021, whereby it agreed, in consideration of the statements contained in the written application attached to the policy, the payment of the prescribed admission fee, and the payment thereafter by the insured of all assessments, as required, to pay to Louisa and Linda Hunziker, his wife and daughter, or to such other person or persons as he might thereafter direct, the sum of \$2,000 upon due notice and proof of the death of the insured.

After the death of Gustave Hunziker, due notice and proof of which was furnished the Supreme Lodge Knights of Pythias, it refused to pay the beneficiaries in the policy the \$2,000 of insurance named therein, but did offer to pay them \$942.60, which they refused to accept. Thereupon this action was instituted in the lower court by the appellants, beneficiaries, to recover

of the appellee, Supreme Lodge Knights of Pythias, the \$2,000 claimed by them under the policy. The facts as herein stated are in substance set forth in the petition, to which the appellee's answer interposes the defense that the insured, Gustave Hunziker, in entering into the contract of insurance evidenced by the policy or certificate sued on, agreed, as recited therein, to be controlled by all the rules and regulations of the order governing the Endowment Bank, then in force, or that might thereafter be enacted, and that the appellee at its biennial convention held in Cleveland, O., August 25 to September 3, 1896, enacted in due form for the government of the Endowment Bank a by-law to the effect, that if the death of any member of the Endowment Bank, theretofore or thereafter admitted into the first, second, third or fourth class, should result from suicide, voluntary or involuntary, whether such member be sane or insane, at the time, the amount to be paid upon such member's certificate should be a sum only in proportion to the whole amount as the matured life expectancy might be to the entire expectancy at the date of the admission into the Endowment Bank, the expectation of life, based upon the American experience table of mortality in force at the time of the death, to govern.

It is also averred in the answer that the by-law enacted in 1896 was in force at the date of the death of the insured; that his death resulted from pistol shot wounds, inflicted by his own hand for the purpose of causing his death, and that he was in the fourth class of the Endowment Bank. It is further averred in the answer that according to the American experience table of mortality in force at the date of the death of Gustave Hunziker, his expectation of life at the date of his admission into the Endowment Bank was 29 62-100 years, that he lived 13 96-100 years thereafter, and, therefore, the amount due on the policy sued on was \$942.60, and for this amount appellee offered to confess judgment. A demurrer was filed to the answer and overruled by the court, to which appellants excepted; they then filed a reply in which it is averred that the by-law of September 3, 1896, mentioned in the answer was adopted by the appellee after the enactment of section 697, Kentucky Statutes, and was never attached to the policy or certificate sued on, nor was any copy thereof so attached or offered to be attached to the policy, or delivered or offered to be delivered to appellants, or the insured, nor did they or the insured ever hear or receive notice of the alleged enactment of such a by-law.

It is further averred in the reply that the insured at the time of the infliction upon himself of the wounds of which he died, "was insane, and did not have sufficient reason to know what he was doing, or to distinguish right from wrong, and did not then have sufficient will power to govern his actions by reason of his mental unsoundness, and which insane impulse governing him at the time, he could not then resist or control."

A demurrer was filed by appellee to the reply, which was sustained by the court, to which appellants excepted. Judgment was thereupon entered in appellants' favor for only \$942.60 of the amount claimed by them, with interest from January 29, 1903, and costs up to the time of appellee's offer to confess judgment for the \$942.60. Of that judgment the appellants complain, and its reversal is asked at the hands of this court. It is admitted by the appellants that the insured committed suicide, therefore it is insisted

for appellee that according to the terms of the certificate or policy accepted by the insured, his contract with it was governed not only by the laws of the association then in force, but also such as might thereafter be enacted by the appellee, Supreme Lodge, for which reason the by-law enacted by it in 1896 was also binding upon him, and inasmuch as it provides that if any member of the Endowment Bank commit suicide, whether the act be voluntary or involuntary, or such member at the time be sane or insane, it shall serve to reduce the amount due the beneficiaries named in the certificate or policy from \$2,000 to a sum only in proportion to that amount, as the matured life expectancy might be to the entire expectancy at the date of admission into the Endowment Bank, according to the American experience table or mortality in force at the time of death, it follows that appellants are only entitled to receive \$942.60, and it was upon this theory that the lower court acted in rendering the judgment appealed from.

It is, however, contended by the appellants that the by-law of September 8, 1896, can not affect their rights under the certificate of insurance, because it was adopted by the appellee subsequent to the enactment of section 679, Kentucky Statutes, and never attached to the certificate as provided therein.

The statute, *supra*, provides: "All policies or certificates hereafter issued to persons within the Commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the corporation, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portions of the constitution, by-laws and other rules referred to; and unless so attached and accompanying the policy, no such application, by-laws, or other rules, shall be received in evidence in any controversy between the parties to, or interested in, said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties." * * *

There is nothing in the certificate of insurance received by Gustave Hunziker from the appellant, or in the application attached thereto, in regard to suicide, or providing that the appellee's liability shall be limited to an amount less than the sum named in the certificate if the insured took his own life. This stipulation had no existence until the enactment in 1896 of the by-law set out in the appellee's answer, and which, though adopted after the enactment of the section of the statute, *supra*, has never been attached to or made a part of the certificate. It appears from the averments of the reply, which upon the demurrer must be taken as confessed, that neither the insured nor the appellants ever received or saw a copy of the by-law in question, or heard of its existence.

In the cases of the Supreme Commandery of the United Order of the Golden Cross v. Hughes, 24 Ky. Law Rep., 984, and Mooney v. Ancient Order of United Workmen, 24 Ky. Law Rep., 1787, it was held that section 679, Kentucky Statutes, is applicable to societies such as that of appellee, and that "the application for the certificate, or the by-laws, or other rules of the corporation, unless attached to or accompanying the certificate, can not be received in evidence, or considered a part of the contract in any controversy between the parties interested in the certificate." * * *

The rule thus stated follows the language of the statute, the provisions of which are mandatory. The by-law claimed to have been adopted by the appellee not having been attached to or made a part of the certificate or policy sued on, can not be relied on to limit the appellee's liability, or reduce the recovery below the maximum amount named in the certificate. The fact that the by-law was enacted after the certificate was issued, did not relieve the appellee of the duty of causing it to be attached to the certificate after its enactment, as required by the statute. In *Mooney v. A. O. U. W.*, supra, the by-law relied on to defeat the action was also enacted after the issuance of the certificate, yet, as we have already indicated, it was held that it could not be set up as a defense because it had never been attached to the certificate.

Counsel for appellee contends that the statute, supra, because of the words "all policies hereafter issued," etc., has no application to a policy (certificate) that like the one on the life of Gustave Hunziker was issued before its enactment. That question is not before us for adjudication. We have only decided that the statute does apply to the by-laws relied on by appellee as it was adopted after the enactment of the statute, and its purpose and effect was to materially alter the original contract of insurance, for which reason it was required by the provisions of the statute to be attached to the original contract, or certificate. It may be remarked, however, that as the statute in question is promotive of justice and a sound public policy, much might be said in favor of extending its provisions to policies and certificates issued before as well as after its enactment, notwithstanding its use of the words "hereafter issued." Indeed, authority is not wanting to sustain this view of its meaning.

In *Park v. McReynolds*, 23 Ky. Law Rep., 894, this court, in discussing section 2358, Kentucky Statutes, which provides for the filing in the county clerk's office a notice of liens acquired by attachment, judgment, or execution, etc., "hereafter issued," said: "It seems to us that the act in question applies to all executions and attachments and suits and judgments whether issued or instituted before or after the enactment."

The statute under consideration is one that affects the remedy to the extent at least that it establishes a rule of evidence. It does not interfere with the right of insurance companies to pass such a by-law as the one relied on by appellee, but it prevents them from making use of it as evidence, or relying upon it as a part of the contract, in a controversy or law suit with one of their policy holders unless it has been attached to and made a part of the policy. In discussing the power of the legislature to pass laws affecting the remedy, Sutherland, in section 478 of his work on Statutory Construction, says: "A law which changes the rules of evidence relates to the remedy, and is not within the constitutional inhibition."

Eliminating from the case the by-law upon which appellee relies, and without it there being nothing in the certificate in regard to suicide, there is but one other question to be considered, viz., was the insured sane or insane when he took his own life? If he was sane, in the absence of any stipulation in the contract providing otherwise, his act in taking his own life would release appellee altogether from liability upon the certificate, and that such is the law is conceded by counsel for appellants. But, on the

other hand, it has been held in this State, and such seems to be the accepted view of the law in most of the States, that in the absence of a stipulation in the contract against suicide while insane, such an act can not be relied on as a defense by the insurance company.

In *Mooney v. Ancient Order United Workmen*, supra, the law on this subject is stated with admirable clearness in a quotation taken from 19 A. & E. Ency. of Law, page 78: "If the insured in a contract of life insurance taken out for the benefit of his estate, or payable to a beneficiary, the designation of whom may be changed at the option of the insured with the consent of the insurer, commits suicide, the policy is void if the insured was sane when he took his own life, and this for two reasons: In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural ordinary course of events. It is upon these chances that the premium is calculated and the contract is founded; hence the suicide of the insured operates as a fraud upon the insurer, and especially is this so when the insurance is taken out in contemplation of the act. In the second place, the enforcement of the contract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy in that it tempted or encouraged the insured to commit suicide, and it is obvious that the court will not imply a condition which, if expressed in the contract, would render it void. But when the policy is made payable to a nominated beneficiary, and contains no stipulation that it shall be void in cases of death of the insured by suicide, it may be enforced notwithstanding the insured dies by his own hand, unless, perhaps, where the policy was taken out in contemplation of suicide."

As the act of an insane person in taking his own life can not be a fraud upon the insurer, no reason exists why it should invalidate the policy. If the insurance company would protect itself against such a risk it should so provide in its policy, otherwise it will be liable. It is in substance averred in the reply in this case that the insured was insane at the time of the shooting, and was then without sufficient reason to know what he was doing, or to distinguish right from wrong, and was, by reason thereof, without sufficient will power to resist the insane impulse to kill himself. If this be true, the appellee is liable for the amount sued for. From the foregoing view of the law, it follows that the lower court erred in sustaining the demurrer to the reply. The question of whether the insured was sane or insane at the time of taking his life was one of fact that should have gone under proper instructions to the jury.

The judgment is, therefore, reversed and cause remanded, with directions to the lower court to set aside the judgment and also the order sustaining the demurrer to the reply, and for further proceedings consistent with this opinion.

KENTUCKY LAND AND IMMIGRATION CO. v. SLOAN, &c.

(Filed January 26, 1904—Not to be reported.)

Lands—Ejectment—Where appellants show no title from the Commonwealth, appellees having shown a perfect title from the patentee down to themselves, and by a preponderance of proof establish adverse and actual possession of the land for more than thirty years, adverse possession under a claim of tenancy by the appellants will not avail.

Goulrey & Roberts for appellant.

J. M. Beatty and Beckner & Jouett for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Nunn.

This suit instituted in 1868 by the appellant against appellee, Preston Sloan, in ejectment for the recovery of fifty-seven acres of land. The appellee, Sloan, answered and put in issue the allegation of the petition and averred that he was the tenant of the Beattyville Mineral and Timber Co.

Appellant filed an amended petition, making the Beattyville Mineral and Timber Co. a defendant to the action, alleging that it was claiming by some pretended right or title a much larger area of land than the fifty-seven acres which belonged to appellant, and that Preston Sloan was its pretended tenant, and that the claim of the appellee was casting a cloud upon the title of the appellant. The appellee answered, denying title in appellant to any part of the land claimed by it and the Beattyville Co. set forth the derivation of its title from the Commonwealth. Both parties also claimed the land by adverse possession for more than fifteen years. The proof was heard and the lower court adjudged in favor of the appellees. It appears from the record that one John Carnan obtained a patent from the Commonwealth for nearly thirty thousand acres of land which is now situated in Lee county, Ky. This land lies in nearly a square bordering of Kentucky river. It appears from the oral proof that the patentee, Carnan, sold and conveyed the Western portion, something like one-half of the survey, to one Cowland, who sold and conveyed to one Champney, who sold it to one Shumway.

These deeds, however, were not filed with the record, at least not copied therein. It also appears that Carnan, the patentee, sold and conveyed the balance of his survey to one Flahaven, the eastern half of which balance is now owned by the St. Helens Coal and Iron Co. The western half of the said balance includes the land in controversy, which is claimed by the appellee, mineral company, and its derivation of title is that which is fully stated in 24 Ky. Law Rep., 749, in the case of Kentucky Land and Immigration Co. v. Crabtree, &c., with the addition that David Pryse sold and conveyed this land to one Bush, who conveyed it to the appellee, Beattyville Mineral and Timber Co.

It further appears from the record that the line beginning on the Kentucky river at Mirey branch running N. 9 W. over 3,000 poles is a well marked and the established line between the Cowland and Flahaven surveys, as conveyed to them by the patentee, Carnan. But it appears that Shumway, vendee of Champney, in making a conveyance to one Thomas Duckham, who conveyed the same to one Meadows, did not stop at the Flahaven line, but included in these conveyances considerable land beyond this line.

situated on the northern end of the Flahaven survey and it is this land on the northern end of the Flahaven survey which is in controversy in this action.

The appellant does not show any title deducible from Commonwealth for any part of the land contained within the Flahaven deed which is claimed by appellees. The appellees have shown a perfect title from Carnan, the patentee, on down to themselves. The great preponderance of proof shows that the appellees and their immediate and remote vendors have held the adverse and actual possession of the land in controversy for more than thirty years, and that the appellant and its vendors have not been in the actual possession of any part of this land. Its claim, that its tenants and the tenants of its vendors being in the actual possession of this land west of the Flahaven line, conveyed by Carnan to Cowland, and claiming all the land in the deed from Shumway to Duckham which extended across the Flahaven line gave it the actual possession to the boundary of its deed, is erroneous. Appellant holding the inferior title, the possession of its tenants ended when it reached the superior title in possession.

"The possession of any part of a tract under the better title extends to the whole boundary and claim therein, except such part as may be in the adverse actual possession of another. This adverse, actual possession will not be construed to attach to the claim of tenancy under the junior holding, where it is not inclosed, and where the entry under the junior grant is not within the conflict." See the case of Ky. Land and Immigration Co. v. Crabtree, 24 Ky. Law Rep., 752, and the cases therein cited.

Wherefore, the judgment of the lower court is affirmed.

CITY OF RICHMOND v. MARTIN.

(Filed January 26, 1904—Not to be reported.)

1. Damages—Where appellee fell into a hole in a sidewalk on a street where there was no light and where she did not know of its existence, and where it appears from the evidence the officers of the city either knew of the dangerous condition of the sidewalk, or could have known it by the exercise of ordinary diligence, and where the injury was serious, the jury was authorized in fixing the damages at \$1,500 although they went to the utmost limit.

2. Same—Evidence—Where a witness testified for appellee in her action for damages, but afterwards made an affidavit that he was mistaken as to the place where the injuries were received, and that a defect in the pavement was not as great as one about which he testified, it was not error in the trial court to disregard the affidavit because at most his testimony would only be cumulative.

J. T. Jackson and J. Tevis Cobb for appellant.

Smith & Bush for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Settle.

The appellant seeks the reversal of a judgment of \$1,500 in damages recovered against it by the appellee in the Madison Circuit Court for injuries to her person caused, as averred in her petition, by the negligence of the ap-

pellant in knowingly permitting a hole to be and remain in its sidewalk on Collins street within its corporate limits into which she, without knowing of its existence, fell in going to the house of a neighbor.

The answer denied the negligence charged, or that the appellee was injured, and alleged contributory negligence on her part. By consent all affirmative matter in the answer was controverted of record. A trial by jury resulted in a verdict and judgment as indicated, followed by the filing of grounds and a motion by appellant for a new trial, which was refused by the lower court. The evidence showed that the pavement on Collins street at a point near appellee's residence in the appellant city was in a defective and dangerous condition, in that it contained a hole several inches in depth. In passing along the sidewalk in question, after night fall, with no light save what was furnished by a moon entering upon the fifth day of its quarter, the appellee fell into this hole thereby receiving the injuries complained of.

There was no evidence tending to show that she knew of the existence of the hole, or that she had passed over the pavement at that point from the time the hole made its appearance down to the time of her falling into the same. Upon the other hand, the evidence strongly conduced to prove that the officers of appellant charged with the duty of keeping the streets and pavements of the city in repair knew, or by the exercise of ordinary diligence could have known, of the presence in the pavement of the hole and of its dangerous character, for it had existed for a week or more before appellee received her injuries. In view of the evidence, the weight of which preponderated in appellee's favor, we are of opinion that the jury was authorized to find for the appellee, but we are further of opinion that in fixing the amount of appellee's damages at \$1,500, they went to the utmost limit.

While it appears from the evidence that none of appellee's bones were fractured by the fall into the hole, it does appear that one of her legs and her side and body were greatly wrenched or sprained and otherwise injured thereby; that she suffered greatly physically and mentally, and was confined from three to five weeks to her bed, from which she finally arose to go about with the aid of crutches, and though now able to walk without their use, she contends that the injured leg is shorter than the other, and that her general health and strength have been permanently impaired by the injuries complained of. How far this claim would be sustained by the examination of a skilled surgeon, we are unable to say, as such an examination has never been made. She was visited from three to five times, immediately after her injuries were sustained, by a reputable surgeon, but he failed to make a critical or satisfactory examination of her person, though he testified that he did, without removing her clothing satisfy himself that none of her bones were fractured. While loath to approve the amount of the verdict returned by the jury in appellee's behalf, we are equally loath to disturb it on the ground that it is excessive. Moreover, the record fails to show any evidence of passion or prejudice upon the part of the jury. For these reasons we are of opinion that grounds 1, 2 and 3 in support of a new trial, which relate to objections to the verdict, were all and severally insufficient to authorize the lower court to set aside the verdict. With reference to alleged errors upon the part of the trial court in the matter of admitting and rejecting evidence.

set forth in grounds 4 and 5 filled in support of the motion for a new trial, we find it proper to say that no such errors are shown by the record, nor have any such been suggested in the brief of the appellant's counsel.

It is contended that the lower court erred in not granting a new trial upon the alleged new evidence disclosed by the affidavit of S. P. Deatherage. Deatherage was introduced by appellee and proved a fairly good witness in her behalf, but after giving his testimony he discovered, as stated in his affidavit, that he had been mistaken as to the place where appellee received her injuries, for which reason he would testify if the case was again tried; that the defect in the pavement where appellee was injured was not so great as the one about which he had formerly testified. We do not think it was error for the lower court to disregard the affidavit of Deatherage. At most his testimony would only be cumulative. The evidence fixed beyond doubt the point where appellee was injured. The dangerous character of the hole which caused her injuries was equally well established, and several witnesses testified without contradiction to the manner in which her leg was injured in the hole, and also as to the manner in which she was extricated. We are, therefore, unable to see that the testimony of Deatherage would throw any new light on the occurrence. The only remaining complaint of appellant's counsel is as to the instructions given and refused by the lower court. As to those refused it may be said that several of them with the addition of a few words of modification would contain the law. But there could have been no error in refusing them for those given by the court embraced all the law, expressed in language wholly free from error or ambiguity. The law applicable to the state of case here presented has been repeatedly declared by this court in the following recent cases: *City of Midway v. Lloyd*, 24 Ky. Law Rep., 2448; *City of Covington v. Asmon*, 24 Ky. Law Rep., 415; *City of Wickliffe v. Moring*, 24 Ky. Law Rep., 419; *City of Covington v. Johnson*, 24 Ky. Law Rep., 602; *City of Louisville v. Johnson*, 24 Ky. Law Rep., 685. Tested by the rule announced in the foregoing authorities the appellant was properly held liable under the facts disclosed by the record.

Wherefore, the judgment is affirmed.

BOARD OF COUNCILMEN CITY OF HARRODSBURG v. MITCHELL.

(Filed January 26, 1904—Not to be reported.)

Damages—A verdict and judgment for \$200 against a city for injuries to a residence lot and garden because of the raising of a street and the building of a culvert and so ditching the street upon both sides as to divert the surface water from its natural course and cause it to flow in unusual quantities upon the lot and garden, is not excessive and will not be disturbed, no error appearing in the record prejudicial to the city.

E. M. Hardin for appellant.

E. H. Gaither for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Stille.

The appellee recovered in the lower court a verdict and judgment of \$200

in damages against the appellant. The alleged injury upon which the claim for damages was based grew out of the raising by appellant of a street in front of appellee's lot, the making of a culvert thereunder, and so ditching it upon both sides as to divert the surface water from its natural course, and cause it to flow in unusual and increased quantity upon appellee's lot, thereby inundating and injuring his yard and garden, and washing the metal from a drive way through the premises.

Appellee's motion for a new trial was overruled and it has appealed. There being no brief for the appellant in the record we are not apprised of the particular errors upon which it relies for a reversal. But we have examined the grounds urged in the court below for a new trial and find that they were seven in number.

1st. Irregularity in the proceedings of the court in excluding certain taxpayers of the appellant city from sitting on the jury, and allowing others to do so, to the prejudice of appellant, to which it then objected and excepted. Besides it would not have been error for the court to have excluded taxpayers of the city from the jury if it did so.

2d. Excessive damages appearing to have been given under the influence of passion or prejudice on the part of the jury.

3d. Error by the jury in its assessment of damages.

4th. That the verdict was not sustained by sufficient evidence and was contrary to law.

5th. That the appellant has discovered new evidence which it could not, with reasonable diligence, have discovered and produced at the trial.

6th. Errors of law occurring at the trial and excepted to by appellant at the time.

7th. The court improperly instructed the jury.

As to the first of these grounds it may be remarked that the record fails to show that taxpayers of the appellant city were excluded from the jury, or that others who were not such taxpayers were permitted to serve thereon. In other words there is nothing appearing in the record that conduces to show any error or irregularity upon the part of the court in selecting or empaneling the jury.

As to the second and third grounds it is only necessary to say that we have been unable to find anything in the record that may be said to sustain either of them. The amount of the verdict is certainly not unreasonable, and could not have been influenced by either passion or prejudice, yet in our opinion it was as much as the jury were warranted by the evidence in finding. If by the third ground it is meant that the jury adopted some improper mode of assessing the amount of appellees' damages, that fact is not disclosed by the record. The fourth ground that the verdict is not sustained by sufficient evidence is, in our opinion, equally untenable, as the evidence introduced by appellee conduces to show that there was some injury caused to his lot by the overflows of which he complained, and that such overflows were caused by the manner in which the appellant's servants and agents repaired the street in front of his property; that is to say, it appears from the evidence that this street had been in existence a great number of years, that the appellee's land was slightly lower than that on the north side of the street; that the land on the north side constituted a kind of natural water

shed from which the water ran down on the street, but which, before the street was raised, flowed in large measure to the low places therein somewhat beyond appellee's lot, and some of it stood on the north side of the street in pools or ditches, by all of which it was prevented from running upon the appellee's premises to his injury. Even when the rain fall was great the overflow was gradual and extended over so large a surface that it could do his lot little or no injury. But when the appellant raised the street in front of appellee's lot, ditched it on both sides, and put in a culvert almost opposite the center of his gate, it caused all the water from the higher ground on the opposite side of the street to flow through the culvert where it joined the water from the ditches on the side of the street next to appellee's lot, thereby producing a greater accumulation of water than had been accustomed to gather on that side of the street which was all thrown upon the lot of Mrs. Riley, adjoining that of appellee's from which it was thrown upon appellee's lot, which was the lower ground, with much greater force and volume than had ever been known before the repairing of the street. By this means his garden was in part washed away, his drive way in part demolished and his lot otherwise injured.

Upon the other hand, the witnesses introduced by the appellant furnished testimony that tended to contradict and disprove the evidence introduced in behalf of the appellee. The evidence was, therefore, conflicting, but it was all proper to go to the jury, and it was for them to determine whether the appellee was damaged by the acts of appellant, complained of, and if so to what extent, and we can not disturb the verdict as we are unable to say that there was no evidence to sustain it. It is unnecessary to consider the fifth ground that was urged in the lower court for a new trial for we have no means of knowing what new evidence was discovered by appellant after the trial, the record being altogether silent upon the subject. We are also at a loss to know what error of law occurring at the trial is referred to by appellant in the sixth ground, as the record furnishes no light to aid us in its discovery.

The complaint presented by the seventh ground that the court improperly instructed the jury is not in our opinion well founded. It can not be said that the one instruction given by the trial court did not correctly present to the jury the law of the case. Though it might have been more specific in defining the measure of damages it could not have been misleading or otherwise prejudicial to the appellant. Besides appellant is not in a position to complain that it was not more specific on that point, in view of the fact that it neither asked nor offered any other instruction.

Finding in the record no cause for disturbing the judgment the same is hereby affirmed.

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KENTUCKY COURT OF APPEALS.

WILLIS, &c. v. THORNTON.

(Filed January 12, 1904—Not to be reported.)

1. Schools—Taxation—The judgment of the chancellor awarding damages for the seizure of appellee's property and restoring the possession of same to her where it was seized for taxes by the collector of the tax of a graded school district will not be disturbed, it appearing from the evidence and a map in the record that appellee was not a resident of the district and, therefore, not liable for the tax sought to be collected by the sale of her property.

2. Same—In cases involving questions of taxation this court has repeatedly exercised jurisdiction no matter how small the amount involved.

H. S. McElroy and C. S. Hill for appellants.

J. T. Maryson and Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

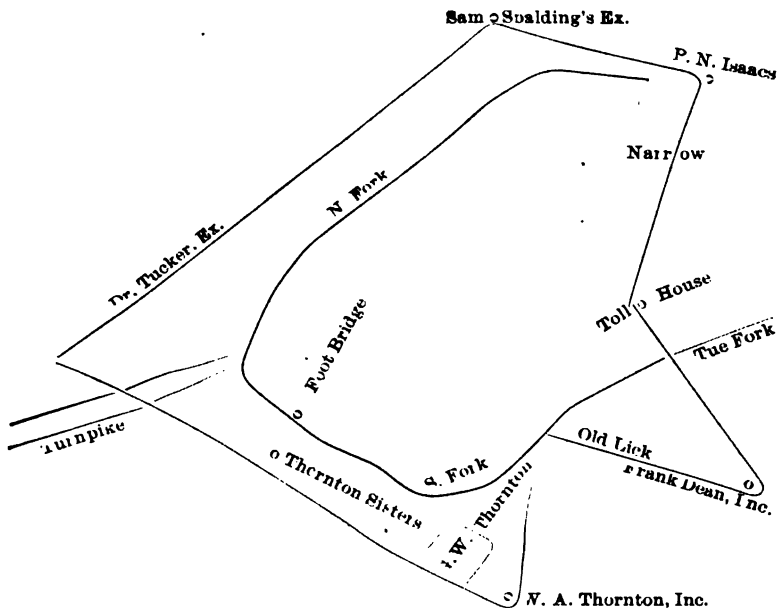
Opinion of the court by Judge Settle.

This action was instituted and an order of delivery obtained by the appellee, Eliza Thornton, to recover of the appellants, Willis and Glasscock, a cow and calf which they levied on to satisfy a tax assessed against her by the trustees of graded school district No. 37 in Marion county.

It is averred in the petition that the levy upon the cow and calf was made by the appellee, Willis, as deputy for his co-appellant, J. H. Glasscock, who was and is collector of the school tax for district No. 37; that the levy was and is illegal, as she did not owe the tax assessed against her, and is not liable therefor, because she is not now and never has been, a resident of graded school district No. 37. It is further averred in the petition that the cow and calf are worth \$50, and that appellee had been damaged in the amount of \$25, by reason of the wrongful seizure and detention of the cattle by the appellants. The answer of the appellants after admitting the seizure and detention of the cattle, and denying the illegality thereof, or that appellee was damaged thereby \$25 or any other sum, avers that the tax for which the cow and calf were seized, was legally assessed by the trustees of the district, that it was due and unpaid and is still owing by the appellee.

and further that she was, at the time it was assessed, and is now a resident of graded school district No. 37.

The cause was tried by the circuit judge without the intervention of a jury, and the judgment rendered declared the appellee not liable for the tax, restored to her the cow and calf, awarded her \$15 damages for their detention, and also allowed her her costs. By this appeal a reversal of that judgment is sought by the appellants. We are of opinion that the lower court decided correctly in holding that the appellee is not a resident of graded school district No. 37, and consequently not liable for the tax sought to be collected of her by the sale of her cattle. A number of witnesses introduced by the appellee testified that the land owned by her, and upon which she resides, does not lie within the boundary of the school district. Others introduced by the appellants testified that it is included therein. We are not, however, forced to depend in this case upon mere expressions of opinion from witnesses. There is other evidence by which we can better afford to be guided as it is the highest known to the law, and is furnished by the record fixing the boundary of the district which was in the office of the clerk of the Marion County Court, and introduced in evidence upon the trial together with the accompanying map:



The boundary referred to is as follows: "Beginning at Sam Spaulding's, excluded; thence across the knob to Dr. Tucker's farm, excluded; thence up the Rolling Fork (river) and South Fork (tributary of Rolling Fork) to the mouth of Old Lick creek; thence to Frank Dean's, included; thence to the toll house on the Lebanon and Hustonville pike, included; thence through the narrow, including all the narrows; thence to B. N. Isaac's farm, ex-

cluded; thence down the North Rolling Fork to the beginning. This boundary changed by the consent of trustees to include farm now occupied by Wm. Thornton, no point of the aforesaid boundary being more than two and one-half miles from the site of the school buildings hereinafter named."

It will be observed that from the beginning point at Spaldings, the line runs to the farm of Dr. Tucker who is excluded. After reaching his place, or upon passing it, the line strikes the Rolling Fork, then runs up that stream to where South Fork joins it, thence up South Fork to where the land of Wm. Thornton touches that stream, at which point, by consent of the trustees, given after the line was originally fixed, it was made to diverge so as to include his (Wm. Thornton's) residence, after which it again returns to the South Fork, which stream it follows until the mouth of Old Lick creek is reached; here the line again diverges so as to include the residence of Frank Dean, after which it runs to the toll house on the Lebanon and Houstonville pike, and from that point through and including the "Narrows" until it reaches B. N. Isaac, who is not included, and from his residence the line soon reaches the North Rolling Fork, with, or contiguous to which stream, it continues until the beginning point is reached at Spauldings.

It appears from the map that appellee's land lies wholly on the west side of the Rolling Fork, and as the school district boundary line calls to run with the South Fork after leaving the Rolling Fork, it must continue with the South Fork until it passes the land of appellee, in order to reach the land of Wm. Thornton. Upon reaching his land the boundary, as already stated, leaves South Fork so as to include his farm, and then returns to the same stream to continue as further indicated by the map.

S. G. McElroy, Superintendent of Common Schools, testified that the original boundary was changed by consent of the school trustees so as to include Travis Thornton and Wm. Thornton. We are unable to understand what connection Travis Thornton had with the appellee, unless, as we suspect she is his daughter, and her land was derived through him, but that fact does not appear from the record. The school superintendent does not seem to be borne out by the record as to Travis Thornton's having been included in the boundary of the school district by consent of the trustees, for the order of the county court copied into the record shows that only Wm. Thornton was so included.

It is insisted for the appellee that the amount in controversy in this case is not sufficient to give this court jurisdiction of the appeal. If the value of the cattle in controversy, and the damages claimed for their detention, were all that is involved, the appeal could not be entertained. But that is not all. An attempt has been made to subject the property of the appellee to taxation which is resisted by her, and in cases involving questions of taxation this court has repeatedly exercised its jurisdiction no matter how small the amount involved. If the trustees of graded school district No. 37 have the legal right to enforce the payment of the tax demanded by the appellee, her entire estate, real as well as personal, is liable therefor, or may in the end become so.

Believing the judgment of the lower court to be free from error the same is hereby affirmed.

PARISH v. LOUISVILLE & NASHVILLE R. R. CO

(Filed January 20, 1904.)

1. Railroads—Division fences—Notice—In an action against a railroad company for damages for injury to cattle it was error to sustain a demurrer to the petition because it stated that no written notice was given the railroad to build its part of a division fence. Under section 1791, Kentucky Statutes, written notice is only required for the purpose of putting the criminal law in motion.

2. Same—Construction of statutes—Section 1793, Kentucky Statutes, requires that cattle guards shall be maintained at all terminal points of fences along railroad lines and does not limit such cattle guards to public and private crossings.

3. Same—By section 1790, Kentucky Statutes, a railroad company is required to construct its half of division fences and no notice of any kind to a railroad is required.

J. Tevis Cobb for appellant.

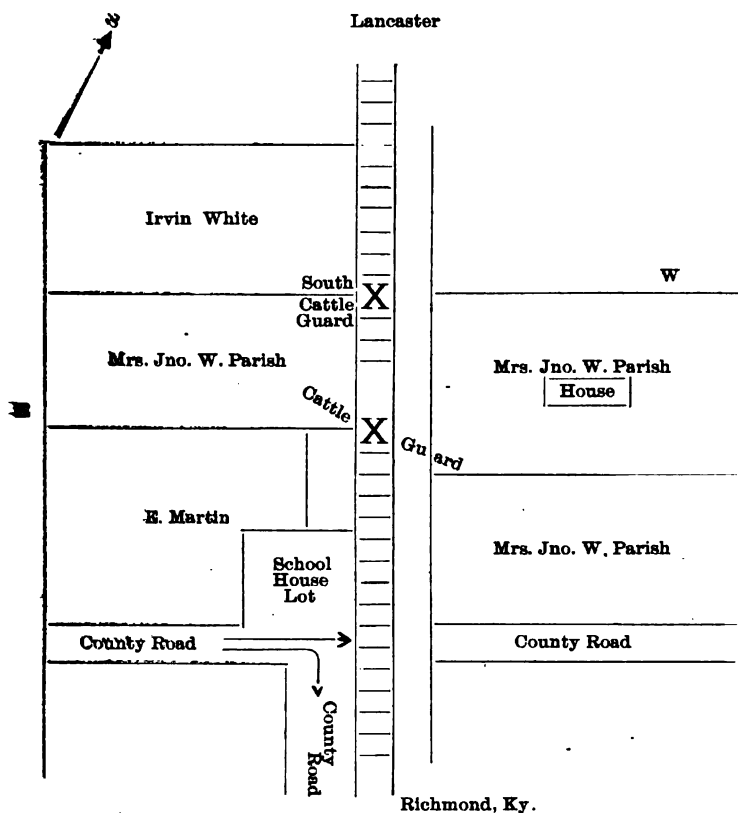
J. A. Sullivan for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

The appellant instituted an action against the appellee for damages for alleged injury to her cattle. In addition to the original petition she filed several amendments, and the last is denominated as a reformed amended petition. The lower court sustained a demurrer to her pleading, dismissed her action, adjudged the costs against her, and of this she complains.

Appellant filed with her pleading a diagram, which is here inserted:



It appears from the pleadings that appellee's road passes through her farm a north and south course, leaving her home and most of her farm on the west side of the road, and the other part of her farm, about sixty-five acres, on the other or east side. It appears that she built a fence, with her own means, on the west side of the railroad, and parallel with it along the right of way from her south line to the public highway, and gave notice of this fact, but not in writing, to appellee, and requested it to erect a fence on the east side, on her land, parallel with and along the right of way of appellee, but that it failed and refused to erect the fence. She further alleged that her sixty-five acres of land on the east side of the railroad was surrounded by a good fence except along the line of appellee's right of way, but that she connected her two strings of fence, the one between her lands and White, the other between her and Martin, with cattle guards made by appellee, one at her south line, marked "tooth cattle guard," the other at her north line on east side of the railway, marked "cattle guard." She alleged that this "tooth cattle guard" was constructed in a deep cut, and dangerously constructed "a veritable death trap," and that her cattle, fifty or sixty head, repeatedly passed out of her sixty-five-acre field into this cut and over this

cattle guard, killing a few, and injuring others, to her damage in the sum of \$300; that the other cattle guard had filled up about even with the road-bed, and for that reason was no obstruction to cattle which passed out of her pasture over this cattle guard without injury to them, then passed out along appellee's right of way, and thence roamed over the country, whereby they lost so many pounds of flesh, which was named in the petition, to her damage in the sum of \$400.

Appellee contends that the lower court was right in sustaining the demurrer, first, for the reason that the petition stated that no written notice was given appellee, requesting it to build its part of the division fence, as required by section 1791, Kentucky Statutes; that by law it was not required to build its part of the division fence until the written notice, as required by this section, had been served upon it, and that after service of this notice it had four months in which to erect the fence; second, that under its construction of section 1793, Kentucky Statutes, and the decision of this court in that section, it contends that it is not required to erect cattle guards at any point on its road except at public and private crossings, and as the cattle guards complained of in the petition were not at a public or private crossing, it was not required by law to keep and maintain cattle guards at the points where situated, and consequently not responsible for any of the damage alleged to have been sustained by appellant's cattle.

We are of the opinion that appellee misconstrues section 1793, and the opinions of this court thereon. Section 1793, Kentucky Statutes, reads as follows: "That all corporations and persons owning or controlling and operating railroads as aforesaid, shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be fenced on both sides, and at public crossings. But where there is a private passway across said railroad, the land owner for whose benefit it is kept open shall bear one half of the expense of cattle guards and gates, the former to erect the gates, the corporation or person operating the railroad to erect the cattle guards."

The words "shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be fenced upon both sides and at public crossings," do not limit the erection and maintaining of cattle guards at public crossings and private passways. The section of the statute quoted does not require cattle guards at public crossings, except where lines of fence, running parallel with said road, terminates at the public crossing, or, if only a line of fence on one side of the railway extend to the crossing, a cattle guard would be useless.

It is the purpose of the statute that cattle guards should be erected and maintained at all terminal points of fences, not at terminal points of one fence on one side only of the railway, nor when the railroad enters or leaves a person's enclosures or farm, unless this should be the terminal of the fencing on both or one side of the railroad. In such a state of case a cattle guard is required. To illustrate: Suppose a railway passed from one public highway to another, a distance of five miles, through enclosed farming lands, and fences erected on each side of the railway, parallel with it, for the whole distance, in such state of case a cattle guard at each public high-

way would meet the requirements of the statutes, unless the necessity for others arose at private crossings. But if the two fences beginning at one of the highways extended only half way to the other public highway at that point and at the public highway from which the fences started, cattle guards would be required, and also at terminal points where the line was not required to be and was not fenced on both sides. From the diagram filed and the allegations of the petition it is not clear where the cattle guards should have been erected. It is clear, though, that the two fences do not extend north to the public highway.

It is indicated by the diagram that there is unenclosed land along the right of way on the Martin tract; if so, the cattle guard should have been erected at the line of Martin and appellant, at the point indicated "cattle guard." If there is a fence parallel with the railroad along the Martin line to the schoolhouse lot, then at that point the cattle guard should have been erected.

The appellee is also in error as to its construction of section 1790, Kentucky Statutes, which reads as follows: "That every such corporation or person owning or controlling and operating a railroad in this Commonwealth, and owning right of way, shall construct and maintain a good and lawful fence on one half of the distance of the division line between such rights of way and the adjoining lands, except as is hereinafter provided; and that every owner of land or lands adjoining any rights of way of such corporation or person as aforesaid shall construct and maintain a good and lawful fence on one-half of the distance of the division line between such land or lands and such rights of way except as is hereinafter provided."

This section required the appellee to construct and maintain this fence, that is, one-half of the division fences between them. She alleged in her petition that she had performed her duty in this regard, and that appellee had failed to erect its part of the fence as required by statute. By the demurrer this is admitted. But appellee says that it is not compelled to erect this fence until it is served with written notice as required by section 1791, Kentucky Statutes. This written notice is only required for the purpose of setting the criminal law in motion, and fining the party in default \$1 per day, and every day after the expiration of the period of four months from date of service of the written notice, during the time such fence shall not have been constructed.

We have a statute, section 1790, that expressly required appellee to construct its half of the fence, and it admits that it failed to erect it. It should have complied with this statutory requirement, without notice from the appellant of any kind for none is required. (*McGehee, &c. v. Gaines*, 98 Ky., 183.) In that case, the court said: "There can be no doubt of the proposition that if the company is in default of the performance of a legal obligation, as by neglect to maintain a fence or cattle guard where stock may stray on the track, proof of such default and of the cattle coming on at such places and being killed will suffice to render it liable for damages." (*Pierce on Railroads*, page 428.)

The case of the City of Henderson v. Clayton, 22 Ky. Law Rep., 284, was where the city was sued for a violation of its duty imposed by a statute. The court said: "From time immemorial, where a statutory duty for the

protection of individuals had been violated, an action at common law might be maintained. The common-law rule referred to is thus stated in Comyn's Digest, Action Upon Statutes: 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' Another common-law authority thus states the rule: 'Whenever an act of parliament doth prohibit anything, the party grieved shall have an action and the offender shall be punished at the King's suit. It is written in the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to both a public and a private wrong.' (Endlich on Statutes, section 463.) The same common-law rule is laid down in Bishop on Noncontract law, section 188, and in Cooley on Torts, page 658. It is also recognized in section 66, Kentucky Statutes: 'A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed.'''

The appellee was, therefore, liable to appellant for such damages as she sustained by reason of its violation of section 1790, Kentucky Statutes, above quoted, although that statute did not in terms impose this liability on it. We are not to be understood as deciding that the parties in interest can not, if they desire, agree upon the erection, or agree to waive the erection and maintenance of fences and cattle guards, if they can do so without injury to the rights of others, but without such agreement the principles herein stated must prevail. It follows that the court below erred in sustaining the demurrer to the petition.

The judgment is, therefore, reversed and cause remanded for further proceedings not inconsistent with this opinion.

CITY OF LEBANON v. BIGGERS, &c.

(Filed January 26, 1904.)

Taxation—Place of residence—Where one left his home in the country and moved into a city, bought a residence, furnished it comfortably, taking up his residence there with no fixed intention of returning to his home in the country and testifies in a suit against him for city taxes that he does not know when he will return to his farm in the country, that he moved into the city for the purpose of benefiting his health and for the opportunity afforded him for attending church regularly, all of these circumstances are likely to make his residence in the city permanent although he testifies that at present it is indefinite.

H. S. McElroy for appellant.

Lafe T. Pence for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, J. M. Biggers, was assessed for taxation for the year 1901, by the city of Lebanon on property valued at \$6,925, which included his residence at \$2,000. The great bulk of the balance of the property consisted

of cash notes, which were valued at \$4,835. The rate of assessment for that year, as fixed by the board of council of the city, was 70 cents on each \$100 worth of property, and a poll tax of \$1. Appellee having refused to pay the tax assessed against him, the city brought this suit for a personal judgment for the amount of the taxes, \$48.47, the poll tax, and the penalty provided by law for failure to pay. The defendant resisted payment of the taxes upon the ground that he was not a resident of the city, but that his permanent home was located upon his farm some three and one-fourth miles from the city of Lebanon, and he was only liable for the tax assessed against the real estate owned by him, which he offered to pay. To support his contention as to his residence, the defendant testified that he had a wife and two children; that for many years he had owned a farm of 800 acres about three and one-half miles from Lebanon, on which was located a dwelling house which contained seven rooms, which he had occupied for many years; that on the 20th of October, 1899, he purchased the residence then occupied by him in Lebanon, furnished it comfortably, and shortly thereafter took possession of it with his family, and had continued to reside in it; that after his removal from his farm it was operated by him on shares; that the tenant occupied a portion of the dwelling, but that he reserved three rooms for his own use; that he still got his vegetables, chickens, milk and household supplies largely from the farm; and that he frequently stayed out at the farm at night during the summer; that he depended upon his farm and stock trading for a living. But upon his cross-examination he was asked this question:

"Mr. Biggers, where in future do you expect to make your residence for your family?"

"A. In the country on some farm. I do not know whether I will make it my farm or not, but I am going away from town."

He admitted that his family had not occupied his country residence during the year 1901, and that he had paid taxes upon his personal property for that year in Lebanon, but had refused to pay for the year 1901, in consequence of the decision by this court in *Montgomery v. City of Lebanon*, 28 Ky. Law Rep., 891; that he had moved to town because both his own and his wife's health were better than on the farm, and because they wanted the advantages afforded by the city of attending church, etc., that when he moved into the city there was no fixed definite time in his mind of abandoning his town residence. Under this state of fact the trial court dismissed plaintiff's petition and they have appealed.

It is a maxim of the law that every person must have a domicile, and also that he can have but one; and that when once established it continues until he renounces it and takes up another in its stead. Nor can there be any question that a domicile is not lost by temporary absence. The question is one of fact and it is often difficult to determine. The rule is laid down by Mr. Justice Cooley in volume 1 of his work on Taxation, 3 edition, page 641, quoting Ch. J. Shaw, as follows: "No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere; and also that he can have but one. Of course it follows that his existing dom-

domicile continues until he acquires another; and vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place. If a seaman without family or property sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin. So going abroad with one's family and actually taking up one's residence in a foreign city, but with the intention at some time of returning, does not deprive one of his domicile of birth, or the authorities of the place of domicile of the right to tax him."

Jacobs, in his *Law of Domicile*, 378, says: "A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicile. The result is that the place of residence is *prima facie* the domicile, unless there be some motive for that residence, not inconsistent with a clearly established intention, to retain a permanent residence in another place."

In 10 A. & E. En. of Law, 2 edition, 15, it is said: "Domicile is composed of two elements, residence and intention; and both of these must concur. Residence in a place without the requisite intention of remaining will not suffice to give one a domicile in such place. Nor will an intention to change one's domicile, unaccompanied by actual removal, result in a change of domicile. * * * The intention which is necessary to said domicile is the intention to reside in a particular place permanently, or for an indefinite period of time. It is not necessary that the person should intend never to move away. * * * When a person has actually removed to a place with the intention of remaining there for an indefinite time, it becomes his place of domicile, notwithstanding he may have a floating intention to return at some future period to his previous domicile."

The same author says on page 20: "Every independent person may change his domicile at will, and to constitute a change there must be an actual removal of residence coupled with an intention of remaining at the place of removal permanently, or for an indefinite time. The domicile must be determined in each particular case from the whole taken together."

Lord Thurlow in *Bruce v. Bruce*, 2 B. P., 229, says: "A person being at a particular place is *prima facie* evidence that he is domiciled at that place and it lies on those who say otherwise to rebut that evidence."

When we apply the law as stated in these authorities to the facts of this case, we find that when appellee left his home in the country and moved to

the city of Lebanon, he bought a new residence, furnished it comfortable, and took up his abode there with no fixed or definite intention of returning to his farm. Indeed he testifies that he does not know that he will return to his home in the country, even if in future he should abandon his residence in the city. He says the hope of improving his health was one of the main inducements in moving to the city; and that his anticipations have been realized; that the opportunity afforded by the city of attending church regularly was an element in determining his choice. All of these circumstances are likely to make his residence in the city permanent, although he testifies that it is at present indefinite.

The facts in this case clearly distinguish it from *Montgomery v. City of Lebanon*. In that case it appeared that Montgomery moved to Lebanon for a definite purpose and for a definite time, the education of his two children, the youngest of which was then sixteen years of age; that he continued to act as surveyor of a public highway in the country in the neighborhood of his farm; that he intended to return to his farm as soon as his children had finished their education. It would be better if the questions of fact involved in cases of this character were left to the determination of a jury. But as the parties elected to submit their controversy to the chancellor and he has decided the question upon its merits without objection, we think it not improper that upon this appeal the matter should be finally disposed of. We have reached the conclusion that under the facts of this case the appellee, J. M. Biggers, was liable for the taxes sued for; and that the trial court erred in not so adjudging.

Judgment reversed and cause remanded for proceedings consistent herewith.

NEW YORK LIFE INSURANCE CO.. v. HORD.

(Filed January 26, 1904—Not to be reported.)

Original opinion, ante, 1219.

A. D Cole for appellant.

D. W. Robertson and E. S. Worthington for appellee.

Appeal from Mason Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

It is very earnestly urged that appellant was entitled to its election of remedies when defrauded by Dr. Hord and Mrs. Weaver; that it had the right either to rescind the contract on discovering the fraud; or to affirm the transaction, and sue to recover its damages. The only defendant now being considered is Dr. Hord. He was not a party to the contract.

There could never have been maintained against him a suit for rescission. It might have been that he by his fraud had induced appellant to enter into such a binding contract with Mrs. Weaver as that neither she nor the company could have compelled its rescission. That would not have altered Hord's liability to appellant for his fraudulent practices (if they were fraudulent) by which appellant was induced to enter into the contract. The liability of the faithless servant to his master for having fraudulently induced

the latter to enter into a contract may be wholly distinct from the liability of the other contracting party.

The doctrine of election has no place in this case. As contended for it would amount to this: Appellant's agent fraudulently misrepresented to it the health of an applicant for life insurance, but appellant learned of the fraud before it had sustained damage; appellant claims it may elect to let the injury happen, though it might have averted it, and then recover the damages from the wrong-doing servant. But that can't be the law. If a tort-feasor set in motion an event calculated to injure another, if the latter sees the danger in time to avoid it, he can not let the damage happen to him and then recover his loss from the wrong-doer. So all the authorities hold. Applying those familiar and just principles to this case we have it that appellant after discovering the alleged fraud that had been practiced upon it, and with every opportunity and right to place that fact in bar of any recovery upon the policy of insurance, nevertheless voluntarily paid the policy. Until then it had not suffered loss, the damage had not occurred. Issuing the policy of insurance did not damage appellant. It was the payment of it that caused the loss.

If appellant had learned of the false representation before it issued the policy, but had nevertheless elected to issue it, it could scarcely be said that it was induced to do so by the false representation, for in fact it would have issued it in spite of, and not in reliance upon, them. It may be true such false representations inducing a policy of life insurance to issue would be regarded as continuing representations to induce the payment of the money in case of death of the injured, when their falsity was not learned till after the money was paid. But if before the money was paid, and while its payment might have been successfully resisted, the insurer learns of the falsity of the representations, then it can not say it paid the money relying on their truthfulness, because it did not.

It was not and could not have been misled by a statement which it knew to be false. The demurrer was sustained to the petition because it showed that appellant's loss was not because it was misled by appellant's statements into paying the money. To attempt to deceive is wrong; but if it is not successful to the point of causing the loss, it is *damnum absque injuria*.

Petition overruled.

DALMAZZO v. SIMMONS, &c.

(Filed January 26, 1904—Not to be reported.)

Wills—Where S. devised his property to his brothers and sisters, but provided that the portion of his eldest brother should be held in trust by him for the benefit of his child or children, Held—That the purchaser of the portion of this brother after it had been allotted to him did not take a fee-simple title, but that the children of this brother in an action against the purchaser to recover their interest and to have the deed corrected to that extent were entitled to such relief and that appellant, the purchaser, can not rely upon his plea that he was an innocent purchaser as he was bound to take notice of the facts disclosed by the records, the will of S. having been properly proven and admitted to record in the county of his residence, as required by section 4849, Kentucky Statutes.

C. T. Atkinson for appellant.

John T. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Burnam.

Joseph G. Simmons, Albert Simmons, Lillie Simmons, Nathan R. Simmons, William S. Simmons and George W. Simmons, Jr., held the fee-simple title to five tracts of land in Nelson county, which aggregate 710.75 acres, subject to the life estate therein of George M. Hays and his wife, Margaret Hays. None of them, however, resided in Nelson county prior to 1884. One of them, Albert, died a citizen and resident of Bullitt county in the year 1881, leaving a will which was duly probated in the Bullitt County Court, which reads as follows:

"I, James Albert Simmons, of Bullitt county, Kentucky, being in bad health, but of good mind and memory, deem it my duty as well as my privilege to make such disposition of my worldly affairs as I may deem best for my sisters and brothers, namely, Lillie Simmons, Joseph Simmons, Nathan R. Simmons, Willie Simmons, George W. Simmons, Jr. It is my will and desire that they shall have all of my property, both real, personal and mixed, and share equally in the distribution of my effects. That portion of my property that shall fall to my oldest brother, Joseph G. Simmons, it is to be held in trust by him for the benefit of his child or children. He is, however, to have the rents and profits of same so long as he shall live, to help to support him during his natural life. Lastly, I hereby constitute my father, George W. Simmons, executor of this my last will, and also empower him to act as guardian of Nat, Willie and George during their minority.

"This 7th of October, 1878.

(Signed) "ALBERT SIMMONS.

"Witnessed: J. B. MORRIS."

After the death of George M. Hays and his wife, Peggy Hays, the life tenants, Joseph G. Simmons, Nat R. Simmons, Lillie H. Simmons and William W. Simmons brought an action against their infant brother, G. W. Simmons, in the Nelson County Court for a partition of these five tracts of land, into five equal parts. There was allotted to J. G. Simmons, as his one-fifth interest therein, a tract of seventy-five acres and a deed for the fee-simple title was duly executed to him.

He took possession of it and moved his family thereon, and resided there until the 25th day of January, 1898, when he and his wife sold and conveyed this seventy-five-acre tract of land to W. J. Delmazzo in fee-simple with covenant of warranty in consideration of \$1,800, paid cash in hand. On the 10th of January, 1903, the appellee, Maggie May Simmons, a daughter of J. G. Simmons, and J. G. Simmons as trustee for his five children, Maggie, Lowdy, Courtney, Lillie and Sarah Simmons brought this action against the appellant, W. J. Delmazzo to recover from appellant one-sixth of the seventy-five acres, claiming the ownership thereof under the will of their uncle, Albert Simmons, and to have the deed to appellant corrected to that extent, and also to recover one-sixth of the rents and profits for the use of the land during the time that it had been in the possession of appellant.

Defendant, in his answer, plead, first, that he was a bona fide purchaser

of the land for value without notice of the will of Albert Simmons; second, that under the will of Albert Simmons, J. G. Simmons was entitled to use of the interest devised to him during his life, which fact he plead in support of the claim for the rent or use of the property; third, he alleged that each of the children of J. G. Simmons and his wife had died in infancy subsequent to the will of Albert Simmons; that each of these children was vested at their birth, with a one seventh interest in the land in controversy; and at their death their shares descended to their parents, Joe G. Simmons and Mary M. Simmons, one-half each, and was covered by their deed to him. He also plead that Joe G. Simmons had made improvements upon the land subsequent to its allotment to him, which had increased its saleable value at least \$634, which he claimed should be ratably taken from the interest of the infant plaintiffs. It was adjudged by the circuit court that Joe G. Simmons owned a life estate under the will of his brother, Albert, in one-sixth of the land, and that it was included in the conveyance to appellant; and that he and his wife inherited the fee-simple title to the interest of their two children, who died in infancy, and that this interest passed by their deed to the appellant; that appellant was entitled under his deed to the use and occupation of the seventy-five acres during the life of J. G. Simmons, and that the death of J. G. Simmons, his five children would be entitled to five-sevenths of this one-sixth. The defendant, Delmazzo, has appealed, and plaintiffs prosecute a cross appeal. Appellant insists that the children of J. G. Simmons are chargeable with his negligence and fraud against his rights as an innocent purchaser for value; and that they have lost, in consequence thereof, the land willed to them by their uncle; second, it is claimed that as the will of Albert Simmons was not recorded in Nelson county, where the land was located, that their claim to the land in controversy is equitable, and that in this contest between equities, he has the better one.

We can not concur in either contention. The will of Albert Simmons was properly proven and admitted to record by the county court of the county of Nelson, at his residence, as required by section 4349 of the Kentucky Statutes, and vested in the children of J. G. Simmons, living at that time or when they subsequently came into existence, a vested interest in remainder subject to the life estate devised to their father; and they were not divested of this interest either by the partition suit in the Nelson County Court to which they were not parties, or by the deed from Joseph G. Simmons and wife to the appellant, Delmazzo. He was bound to take notice of the facts disclosed by the record. They show that this land had been conveyed to George W. Simmons and his wife, Margaret E. Simmons, by G. M. Hays and wife; that there was no subsequent conveyance by Margaret Hays of her interest; and that George W. Simmons had conveyed his interest to each of his six children, Albert included. These facts were sufficient to give appellant notice of the interest of Albert Simmons, and ordinary prudence on his part would have suggested an examination of the records of the county in which he died for the purpose of ascertaining whether he had made disposition of his interest by his will. It certainly can not be fairly contended that these infants should lose the provision made for them by the will of their uncle by the negligence of appellant or the fraud or carelessness of their father.

Counsel for appellees has made a very ingenious argument to show that the interest of the children of J. G. Simmons is a defeasible fee and not a fee simple. Section 2843 of the Kentucky Statutes provides: "Unless a different purpose appear from the express words, or necessary inference, every estate in land created by deed or will without words of inheritance shall be deemed a fee simple, or such estate as the grantor has the power to dispose of."

In construing provisions of wills containing provisions similar to that of Albert Simmons, this court has uniformly held that the interest in remainder was a fee simple unless the remainderman died after the execution of the will prior to the death of testator. (*Baxter, &c. v. Isaacs*, 24 Ky. Law Rep., 1618, and the authorities there cited.)

As the judgment of the circuit court is in conformity with the conclusions here reached, it is affirmed.

FITCH, &c. v. DUCKWALL, &c.

(Filed January 26, 1904—Not to be reported.)

1. *Liens*—Appellant in asserting a lien upon a lot arising upon the assignment to her in a family litigation of some notes, established the fact that the assignment was made to her by her father and that the consideration was paid by him to the payee, the lien should have been adjudged in favor of appellant.

2. *Same*—Homestead—A debtor may sell his homestead and reinvest the money in another, and the latter will not be subject to general debts to which the former was not, but he can not sell his homestead and convert it into personalty and use it in trading for an indefinite time, and then invest that in another homestead and claim it as exempt from his antecedent debts.

M. A., D. A. & J. G. Sachs for appellants.

John S. Jackman for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge O'Rear.

Fitch and wife executed a mortgage on his lot to Brierly in 1881 to secure two notes of \$1,500 each. The notes were some years afterwards assigned by Brierly to W. A. Duckwall, who was the father of Mrs. Fitch. W. A. Duckwall died in 1893, and his executor, by the consent of all his devisees, and in a settlement of a family litigation among them, assigned these notes to Mrs. Fitch. After that, appellee Fred Duckwall brought this suit and attached the property covered by the mortgage, claiming that Fitch had in fact paid it off before the attempted assignment to his wife; and that the assignment to her was without consideration; that the mortgage was transferred to W. A. Duckwall by collusion with Fitch to defeat and delay the latter's creditors; and that Mrs. Fitch knew those facts when she took the assignment.

B. F. D. Fitch and D. T. Duckwall, the executor of the will of W. A. Duckwall, and the principal devisee therein, who is also the brother of appellant, Mrs. Fitch, testified concerning that transaction; that the original mortgage to Brierly was executed for a full valuable consideration is not

denied. But it is asserted that Fitch, with his own means, paid it off to Brierly, thereby extinguishing the debt and lien; and if that was so, his delivery of it afterward to W. A. Duckwall could not give it any validity as creating a lien on the property.

D. T. Duckwall, who showed considerable feeling, and took quite an active and unnatural part in the case against his sister and her husband, testified that he knew that Fitch paid off the Brierly mortgage with his own means because he saw him do it, and knew where he got the money used for that purpose. He fixes the time and place, and names those present. None of those were living when this suit came to be tried, except D. T. Duckwall and B. F. D. Fitch. The latter testified that he was not present, and did not furnish the money, or any of it, to pay off the debt; that he was very much pressed for money, even for necessities, and was hopelessly insolvent, and that W. A. Duckwall, who knew the situation, bought in the mortgage notes and held them to save his daughter her home. It is shown conclusively that Col. W. A. Meriwether wrote the assignment of the notes. He testified that he wrote the assignment and remembered the transaction; that it occurred in his office, and not at the place fixed by D. T. Duckwall; that neither D. T. Duckwall nor B. F. D. Fitch were present; that the consideration was paid to Brierly by W. A. Duckwall in the presence of the witness.

In the record is the assignment of the notes by D. T. Duckwall, as executor of W. A. Duckwall, to Mrs. Fitch, in part settlement and compromise of the suit attacking the will and D. T. Duckwall's interest under it. Nothing appears in that paper to discredit the validity of the notes and mortgage. This was all the evidence on this point. We think the weight of it is clearly with appellants, and the circuit court should have adjudged the lien in favor of Mrs. Fitch.

2d. The consideration for appellee's debt was labor done in 1873 to 1875. This was settled by a note dated 1877, and later reduced to a judgment. Appellant bought the lots in contest in 1876. He claims a homestead exemption from appellee debt. Before 1873 appellant owned a farm, which was his homestead. He claimed to have sold it, and reinvested \$3,000 of the purchase money in the lots in suit. As a matter of fact he invested the proceeds of the farm in business, in merchandising and trading; and later took the proceeds of that business and invested it in the lots on which the present home was built. A debtor may sell his homestead and reinvest the money in another, and the latter will not be subject to general debts to which the former was not. But he can not sell his homestead, and convert it into personalty, and use it in trading for an indefinite time, and then invest that in another homestead and claim it as exempt from his antecedent debts.

The circuit court properly denied the claim of homestead exemption in this case

3d. The debtor, Fitch, executed a general deed of assignment for the benefit of his creditors in 1894, before the enactment of the present statute on that subject. We are of opinion from the proof that his purpose was to hinder and delay his creditors, and that it gave grounds for the attachment of his property by creditors. The rights of the parties were fixed under the former statute. The act of March 16, 1894 (sections 74-96, Kentucky Stat-

utes), was not intended to be retroactive so as to disturb rights and liabilities incurred before its passage, although so far as the practice was concerned, the new act applied in winding up assigned estates.

The judgment of the circuit court is reversed and cause remanded, with directions to enter a judgment giving appellant, E. Laura Fitch, a lien on the attached property next in priority to the taxes and street improvement claims; then adjudge appellee a lien for his debt, interest and costs, and sustaining his attachment, and denying appellant's claim to homestead in the lots. And for any other necessary proceedings not inconsistent herewith.

O'REAR v. COMMONWEALTH.

(Filed January 27, 1904—Not to be reported.)

1. Criminal law—Continuance—Upon the calling of appellant's case for trial the announcement by the sheriff under a mistaken belief that no subpoena had been issued for his witnesses, when such subpoena had been issued and placed in the hands of the sheriff, and his regularly employed counsel being absent the court appointed counsel and directed the trial to proceed over his objection, it was error for the trial court to overrule a motion for a continuance upon appellant's filing an affidavit that the witnesses if present would testify that he was attempting to use his knife on Ed. Jackson in his self defense, and that Bertie Page was stabbed accidentally, the charge against him being for cutting and wounding Bertie Page with the intent to kill her.

2. Same—Instructions—Where upon a trial for cutting and wounding with intent to kill, defense is made that he was striking at one in self defense and accidentally struck another, an instruction should be given to the effect that if he so struck in self-defense and wounded another he can not be found guilty of maliciously stabbing such other person.

Moury Kemper for appellant.

N. B. Hays for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

The defendant was indicted for maliciously cutting and wounding one Bertie Page with intent to kill her.

He was arrested in the month of August and confined in jail. On the 8th of September the court set the case for trial on the 11th of the same month. On the first-named date he obtained a subpoena for witnesses and placed it in the hands of the sheriff to be executed. On the day the case was called for trial the defendant's employed counsel was temporarily absent from the courthouse, thereupon the court appointed counsel for the defendant and ordered the trial to proceed over the objection of the defendant. When it was announced that the defendant desired his witnesses to be called the sheriff, under a mistaken belief, announced that no subpoena had been issued for his witnesses. After the jury had been sworn defendant's employed counsel appeared and moved the court to set aside the swearing of the jury and continue the case and the court overruled the motion, the Common-

wealth's attorney, so far as the record shows, did not consent that the de-
posit should be read as the deposition of the absent witnesses.

The testimony of these absent witnesses would have tended to show
the defendant was attempting to use his knife on Ed. Jackson in his r-
sary self-defense; and that Bertie Page was stabbed accidentally by the
defendant. The court evidently overruled the motion for continuance
the theory that the defendant did not use due diligence to procure the at-
tendance of his witnesses.

On the 8th day of September, after a day had been fixed for the tri-
al of the case, the defendant only had three days in which to procure the at-
tendance of his witnesses and he promptly procured a subpoena for them
placed it in the hands of the sheriff with an indorsement showing that
they did not live more than a mile from the courthouse. We are of the opi-
nion that he used proper diligence to procure the attendance of his witnesses,
and that the court erred in overruling his motion for continuance. As there
will be another trial of the case, the court suggests that an additional in-
struction should have been given. The claim of the defendant is that
he was striking at Jackson in self defense, and in doing that, if at all
he stabbed Bertie Page. If he struck at Jackson in self-defense, and in do-
ing so, he wounded her, he could not be found guilty of maliciously stab-
bing her. None of the instructions embrace this view of the case.

The judgment is reversed for proceedings consistent with this opinion.

UNITED LOAN AND DEPOSIT BANK OF CAMPBELLSBURG v. BITZER, &c.

(Filed January 27, 1904.)

1. Mortgages—Assignment—Where G. executed a mortgage on lots t-
and subsequently borrowed money from B. to purchase materials for s-
improvements with the agreement that he would assign over to B. the
tract with the city and all warrants to be received thereunder, and
assigned to B. all rights under the contract and all warrants to be rece-
ived thereunder, Held—That as to the mortgage executed to C., B. has no lien
on the land by reason of the apportionment warrant assigned.

2. Same—Where a warrant was received from a city for street impr-
vements on land mortgaged to another, such warrants directing the holder
to pay himself so much money, being both the payor and the payee of
the paper, could not by assigning it vest the right of action in the assignee
as to the land, and give him any lien as against third parties.

Carroll & Carroll and Wallace & Miller, for appellant.

Alfred Seligman for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First D-
istrict.

Opinion of the court by Judge Hobson.

On July 18, 1892, Michael Gleason executed to John I. Calloway his n-
ote for \$2,000, and a mortgage to secure it on some lots on Floyd street in
the city of Louisville. The note and mortgage were assigned by Calloway
to the appellant, the United Loan and Deposit Bank, who filed this suit to en-
force the payment of the note.

its lien. Peter Bitzer was made a defendant to the action, and set up the fact that Michael Gleason, in the year 1898, made a contract with the city of Louisville for the improvement of Floyd street between the center line of Magnolia avenue and the center line of Burnett avenue; that upon the execution of this contract Gleason desired to borrow money from Bitzer to purchase the necessary materials, and to pay for the work required in the construction of the improvement as provided by his contract; that with the express agreement between him and Gleason that Gleason should assign over to him the contract with the city and all the warrants to be received thereunder, Bitzer advanced to Gleason in money the full value of the contract and of all warrants to be received thereunder and Gleason assigned to Bitzer all his rights under the contract and all money and warrants to be received thereunder, of all which the city of Louisville had due notice; that under Bitzer's supervision and by his direction and with his means and money the improvement was made; that Bitzer paid with his own means for all of the material used in and the work done on the improvement; that Gleason did not furnish any of the material, or pay for any of the material or work, but the improvement was wholly constructed by Bitzer and at his expense; that three warrants were issued by the city for the cost of the improvements which was chargeable to Gleason's property, and these warrants were issued to Bitzer. On these facts Bitzer claimed a lien on the land for the amount of the warrants. A demurrer having been sustained to this pleading, Bitzer filed an amended pleading, in which he alleged that the improvement in front of the property of Gleason enhanced its value to the extent of its cost. The court thereupon overruled the demurrer to the answer as amended, and, the case being submitted for final hearing, entered judgment giving Bitzer preference over the mortgage executed to Calloway, and from this judgment the bank appeals.

We need not consider whether the allegations of the answer as amended were sufficient to entitle Bitzer to precedence over the mortgage. The allegations of the answer were aptly denied by a reply, and the only proof taken to sustain the allegations of the answer is the deposition of Bitzer himself and the deposition of his clerk, Wilkes. Exceptions were filed to the evidence of Bitzer on the ground that Gleason being dead, he could not testify for himself as to any transaction between him and Gleason. This exception was well taken. The testimony of Bitzer as to transactions between him and Gleason, who is dead, can not be considered, for he can not testify for himself under section 606 of the Code, as to a transaction with the decedent. (*Turner v. Mitchell*, 22 Ky. Law Rep., 1784; *Trail v. Turner*, 22 Ky. Law Rep., 100; *Murray v. East End Improvement Co.*, 22 Ky. Law Rep., 1477.) Wilkes states that he kept books for Bitzer; that Bitzer was the surety of Gleason in the contract; that Bitzer furnished groceries and money to Gleason to do the work with, commencing in the first part of April, 1898; that they were furnished under the agreement that Bitzer was to have an apportionment warrant for enough to cover the amount advanced, the arrangement having been made before the work was done or the advances made. He files with his deposition an itemized account running from April 11, 1898, to August 31, and footing up \$1,766.64. This he says is the correct account of the advances. The entire amount of Gleason's contract was

\$6,012.92. There were three warrants issued against the property of Gleason; one for \$119.19, another for \$1,631, and the third for \$182.91. All the other warrants, nineteen in number, appear to have been collected by Gleason or by E. F. Finley, his assignee. Only the three warrants against Gleason's own property appear to have come into the hands of Bitzer. These were directed by the city to be issued to Gleason, and were endorsed by Gleason to E. F. Finley, and by Finley to Bitzer. Each of them orders M. Gleason to pay to M. Gleason the amount therein specified for improving Floyd street from Burpett to Magnolia avenue. The warrant of the city in favor of Gleason on himself must stand as a note where the same person is both the obligor and the obligee. When Gleason received the warrant from the city directing himself to pay himself so much money, he, being both the payor and the payee of the paper, could not, by assigning it, vest any right of action in his assignee, or give him any lien on the land as against third parties. Thus where a note has been paid off, which is secured by a lien on land, the obligor can not again put it out in circulation and thus create a lien on the land as to third persons. If Gleason had continued to hold these warrants he could not have set them up himself as against the mortgage executed to Calloway and Bitzer as his assignee is simply substituted to his rights. (Allen v. Shadburn, 1 Dana, 68; Morrison v. Stockwell, 9 Dana, 172; Muhling v. Sattler, 8 Met., 285; Logan County Bank v. Barclay, 104 Ky., 97.) It is true Bitzer was Gleason's surety in the contract and he made advances to him upon the promise of an apportionment warrant. His account seems to consist in the main of merchandise to the hands or feed, and ran along from day to day in small amounts from April to August. By furnishing this money to his principal he stood in no different light than any other surety making advances to his principal, in carrying out the contract. The fact that Gleason promised to assign him an apportionment warrant to secure him does not help him when this promise was not carried out in the making of a valid assignment. This assignment by Gleason of the warrants payable to himself on himself was as to third parties in law no assignment. There is nothing in the case to sustain the allegations of the answer that Bitzer, as surety, took charge of the work and performed the contract at his expense. The authorities relied on for appellee are, therefore, inapplicable, and we have the case simply of a debtor assigning to his creditor for his security a paper which, as to third parties, was unenforceable. (Ryan v. Doyle, 79 Ky., 363; Thompson v. George, 86 Ky., 311.)

We, therefore, conclude that as to the mortgage executed by the decedent to Calloway, Bitzer has no lien on the land by reason of the apportionment warrant assigned to him by Finley.

The judgment is, therefore, reversed, with directions to enter a judgment in favor of the bank.

FRIEND, &c. v. MEANS.

(Filed January 27, 1904—Not to be reported.)

Liens—Instructions—Where appellee sold a tract of land reserving a lien for the unpaid purchase money, and it was sold under a judgment to satisfy a lien of a creditor of the vendee, the fact that the vendee sold a lot which

was included in the sale under the judgment, does not entitle the purchaser of that lot to maintain an action against the appellee, who was made a party to the sale for the purpose of requiring him to set up his original purchase-money lien, for damages resulting to her on account of the sale. Appellant was not made a party to the action because she had not put her deed to record and those in charge of the litigation had no knowledge of her interest.

D. W. Steele, Jr., for appellants.

Thos. R. Brown for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Barker.

The appellee, C. W. Means, sold a tract of land in Ashland, Boyd county, Kentucky, to a corporation known as the Ashland Improvement Co., reserving a lien for the unpaid purchase money, amounting to the sum of \$5,000. Subsequently, the corporation borrowed a sum of money from S. B. Buckner, and to secure payment of the debt, executed and delivered to him a mortgage upon the land in question.

Afterwards, it sold lot No. 6, in block 800, size 50 by 142½ feet on Fifteenth street, to A. C. Campbell, who sold it to appellant, Emma L. Friend. The latter, for some reason, failed to put her deed to record. The Catlettsburg National Bank instituted an action in the Boyd Circuit Court against the Ashland Improvement Co., seeking a sale of its property and effects. In this action, S. B. Buckner, on his petition, was made a party defendant, and sought, by cross petition, to enforce his lien against the property mortgaged to him, which included the lot involved in this action. To this cross petition, appellee C. W. Means was made a defendant, and required to set up his lien for the unpaid purchase money upon the lot and realty covered thereby, which he did. Appellant not having placed her deed upon record, was not made a party defendant to these proceedings.

Afterwards, the action proceeded to judgment, wherein appellee's vendors lien for the unpaid part of the purchase money due him, being the sum of \$5,000, was enforced, as well as the mortgage lien to Buckner, and a judgment rendered, decreeing a sale to satisfy the debts in question. In the sale so had, appellant's lot was sold to Robert Russell for the sum of \$150. Afterwards, Robert Russell received from appellant the sum of \$168.20, that being the amount of the purchase money paid by him, together with accrued interest and costs. In order to make this payment, appellant received \$85 from her remote vendor, the Ashland Improvement Co.; the balance, she furnished herself. Having settled with Russell, and in this way quieted her title to her lot, she instituted this action against appellee, substantially alleging the foregoing facts, and claiming that she had been damaged in the sum of \$1,050 (that being the amount paid by her to Campbell for the lot), by reason of the fact that he had wrongfully failed to make her a party defendant to the suit in which he enforced his vendor's lien, and praying judgment for the sum sued for. There is no basis in law for such an action as this.

On the agreed facts, appellant has lost only the difference between \$168.20, the amount she paid Russell, and \$85, the amount furnished her by the Ashland Improvement Co., or \$83.20; and her damage, in any event, does not

exceed that amount. Appellee was under no duty to make her a party defendant to the action in which he set up his vendor's lien, even if he had known she owned an interest in the land. No legal right of hers could be prejudiced in an action to which she was not a party, and properly before the court. That she was not made a party was due to the fact that she had not placed her deed to record, and those who were in charge of the litigation had no knowledge of her interest. If she had been made a party, she could not have fared better than she did, as, under the agreed facts, she had no defense, either to the vendor's lien of appellee, or the mortgage lien of S. B. Buckner.

Her only remedy for the loss she sustained is upon the warranties she holds from her immediate and remote vendors. This action is both unique and untenable; wherefore, the judgment, peremptorily instructing the jury to find in favor of the appellee, is affirmed.

NORTH v. ROGERS.

(Filed January 23, 1904—Not to be reported.)

Estoppel—Where appellee said to appellant that he was owing E. as much as E. was owing him, and that the balance of the purchase price of land would be settled that way, and appellant bought the land from E. upon the faith of the statement of appellee that he would look to E. for the payment of the balance of purchase price, under a pleading setting up these facts appellee is estopped from asserting a lien on the land sold.

J. A. Violet for appellant.

Ira Julian for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

On the 7th day of October, 1898, the appellee sold to J. H. Ethington a tract of land for the price of \$300. Ethington paid a part of the purchase price and executed several notes for the balance; two of the notes for \$173.33 each remain unpaid, for the recovery of which the appellee brought this action against J. H. Ethington, Green McCarty and appellant, Joseph North, Ethington having sold this land to Green McCarty, and he sold and conveyed it to appellant.

The appellee's petition was in the ordinary form by which he sought to enforce a lien for his unpaid purchase money upon the land of appellant. Appellant filed his answer to which a demurrer was sustained, then he amended his answer, and that part of it material to the question involved in this case is as follows: "Defendant says that the aforesaid conveyance was made by McCarty to him and before he had paid McCarty on said land and before the contract of purchase had been completed the plaintiff, Henry Rogers, said to this defendant that the defendant, Ethington, was at that time sawing him (the plaintiff) a large bill of lumber, the sawing of which would about come to as much as Ethington was owing him on that land, and that whatever Ethington owed him would be settled by him in that way, and if defendant should buy said land from this McCarty and pay

for same, if he desired to do so, and that he, the plaintiff, would give him no trouble, and would not look to him for the payment of the unpaid purchase money on said land, if any, but would look to Ethington and make his payments out of him and not either he or McCarty. Defendant says that relying upon said statements of the plaintiff that he would look to Ethington and not to him, and that the plaintiff would give him no trouble about said land he bought the tract of land from McCarty in the presence of plaintiff, and made the first payment thereon to McCarty in his presence, and that McCarty then and there offered to pay to the plaintiff and tendered him the money in any sum the defendant then owed him, and the plaintiff refused to take said sum or any part thereof, and said again that he looked to Ethington and not to either of these defendants. Defendant says that on the 1st day of March, 1902, when his second payment was due to the defendant, McCarty, he went with the defendant McCarty to the plaintiff and paid the said McCarty the second payment in the presence of the plaintiff, and the said McCarty again offered to pay the plaintiff any sum that was due from Ethington to him on said tract of land at that time, and the plaintiff refused to accept said money, or any part thereof.

"Defendant says that before he paid the said McCarty the last payment, he offered to pay the plaintiff the said sum, but he failed and refused to accept same or any part thereof from him. Defendant says that relying upon said statements and conduct of the plaintiff in telling him that he would not bother him or look to him for the money or the said McCarthy, and he refusing to take said payments, he purchased said land and paid therefor the money paid thereon, and all that is due the defendant, McCarty, and all with the exception of \$350, \$100 of which is now due, and remainder will be due on the 1st day of March, 1903."

"He did not know that Ethington was indebted to said Rogers. Defendant says that by all of which Henry Rogers is estopped to assert any lien against his land for the payment of the debt against Ethington and McCarty, and is estopped to have said land sold." To this amended answer the lower court sustained a demurrer. The statements in this amended answer by demurrer are admitted to be true. These allegations being true it is impossible for us to see how in equity and good conscience the appellee is entitled to enforce a lien on appellant's land, unless it be by subrogation to the rights of Ethington and McCarty. Under this pleading he is certainly estopped from the recovery of any greater sum than \$350, and then only for such interest as North agreed to pay McCarty.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

DONNELLY v. DONNELLY.

(Filed January 27, 1904—Not to be reported.)

1. Divorce—Alimony—While this court has no jurisdiction upon appeal from judgment granting divorce, yet it will look into the merits of such judgment for the purpose of ascertaining whether an award of alimony is proper.

2. Same—Where the evidence is not sufficient to authorize the judgment

for divorce, it was erroneous to award alimony, but a fee of \$250 to the attorney who brought the suit where such allowance is supported by sufficient evidence will be upheld.

W. P. Sandidge and John S. Rhea for appellant.

E. B. Drake for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellee for an absolute divorce from her husband, the appellant, on the ground of adultery. By amended petition, she set up the additional ground of cruel and inhuman treatment, but, as no effort was made to substantiate this, it may be dismissed from further consideration.

Appellee left the home of her husband upon the ground mentioned in her pleading, and notified him of her determination never to return. Upon final trial the chancellor awarded appellee a divorce a vinculo matrimonii, the sum of \$750 alimony, and to her counsel the sum of \$250 as attorney's fee. As this court has no jurisdiction to entertain an appeal from a judgment granting a divorce, appellant has appealed from so much of the judgment as awards alimony and attorney's fee. We have often held, that, while we have no jurisdiction of a judgment granting a divorce, yet, we will look into the merits of the judgment for the purpose of ascertaining whether or not the award of alimony is proper, and, if it be found that there was no legal basis for the divorce, the award of alimony would be reversed. (Lee v. Lee, 1 Duvall, 197; Beall v. Beall, 80 Ky., 675; Woolfork v. Woolfork, 17 Ky. Law Rep., 20)

While entertaining the highest respect for the opinion of the chancellor, we are utterly unable to preceive upon what evidence the judgment of divorce is predicated. There was no testimony on this subject which could, at best, more than rise a suspicion of improper conduct, and, without going into the matter in detail, we can say that a careful reading establishes the conviction that appellee wholly failed to prove the allegations of her petition. The letters, which were introduced, were incompetent, as there was no evidence as to who they were written by, or that they were addressed to, or received by, appellant. Appellant's daughter, whose testimony was the medium for the introduction of the letters in question, could only state that they were shown to her by appellee; she did not know who wrote them, that her father had ever received them, or where appellee obtained them. One would hold his character by a precarious tenure, if it could be broken down by such evidence as these letters afford, coming in the questionable shape they do: and especially is this true, where the law seals the lips of him at whom they are aimed, and, in this way, would place him at the mercy of appellee, if she chose to concoct and introduce them against him. There having been no foundation laid for the introduction of the letters, they were incompetent. We are of opinion that the court erred in granting the divorce, and, this being true, it was also erroneous to award alimony. The sum of \$250 allowed appellee's counsel seems to have been established by sufficient evidence, and is not excessive in amount. This part of the judgment is correct. (Section 900, Kentucky Statutes; Whitney v. Whitney, 7 Bush, 620.)

Wherefore, so much of the judgment as allows to appellees' counsel a fee is affirmed; so much, as awards her alimony, is reversed.

DEARING, &c. v. MORAN.

(Filed January 27, 1904—Not to be reported.)

1. Wills—Debts of devisor—Where the devisor of lands owed for services for nursing her while she was sick, the devisee can not claim a homestead in the land as against the debts of the testatrix from whom he acquired it.

2 Where one takes under a will he must do so with concomitant burdens. He can not claim under the will and against it.

Baird & Richardson for appellants.

Luther James and C. H. Hatchett for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hobson.

Rebekah J. Dearing, while sick, was taken to the house of appellee, J. T. Moran, and was nursed and taken care of by him until her death, about two weeks later. She left a will, by which she devised all her property to appellant, E. B. Dearing, who about a month afterward married his co-appellant, Pernie Dearing.

The property devised consisted of a tract of land which E. B. Dearing has since conveyed to his second wife. Moran brought this suit to recover for the nursing of and attention to the first wife during her last sickness and to subject the land to his claim. The court allowed him \$40 for his services, and ordered the land sold for its payment. From this judgment Dearing and wife appeal. While the evidence is conflicting the weight of it sustains the chancellor's judgment. It shows that the services were reasonably worth the amount allowed, and that they were rendered upon promise of compensation. While the petition was defective in not alleging such promise or facts from which a promise would be inferred, this defect was cured by the answer and reply which made a direct issue on the question whether the services were gratuitous. E. B. Dearing can not claim a homestead in the land as against the debt of the testatrix from whom he acquired it. He takes the land under the will of his wife. It is true that as surviving husband he would be entitled to a life estate in the land, but he can not claim under the will and against it. He conveyed the land to his wife, Pernie, as the owner of it and thereby evinced a purpose to take under the will. When he takes under the will he must take with concomitant burdens. The land was assets of the estate. The facts warranted the chancellor in concluding that the testatrix agreed to pay Moran for his services. While it was his duty to take care of his wife, she could also contract for nursing and thus secure herself such comforts as she needed. The devisee takes the property devised to him subject to the debts of the testator and the voluntary conveyance by E. B. Dearing to his present wife, Pernie, is no bar to the prosecution of the claim. (*Carpenter v. Hazelrigg*, 20 Ky. Law Rep., 231; *Harrison v. Taylor*, 21 Ky. Law Rep., 287; *Schnable v. Schnable*, 22 Ky. Law Rep., 234.)

Judgment affirmed.

GLEASON v. KENTUCKY TITLE CO., &c.

(Filed January 27, 1904—Not to be reported.)

Judicial sales—Inadequacy of price—Upon a suit to enforce a mortgage lien where no notice of service of process was taken by defendant, where the property sold for greatly less than its appraised value, and where the price it sold for was grossly inadequate, where he was an ignorant man and it appears relied on his agent to attend to the matter, the surrounding circumstances are such as afforded ample grounds for the interposition of the chancellor and the sale should have been set aside.

B. F. Washer for appellant.

Ed. M. Louis for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The appellant, Stephen A. Gleason, owned a lot on Smyser avenue, in Louisville, Ky., being 137 feet front by 140 feet deep, upon which he had erected five cottages, and which is shown to be worth from \$4,500 to \$5,000. To secure an indebtedness of \$1,236, this property was mortgaged to the Kentucky Title Co. Appellant having made default in payment, the company instituted this action to enforce its lien. Although properly served with process, appellant, for some reason, took no notice of the action, until after judgment and sale. The property was purchased by appellee Solomon Bloom, for the sum of \$2,167. Prior to the sale, it was appraised at \$3,250.

Appellant filed exceptions to the sale, first, because of the inadequacy of the price; second, because the judgment was ordered to be executed immediately, without any reason therefor; third, the property was sold as a whole, when it was susceptible to division without impairing its value. These exceptions were overruled by the court, and the motion of the purchaser to confirm the sale to him was sustained; from which orders this appeal is prosecuted. The record shows appellant to be a hard working, ignorant man, wholly unused to the methods of legal procedure, never before having been engaged in litigation. He seems to have taken no notice of the action against him, and allowed the proceeding to go on without any supervision or attention on his part, or without employing counsel so to do. It appears that the first time he looked into the matter was after the sale had taken place; he did not know, as a matter of fact, that the sale was ordered, and did not attend to protect his interests. There seems to have been some misunderstanding between him and his agent on this subject, he, evidently, thinking that his agent would attend to the matter, as he did to the collection of his rents, and the repair of his houses.

The price realized at the sale was grossly inadequate to the real value of the property, and, while we adhere to the rule so often announced, that judicial sales will not be set aside for mere inadequacy of price, yet, we think the surrounding circumstances in this case afforded ample ground for the interposition of the chancellor: it having always been the rule that while inadequacy of price, alone, is not sufficient ground to set aside a sale, if there be other elements of substantial hardship, or irregularity, the court will seize upon them in order to prevent spoliation.

That the property in question was susceptible of division needed no evidence. It was 137 feet front by 140 feet deep, and had five separate cottages, each with a lot of 27 feet front. To sell this property as a whole, manifestly worked a great injustice upon appellant. Purchasers who have large sums to invest in real property, as a rule, do not buy cottages; whereas, purchasers who desire cottage property, are not, generally, able to buy five at a time; thus, the very persons who would have been most apt to invest in the property in question, had it been sold in separate lots, were, by the conditions of the sale, excluded as bidders.

This case seems to come within the pale of the principle announced in *Van Meter v. Van Meter*, 80 Ky., 448, and, for the reasons stated in that case, the judgment in this is reversed for proceedings consistent herewith.

TIPTON v. COMMONWEALTH.

(Filed January 27, 1904—Not to be reported.)

Criminal law—Evidence—Where appellant was convicted under an indictment charging him with the crime of breaking and entering a railroad car and feloniously stealing and carrying away therefrom "four railroad brasses," the testimony conducing to show that appellant was one of three men seen to go to the car just before it was robbed, and was seen to leave it just after it was robbed of the brasses, the judgment was authorized.

J. P. Edwards for appellant.

N. B. Hays, Attorney General, and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Chief Justice Burnam.

The appellant, Richard Tipton, James Kerr and James Sullivan were indicted by the grand jurors of Jefferson county of the crime of breaking and entering a railroad car of the Illinois Central Ry. Co., and feloniously stealing and carrying away therefrom "four railroad car brasses."

The separate trial of the appellant, Richard Tipton, resulted in a verdict and judgment fixing his punishment at three years' confinement in the penitentiary, and he has appealed and asks a reversal upon three grounds, first, because there was no competent evidence conducing to show guilt, and the refusal of the trial court to direct a jury to find him not guilty.

Three witnesses were introduced in chief by the Commonwealth. M. J. Owens, a private watchman of the railroad company, testified that a caboose car belonging to the company in its yard at 14th and Kentucky streets was broken into on the 14th of May, 1902, and some car brasses taken therefrom.

William Cockerell, also an employe of the company, testified that he had heard that the caboose had been broken into; that he saw three persons crossing the yard and suspecting them of the crime, followed them to the coal yard of Byrne & Speed; that one of them went down the alley and two into the yard; that these parties dropped the brasses which had been stolen from the caboose inside of the gate leading into the coal yard about 3:20 in the afternoon of the 14th of May, 1902. Charles Pendleton testified that he saw the appellant, Tipton, James Kerr and James Sullivan cross the yard

of the Illinois Central Ry. Co., in the afternoon of the 14th of May, 1902, going in the direction of the caboose which was robbed; and that eight or ten minutes afterwards he saw them running back pursued by Mr. Cock-erell, who was a short distance behind them; that he recognized each of them as the same men he had seen crossing the yard a few minutes before.

At this point the Commonwealth closed its testimony in chief, and the attorney for defendant asked the court to direct a verdict of not guilty, which was properly overruled, as the testimony appeared sufficient to warrant a conviction of the defendant. This court has uniformly decided that under section 340 of the Criminal Code, it had no power to reverse a judgment of conviction in a criminal case upon the sole ground that there was not sufficient evidence before the jury conducting to show the guilt of the accused. (*Vowels v. Commonwealth*, 83 Ky., 193; *Tipper v. Commonwealth*, 1 Met., 6; *Patterson v. Commonwealth*, 86 Ky., 313.)

The appellant then testified that he was not in the city of Louisville on the 14th of May, 1902, and did not commit the offense; that he was not arrested on this charge until May, 1903, and that after his arrest he was tried in the police court and discharged. The Commonwealth then offered in rebuttal officers, Cook and Hessian, who testified that when they arrested appellant in April or May, 1903, that he said at the time to them: "What are you arresting me for? That old charge of breaking into an Illinois Central Caboose, away back in May, 1902." That they answered 'Yes.' And that appellant then said: 'If you arrest me on that charge, you will have to arrest James Kerr and James Sullivan, too.'

This testimony was objected to and is made the basis of a claim for reversal on two grounds, first, that if competent at all, it was substantive evidence and should have been offered in chief; second, that if admitted it was only competent upon the theory that it was a confession of appellant, and that the trial court erred in not instructing the jury as to confessions out of court, as required by section 240 of the Criminal Code. There is no admission of guilt in the statement of appellant testified to by the officers; on the contrary, it scouts at the idea of his guilt. If it tended to prove any fact or was competent for any purpose, it was to show that appellant knew at the time of his arrest in April, that he had been previously charged with the crime for which he was arrested. Upon the whole case we have found no error of law prejudicial to the substantial rights of the defendant.

Judgment affirmed.

SIGHTS V. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 27, 1904.)

Railroads—Damages—Where a city ordinance requires the presence of a flagman at a railroad crossing to give warning of the approach of train, the failure of a railroad company to give the customary signals at such crossings is actionable negligence.

2. Same—Instructions—Evidence—Where the evidence showed appellant was in a buggy driving in the direction of the crossing and when near it not seeing the flagman in the street concluded it was safe to approach the crossing, but when within fifteen or twenty feet of it, the engine, without warning, made its approach and emitted a succession of violent and unusual

noises, frightening appellant's horse, causing it to run away throwing appellant from his buggy and breaking his leg, it was sufficient to show negligence and a peremptory instruction to find for defendant was not authorized, but the question should have been submitted to the jury.

Clay & Clay for appellant.

Yeaman & Yeaman and B. D. Warfield for appellee.

Appeal from Henderson Circuit Court

Opinion of the court by Chief Justice Burnam.

The appellant, A. B. Sights, brought this suit against the appellee for damages for a broken leg, which he alleges was occasioned by his horses taking fright and throwing him out of his buggy in consequence of the negligence of appellee's servants in charge of one or other its trains in the city of Henderson. Appellee filed a general demurrer to plaintiffs' petition, which was overruled. They thereupon filed an answer, which was a traverse and a plea of contributory negligence. The trial court gave the jury a peremptory instruction to find for the defendant at the conclusion of plaintiff's evidence, and he has appealed.

The alleged acts of negligence on the part of the defendant consisted in driving its engine across one of the most frequented streets of the city of Henderson without giving any signals of its approach, and in the failure of their flagman, who was stationed at the crossing in conformity of one of the ordinances of the city of Henderson, to give them warning of the approach of the engine until too late to avoid the injury; third, in causing the engine to emit violent and unusual noises when close to and in front of plaintiffs' horses. The testimony of appellant, which was corroborated by that of Mr. Johnson, who was driving with him, was to the effect that the railway company had maintained at their crossing of Second street in the city of Henderson, in conformity with the requirement of a city ordinance, a flagman, whose duty required when trains were approaching the street, that he should stand in the middle thereof and give notice of their approach to travelers, by waving his flag; that a small house had been erected between the tracks of the L. & N. R. R. Co., and those of the I. C. R. R. Co., for his accommodation, and when the way was unobstructed, he usually retired to his house; that on the date of the accident appellant was riding in a buggy pulled by two horses, which were being driven by Mr. Johnson along Second street in the direction of the railroad crossing; that when they arrived at within two hundred yards of the crossing they discovered an engine backing a train across the street south, and they stopped their horses and remained standing until the entire train had disappeared behind a train of box cars which were standing upon the track; that after the train passed out of view, not seeing the flagman in the street, they concluded that it was safe to approach, and drove their horses slowly and cautiously toward the crossing; that when they had arrived at within about fifteen or twenty feet of the track of the I. C. R. R. Co., they saw the flagman standing near his shanty on the side of the street with his back to the railroad and his flag across his shoulders; holding it with both hands; that suddenly and without warning of its approach the engine reappeared from behind the train of box cars, and simultaneously with its appearances the engine emitted a succession of vio-

lent and unusual noises; and that at this time for the first time, the flagman began to waive his flag; that their horses became frightened at the noise of the train and immediately turned around, throwing appellant out of the buggy and running away; that as a result of the accident appellant's leg was broken and he was for some time confined to his house and unable to perform his duties.

This court has frequently held that it is the duty of a railroad company, in running its trains through a city, to give the usual and customary signals of its approach to street crossings; and that a failure to do so was actionable negligence. (*L. & N. R. R. Co. v. Penrod's Adm'r*, 22 Ky. Law Rep., 73, and the authorities there cited. "And when gates or a flagman have been maintained by railway companies at the crossing of streets in cities and towns, the public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties, and it is not negligence on their part to act on the presumption that they will not be exposed to a danger which could only arise from the disregard of his duties; and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine was approaching a crossing without giving some signal of danger." (*Evans v. Lakeshore & M. A. R. Co.*, 41 L. R. A., 228; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich., 374; *Glushing v. Sharp*, 96 N. Y., 676; *C. C. C. & I. R. Co. v. Schneider*, 45 Ohio St., 687; *Woehle v. Minnesota Transfer Co.*, 52 L. R. A., 348.)

It seems to us that it would be a very narrow construction to hold that the purpose of a flagman was solely for the purpose of preventing collisions upon the crossings, and not also to give notice to approaching vehicles drawn by horses of the danger which might arise from fright in the horses occasioned by suddenly coming in the immediate vicinity of engines. However, we do not mean to hold that an individual approaching a crossing of this character can rely exclusively upon the railway company doing its duty as to giving signals. He is bound to be on the lookout himself and to exercise ordinary care to prevent accidents. But we have reached the conclusion in this case that the demurrer was properly overruled, and there was sufficient evidence of negligence on the part of the defendant to have authorized the submission of the case to the jury.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

METROPOLITAN LIFE INSURANCE CO. v. ASMUS.

(Filed January 28, 1904—Not to be reported.)

1. Insurance—Where appellee had paid premiums upon a policy upon the life of her husband, such policy being void because he was in ignorance of the existence of the policy, the contract was without consideration, she was entitled to recover in an action against the company for the amount of the premiums paid.

2. Same—Limitation—In an action to recover premiums paid to an insurance company, the plea of the statute of limitations will not avail where the fraud or mistake could not have been discovered by the exercise of ordinary diligence.

S. D. Rouse for appellant.

Cecil Pence for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellee to recover premiums paid by her from her own funds to appellant upon two alleged policies of insurance issued by appellant to appellee upon the life of her husband without his knowledge or consent. The first policy bears date of August 19, 1889, for the sum of \$200. The second policy for \$500 and bears date of May 26, 1890. Upon the first policy the premium was 40 cents per week and upon the second the premium was \$1 per week. She paid the weekly premiums on these two policies from their date to some time during the year 1902, when she, for the first time, discovered that they were void and of no effect for the reason that they had been procured without the knowledge and consent of her husband and that he was kept in ignorance of same until the last-mentioned date. She alleged that the defendant company, through its authorized agents, fraudulently induced her to take out these policies upon the life of her husband; that she did not know that the issue of these policies, under such circumstances, was a violation of the rules of the company and the law; that she was innocent of any intention to wrong the company or anybody; that the premiums she had paid on these policies amounted to more than \$900; that it was paid by her without any consideration; that the company knew all the time that the policies were void and that it was receiving her money without consideration.

The company answered, admitting the issue of the policies and the reception of the premiums as alleged, denied that she was innocent of any wrongful intent, but alleged that she and their agent, one Metz, combined to perpetrate a fraud upon the company, and that she forged the name of her husband to the two applications of insurance, and for this reason she was not entitled to recover the premium paid by her; that the same were forfeited to the company. It also pleaded the five and the ten years statutes of limitations. The appellee traversed the affirmative matter in this answer and in her pleadings alleged in avoidance of the ten years statutes of limitations that she could not, by the exercise of ordinary diligence, have discovered that the policies were void for the reason that they were obtained without the consent of her husband before the time she did discover it in the year 1902.

A trial was had before a jury which returned a verdict in favor of appellee for the sum of \$721.80, with interest. There was no evidence introduced except appellee and one or two witnesses in her behalf, who sustained the allegations of her pleadings. The appellant did not introduce any witnesses. At the conclusion of the evidence the appellant offered an instruction and requested the court to instruct the jury to find for appellee the amount of premiums paid by her within the five years next preceding the institution of her action. The court refused to give this instruction, but gave the following: "The jury is instructed to find a verdict for the plaintiff. If the jury believe from all the evidence, that the plaintiff failed to exercise such diligence as is ordinarily exercised by ordinarily careful and prudent persons

under the same circumstances and conditions, in ascertaining that the policies mentioned in the proof were invalid, then the jury should find a verdict in the sum of \$360.80. But if the jury believe from all the evidence, that the plaintiff did exercise such degree of diligence in so ascertaining, then the jury should find a verdict in the sum of \$721.80."

The appellant contends in its brief that the court should have given a peremptory instruction for the reason that she had signed the name of her husband to the application without his knowledge, consent or authority. It is evident from all the proof that appellee was innocent of any intentional wrong; that she did not commit a forgery in the meaning of that term. She was induced to do what she did by the agent of the appellant and she had the right to rescind the contract when she discovered the fraud and recover the premiums paid. (160 Mass., 386, the case of *Fisher v. Metropolitan Life Ins. Co.*)

It appears that about \$300 of the premiums paid by her were paid more than ten years before the institution of her action, which she failed to recover by reason of the plea of the statutes of limitations. The contention of appellant is that the judgment is erroneous in allowing a recovery for any part of the premiums paid by her more than five years next before the bringing of her action because she ought to have discovered that her policies were invalid in a short time after their issue.

Section 2519 of the Kentucky Statutes reads as follows: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

She alleged in her petition that she could not have discovered the fraud or mistake sooner than she did by the exercise of ordinary care and diligence. The court expressly submitted this question to the jury and told it that it could not find for her any sum for premiums paid prior to the five years next before the institution of the action unless it believed from the evidence that she could not have discovered the fraud or mistake before the time she did discover it. It is perfectly clear from the evidence that appellee paid those weekly premiums for twelve or thirteen years under an honest conviction that she held an enforceable contract against appellant and the question of her diligence was submitted to the jury and it found against appellant, and we do not feel authorized to disturb the verdict. (*Blesch, &c. v. Metropolitan Life Ins. Co.*, 23 Ky. Law Rep., 530, and the cases therein cited.)

Wherefore, the judgment of the lower court is affirmed.

VAUGHN v. DUFF.

(Filed January 28, 1904—Not to be reported.)

Mortgages—Priority of liens—Where under the proof this court is in doubt as to whether a mortgage was genuine or fraudulent, the judgment of the chancellor upholding that of appellee will not be disturbed.

J. Lewis Williams and Williams & Underwood for appellant.

Duff & Hutcherson and G. M. Bohannon for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

The only question in this case is priority of mortgage liens. The appellant and appellee each held a mortgage on the same property of J. A. Vaughn, a brother of appellant. Appellant's mortgage was executed September 8, 1900, and recorded March 14, 1901. Appellee's mortgage was executed January 29, 1901, and recorded January 30, 1901.

As appellant's mortgage was recorded first, appellee charged that it was fraudulent and was without consideration, and that appellant had actual notice of his mortgage before the execution and recording of his (appellant's) mortgage. The proof was heard and the lower court adjudged that appellee's mortgage was prior to that of appellant, and from this judgment appellant appeals. Appellant did not testify in the case. It appears from the testimony of J. A. Vaughn, the mortgagor, and Nat Nickols, the person who represented appellant in taking this mortgage, that it was made known to Nichols that appellee held a mortgage on this property before the mortgage to appellant was executed. Considering all of the proof in the case the mind is left in doubt as to whether appellant's mortgage was genuine or fraudulent, and we do not feel authorized to disturb the action of the lower court.

Wherefore, the judgment is affirmed.

HODGES v. METCALFE COUNTY COURT.

(Filed January 28, 1904—Not to be reported.)

1. Liquors—License to sell—Where an applicant for a liquor license outside of an incorporated city or town offered no testimony to show that he was either a merchant, druggist, distiller, or tavern keeper, in good faith, the county court properly refused the license.

2. Same—Appeal to circuit court—Upon an appeal to the circuit court from the judgment of the county court refusing a liquor license, it was the duty of the circuit court to have affirmed the judgment, or remand the case, with instructions to grant the license, but where the cause was remanded for a new trial the applicant had no ground of complaint because a judgment remanding the cause was more favorable to appellant than the facts warranted.

J. W. Kinnaird and M. O. Scott for appellant.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, S. B. Hodges, applied to the Metcalfe County Court at its February term, 1903, for a license to sell spirituous, vinous or malt liquors in quantities of not less than a quart at the residence of Allen Hodges.

He testified himself and showed by other witnesses that he had given notice of his application, as required by section 4203 of the Kentucky Statutes. The county attorney thereupon produced and filed a remonstrance signed

by forty-two legal voters in the neighborhood of the place where the liquor was to be sold against the granting of the application. Upon this testimony the motion was submitted and the county judge refused the license. Appellant prosecuted an appeal on a bill of exceptions to the Metcalfe Circuit Court. Upon the trial of the appeal in that court the judgment of the county refusing the license was reversed and the cause remanded, with directions to grant appellant a new trial.

The appellant objected to so much of this judgment as directed the county court to grant a new trial, insisting that the cause should be remanded, with directions to issue the license. On this appeal, he insists that the burden to show that a majority of the legal voters of the neighborhood had protested against his application was upon the representatives of the county, and this fact not having been established, he was entitled to the license applied for. We know of no statute authorizing county courts to license the sale of spirituous, vinous or malt liquors outside of an incorporated city or town, except as contained in subdivision 2 of article 10 of chapter 108 of the Kentucky Statutes, which are embraced in section 4203 to 4214 inclusive of the Kentucky Statutes. This statute only authorizes the granting of a license to tavern keepers, distillers and druggists and merchants.

Section 4203 provides: "License to merchants, druggists, or distillers shall be granted only upon satisfactory evidence that the appellant is in good faith a merchant, druggist or a distiller, and that the applicant has not assumed the name or the business for the purpose of retailing liquors."

In his application to the court, appellant offered no testimony conducing to show that he was in good faith either a merchant, druggist, distiller or tavern keeper. As we construe the law, the burden of showing these facts was upon him, and having failed to do so the county court properly refused the license applied for, and its judgment should have been affirmed. It was the duty of the circuit court upon this appeal to try and determine the question upon the bill of exceptions, and either to have affirmed the judgment of the county court or to have remanded the cause, with instructions to grant the license. As the judgment of the circuit court remanding the case for a new trial is more favorable to the appellant than the facts warranted, he has no ground of complaint.

We, therefore, conclude that the judgment should be affirmed, and it is so ordered.

HEATHER v. THOMPSON.

(Filed January 28, 1904—Not to be reported.)

1. Reward—Arrest of criminal—Where appellee who had discovered the whereabouts of a criminal for whom a reward had been offered, but fearing the criminal would escape if he undertook the arrest because he was known to him, procured another to make the arrest upon agreeing to pay him \$20 therefor, a verdict adjudging appellee entitled to all of the reward except expenses incurred by appellant in delivering the criminal to the jailer will not be disturbed.

2. Same—Duty of peace officer—Under section 26 Criminal Code, it is the duty of a peace officer making an arrest to do so without other reward than the fees allowed by law.

Hazelrigg & Chenault and L. A. West for appellant.

James Sparks and D. K. Rawlings for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

This controversy between appellant and appellee is over a reward of \$250 offered by the governor for the arrest of one Sol Griffin who stood indicted for murder, and was a fugitive from justice.

The reward is claimed by appellant, Wm. Heather, who actually arrested the alleged murderer, and also by the appellee, Geo. C. Thompson, by whose procurement the arrest was made. It appears that Judge Tinsley, United States District Attorney for the Eastern District of Kentucky, by letter to appellee acquainted him with the offer of the reward by the governor, and appellee took immediate steps to ascertain the whereabouts of Griffin, who was known to him as he was to Griffin, by visiting different counties and making inquiries of divers persons. He finally ascertained from an acquaintance in Clay county where he visited for that purpose, that Griffin was at work at a saw mill in Estill county. He then went to Irvine, the county seat of Estill county, and from the investigation made after getting there became satisfied that Griffin was in the county. As he was well known to Griffin he thought it best not to attempt his arrest himself as he would likely be recognized by the former before he could get near enough to seize his person. So he contracted with the appellant, who was marshal of the town of Irvine, to make the arrest for him, which appellant then undertook to do, for \$20. Fearing that Griffin would hear of his (appellee's) presence in the county, and would suspect the object of his visit, and thereby be enabled to effect his escape, appellee left Irvine for Richmond, this State, but left his address with appellant upon the latter's assurance and undertaking that he would arrest Griffin and inform appellee thereof immediately.

Appellant thereupon went on the following day to the mill where Griffin was at work and arrested him. After making the arrest he failed to notify appellee that he had done so, but having in the meantime telegraphed the governor and learned of the reward he started to London, the county seat of Laurel county, with the prisoner, intending to deliver him to the jailer, and himself claim the reward notwithstanding his agreement with appellee to arrest and deliver Griffin to him.

When appellant got as far as Richmond with the prisoner on the way to London, appellee learning of their being in the city, met them there, demanded of him the prisoner, offered to put his own handcuffs on, and proposed to pay appellant the \$20 for which he had agreed to make the arrest, and to pay the expenses incurred by the appellant and his assistant in making the arrest, but to each and all of these demands and offers the appellant returned a positive refusal, and ignoring appellee went on with the prisoner, though in appellee's company, to London where he delivered the prisoner to the jailer of the county who, over appellee's objection and protest, gave to appellant a receipt for him. It is manifest that the arrest of Griffin was made at the instigation of appellee. In fact he would not, in our opinion, have been arrested but for the investigation, industry and zeal of the appellee. It is, we think, equally clear that the appellant did not act

in good faith with appellee. He attempts to justify his conduct by the ~~claim~~ that appellee concealed from him the amount of the reward to be paid for Griffin's arrest, and the fact that it had been offered by the governor, but admits that he was informed by appellee that a reward had been offered, and that his object in making the arrest was to secure the reward. We fail to see how the concealment by appellee of the amount of the reward, or the fact that it was offered by the governor, could excuse appellant's violation of his contract with appellee, as he seemed entirely willing to make the arrest for \$20. Besides it does not appear that he demanded to know the amount of the reward or the source from which it emanated. He admitted that he was to make the arrest for \$30, but claimed that it was agreed upon for the arrest of a Tom Griffin instead of Sol Griffin, and that appellee made a mistake in the name of the criminal. Appellee denied that he gave to appellant Tom Griffin as the name of the criminal, and said that the mention of that name came first from appellant, and he, appellee, told him that Sol Griffin was the true name, but perhaps that person had changed his name to Tom Griffin to escape detection and arrest.

We are of opinion from the evidence that there was no misunderstanding between the parties, and that appellant knew from what appellee told him that Sol Griffin was the person to be arrested, and further that he ascertained on the day of his employment, and before appellee left Irvine, where Griffin could be found, yet concealed the fact from appellee in order to get him away from Irvine before the arrest was made. The lower court, upon all the evidence before him, adjudged that appellee was entitled to all of the reward except \$40, which sum was allowed appellant in payment of the amount agreed upon between him and appellee, when he was employed by the latter to make the arrest, and in satisfaction of the expense incurred by him in the matter of conveying the prisoner to London. We see no cause for disturbing this finding of the court, as it seems to be sustained by the evidence. In addition it may be said that under section 26, Criminal Code, it was the official duty of appellant, as marshal of Irvine, and a peace officer after undertaking the arrest of Griffin to do so without other reward than the fees allowed by law. Besides, the section of the Code, *supra*, section 8687, Kentucky Statutes, declares what duties shall be performed by marshals, and confers upon them all the powers as peace officers that may be exercised by sheriffs.

In *Marking v. Needy and Hatch*, 8 Bush, 22, it was held that a public officer whose sworn duty it was to make arrests will not be allowed to claim a reward offered therefor. And in the more recent case of *Rigley v. Grace*, 17 Ky. Law Rep., 1008, the rule was re-affirmed by this court. In the latter case the arresting officer was the marshal of the city of Springfield, and the arrest for which he claimed the reward was made some miles outside the corporate limits of the city of which he was marshal, yet as stated it was held that he was not entitled to the reward. While it seems to be the law that a marshal may arrest an offender against the laws of the Commonwealth any where in the county in which is situated the municipality of which he is an officer, we incline to the opinion that he can not be required to execute a warrant of arrest outside of the corporate limits of such municipality except for an offense against the laws thereof, but we are further of

opinion, however, that if he does agree to undertake to execute a warrant of arrest for a violation of the laws of the Commonwealth outside of the corporate limits of the city of which he is the marshal it will be deemed a waiver of his privilege to refuse it, and in that event he would be entitled to no other compensation for the services performed than the statutory fees.

Finding no error in the judgment of the lower court the same is affirmed.

ELLIS' ADM'R v. BLACKERBY.

(Filed January 28, 1904—Not to be reported.)

Personal representative—Where the administrator of Martha Ellis, deceased, sued appellee upon a note and it was averred in the petition that the note had been lost, and appellee set up that the note had been paid, that it had been delivered to her by the intestate, a judgment dismissing appellant's petition will not be disturbed, the note in the possession of appellee creating a presumption of its payment, which presumption was not overthrown by the evidence of appellant.

Leslie T. Applegate for appellant.

C. H. Fossett and John H. Barker for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Settle.

Appellant, as administrator of the estate of Martha Ellis, deceased, sued the appellee in the lower court upon a note of \$521.83, which she executed to his intestate May 4, 1887, and the payment of which was secured by a mortgage of the same date upon a house and lot in the town of Falmouth, Pendleton county, described in the petition.

It was averred in the petition that the note had been lost, but was not such an instrument as would pass by delivery, and that it was due and wholly unpaid. In the answer filed by the appellee it was averred in substance that the note was paid in full by her in the year 1895, with certain accounts and claims, that she held against the intestate upon which the latter was indebted to her, and which she took up in full satisfaction of the note. It was not, however, averred in the answer that the note was then delivered to her by the intestate, or that it was in appellee's possession when the answer was filed. A reply was filed to the answer simply denying the plea of payment.

At the next term of the court the appellee filed an amended answer in which it was denied that the note had been lost, and this denial was followed by the averment that the note was delivered to her by the intestate at the time of the settlement set out in the original answer, that it was in her possession, and the note was in fact filed with and made a part of the amended answer. By his reply filed to the amended answer the appellant denied that the note sued on was ever paid, or in any wise settled by the appellee, or that it was ever turned over to her by his intestate, or that appellee came into possession of same during the lifetime of the intestate. These denials are followed by the averment that appellee and the intestate were sisters, and that all the personal property of the intestate, including

her private papers were in the possession of appellee from the death of the intestate until the appellant qualified as administrator of the latter's estate, and that appellee, in that way, obtained possession of the note. No rejoinder was filed to the reply to the amended answer.

After the taking of proof by depositions the case was submitted to the court, and by the judgment rendered the petition was dismissed, and the appellee allowed her costs. From that judgment the administrator has appealed. There were but three depositions taken in the case. They contain the testimony of appellant, appellee and one J. U. Riggle. Appellant testified that he had two conversations with appellee in 1896, soon after his qualification as administrator of the decedent's estate, in each of which he says, she admitted that she "owed the money, but was not able to pay it, as the house that the mortgage is on was the only source of revenue she had for making a living."

The appellant further testified that no one was present at the time of either conversation, except the appellee and himself. It also appears from his deposition that appellant is a creditor of the decedent's estate to the amount of \$385.50, and perhaps an account for whisky in addition, and that the only assets belonging to the estate besides the note claimed to be owing by appellee was one-half of \$485, realized from the sale of a house and lot in Falmouth, of which the decedent was joint owner with another person, of which house and lot appellant became the purchaser at its sale.

The witness, Riggle, whose deposition was taken in appellant's behalf, testified that he married the daughter and only child and heir at law of the decedent, Martha Ellis. His wife had no children. She died in March, 1896, and her mother in December, 1895; that he and his wife lived with her mother from 1878, until her death. He remained in the house of the mother-in-law until his wife's death, and when he left the premises he gave some personal effects that had belonged to his mother-in-law to appellee, and a Mrs. Watson, who removed them, but some of the things were in the house when one Buck Morris thereafter moved into it. At a later date the witness saw his mother-in-law's bureau and a trunk, which had belonged to his wife, in the house of appellee. The witness also testified that appellee had access to the furniture of his mother-in-law after her death while he and his wife occupied the house, but his deposition contains no statement to the effect that the appellee did in fact go into any article of furniture in which the decedent's papers were kept, or that she thereby got possession of the note in controversy. In fact there was no statement from the witness that he knew where the papers of the decedent were kept, or that he ever saw the note in controversy.

The appellee's deposition contains the positive denial that she made to appellant any such admissions of liability upon the note as were testified to by him. Further than this she could not go as she would not have been allowed to testify as to any conversation or transaction that occurred between herself and her deceased sister. The possession of a note by one named therein as payee, or such possession by his assignee, furnishes presumptive evidence of its nonpayment. If in an action upon the note by the payee or assignee, the payor interposes the defense of payment, the law places upon him the burden of overcoming the prima facie case made by the payee in

possession of the note. In such a case if the payee fail to introduce any evidence, or that introduced by him be not sufficient to establish payment of the note, the presumption of its nonpayment created by the payee's possession of the note will entitle the latter to a judgment. Upon the other hand possession of the note by the payor creates a presumption of its payment by him, and in that state of case the burden of proving that it has not been paid rests upon the payee.

In the case at bar we take it for granted that the lower court found that the testimony of the appellant as to appellee's alleged admissions of indebtedness upon the note in controversy, was not sufficient to overthrow the presumption of its payment furnished by her possession thereof, especially as this presumption was backed and strengthened by her positive denial that she had ever made to the appellant any admission of liability thereon. If appellant was told by appellee as far back as 1896 in substance that she was not able to pay the note and would never be able to do so, why did he delay the bringing of the suit until the year 1899, and what did he hope to accomplish by the delay? The unreasonableness of this delay upon the part of the appellant, together with the fact that the decedent took no steps during her lifetime to collect the note, though it was executed as far back as the year 1887, may have had some weight with the chancellor in determining the rights of the parties, and doubtless served to strengthen in some degree the presumption of payment created by the appellee's possession of the note. But it is insisted for appellant that as there was no rejoinder filed controverting the reply to the amended answer, the appellant was entitled to a judgment upon the pleadings. Payment of the note was averred in the original answer. The amended answer contained the additional averment that at the time the note was paid by the appellee it was delivered to her by the decedent, that it was in her possession, and it was thereupon filed with the amended answer and by apt language made a part thereof, as evidence of its payment.

The reply denied the fact of payment also the delivery of the note by the deceased to appellee, but admits the appellee's possession of the note, and avers that she got it from the private papers of deceased after her death. The issues were sufficiently made without the averment as to how the appellee got the note. If it was not paid by her and not delivered to her by reason of her payment of it, it is wholly immaterial how or in what other way she got it. If she got it from the decedent's papers after her death it was admissible for appellant to prove that fact under the denial contained in the reply that it had been delivered her by the decedent at the time of its payment. Evidence need not and should not be pleaded. When an affirmative averment, as in the reply in this case is in effect a denial, of an averment in the amended answer a traverse is unnecessary. (*Logan County National Bank v. Barclay*, 20 Ky. Law Rep., 773; *Wise v. Covington Street Ry. Co.*, 91 Ky, 587; *Smith v. L. & N. R. R. Co.*, 95 Ky., 11.)

Being unable to say that the judgment of the chancellor is against the weight of the evidence the same is affirmed.

BONNIE & CO. v. PERRY'S TRUSTEE.

(Filed January 28, 1904.)

1. Sales by insolvent debtor—Bankruptcy—Preference of creditor—Where an insolvent debtor sold a stock of saloon goods and fixtures and an unexpired license to a creditor at an unseemly hour, no one being present but the debtor, an agent and officer of the buyer and a friend of the debtor who was also a creditor and whose claim was provided for in the transaction, and the debtor shortly thereafter became a bankrupt, in a suit by the trustee in bankruptcy to set aside the sale the sale will be set aside as it appears it was the purpose of the debtor to secure two of his creditors to the exclusion of all others, and because the scheme was in direct conflict with the United States Bankruptcy Statute.

2. Same—Unrecorded mortgage—Where a mortgage was unrecorded it was not a lien as against subsequent creditors, yet it evidenced a debt and to that extent was not void.

3. License to retail liquors—A license to retail liquor in this State is a personal privilege only and while by section 4198, Kentucky Statutes, a license may be renewed to a personal representative or purchaser, the authorities are not required to renew it. It can not be sold for debt, and is an intangible privilege without vendible value or quality.

E. B. Drake and Gibson, Marshall & Gibson for appellants.

J. W. Linton and Wilbur F. Browder for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

This action was brought to set aside a sale of property on the ground that it was fraudulent, made in contemplation of insolvency, and to prefer the purchaser over other creditors of the seller. The property was the stock and fixtures of a saloon in Russellville, Ky., and unexpired licenses to sell liquor. Perry owned the stock and fixtures, and held licenses expiring the first of October, 1903. The sale was made about the 1st of February, 1903. Appellant was an unsecured creditor of Perry's to the amount of about \$942. Perry had conducted the business since October, 1901, with the result that at the end of January, 1903, he was practically without any stock of goods, insolvent, and in fear of being closed up by attachment. The stock of goods and fixtures were found by the circuit court to be of not exceeding \$1,200 in value.

Appellant is a corporation, a wholesale liquor dealer at Louisville, Ky. The purchase of the stock of goods was made after midnight on Sunday night of February 1, 1903, at Russellville. The persons present were the vice-president of appellant company, who had learned of Perry's falling circumstances and impending bankrupt condition, the owner, Perry, T. S. Rhea, the latter of whom claims to have held an unrecorded chattel mortgage against the fixtures for about \$1,000, and one Dunaven, who had been a traveling salesman for appellant, and who had apprised it of the necessity to take some action to save itself from Perry's collapse.

Shortly after the sale to appellant by Perry, the latter on his own application was adjudged a bankrupt by the United States District Court for the Western District of Kentucky. This suit was brought by the trustee in bankruptcy against appellant to recover the value of the fixtures and goods

bought by it, and to recover the value of Perry's licenses from the State and city of Russellville to vend liquors at retail. The value of the licenses was claimed to be \$800. The value of all the property sold and transferred, including licenses, was claimed to be about \$2,800. Appellant admits that when it bought the property it knew that Perry was "hopelessly and notoriously insolvent;" that it had an unsecured debt of about \$942 against him; that its representative went to Russellville in haste on hearing of Perry's pressing financial embarrassment, to look after its interests as his creditor; that it bought the bar fixtures and liquors and cigars without taking an invoice; that the trade was made at an unusual hour for business transactions; that the trade was made after an all-night conference and negotiation between the debtor and creditor, and a favored lienholder and friend; that \$1,000 of the purchase money was paid to the lienholder whose unrecorded mortgage gave him no legal priority over other creditors; that the remaining \$200 was turned over in cash to the failing debtor.

The trustee claims that the licenses were included in the sale, and that in consideration of their transfer, and the sale of all the other property owned by Perry, appellant's debt was to be satisfied, thus constituting an unlawful preference of appellant as a creditor. On the other hand, appellant asserts that its debt was not and was not to be cancelled by the trade; that it bought the saloon and liquors to set up Dunaven in that business in order to collect from him an old account which he was owing appellant, and to continue a customer for their wares. The saloon was, in fact conducted in Dunaven's name, but only for a short time by him, when he returned to appellant's service as a travelling salesman, leaving in charge other employees furnished by appellant.

The circumstances indicate that it was the purpose of the failing debtor to secure at least two of his creditors to the exclusion of all others, viz., appellant and Rhea. The means adopted was to sell the saloon and contents to appellant at a low figure, including the licenses, and out of the proceeds to settle Rhea's unsecured debt. The scheme was in direct contravention of the United States Bankruptcy Statute (Act of 1898). Nor does it matter whether the purpose of it was to gain an advantage by appellant as creditor, or to get an advantage by Rhea without profit to appellant, but with its knowledge of the debtor's purpose. The effect of the Federal Statute is somewhat broader than the State Statute against preferences. It renders the preference of one creditor to the exclusion of others by an insolvent debtor, a fraudulent act. Whoever with knowledge or notice equivalent in law to knowledge, of the debtor's insolvent condition and purpose, buys his property, even for a fair consideration, takes it subject to the right of the trustee in bankruptcy to sue for and recover it if within four months of the act of preference the debtor is declared a bankrupt. (Section 67 of the Act of Congress of 1898.) Only innocent purchasers for fair value are protected by the act. The sale and transfer are void, if the act is violated, whether by a creditor or purchaser.

It might matter little to other creditors, if a failing creditors could sell his property even for fair value to one with knowledge of his purpose to abscond with the proceeds or to otherwise unlawfully apply them, if they could not get at the tangible property in the hands of the purchaser. It being

clear to us that the act of bankruptcy committed by Perry on the night of February 1 was in fraud of his creditors, whether appellant was or was not a beneficiary of it, we have not stopped to consider the question so much discussed, whether appellant really paid a fair consideration for the bar fixtures and liquors and cigars. The transaction was such that, under the circumstances appellant ought to have kept out of it. But it took chances of its not being attacked by creditors. The trustee ought to recover the property thus placed beyond the reach of the creditors, or if the property can now be had, then he ought to recover of the guilty purchaser its value.

The circuit court adjudged the transaction fraudulent, and that appellant either return the property to the trustee within a named time, or to pay him \$1,000 for it. We are of opinion that the court was right in holding the transaction to be fraudulent as to creditors, and in holding that appellant was not such a purchaser as was to be protected; but we think the judgment should have been for the return of property, or its proven value, \$1,200.

Appellant was no more entitled to credit for the \$200 he paid to Perry than for the \$1,000 he paid to Rhea. The circuit court furthermore decided that the mortgage to Rhea was void, because not recorded, and that it did not constitute a lien on the property. It was adjudged to be cancelled. Rhea was not a party to the suit. Although the unrecorded mortgage may not have been, and was not, a lien as against at least subsequent creditors, it evidenced a debt, and to that extent, so far as the record before us shows, was not void. At any rate, it should not have been cancelled. Its validity is more properly the subject now for decision by the bankrupt court. The court further decided that appellant pay to the trustee \$800, the value of the liquor licenses attempted to be transferred to it by Perry.

A license to retail liquors in this State is a personal privilege only. It is confined by statute to the place and person named in the order granting it (Section 4203, Kentucky Statutes.) Although by section 4198, Kentucky Statutes, when the owner of a license dies, or sells his stock or place of business, the authorities may renew the license to the personal representative, widow or purchaser, they are not required to. Indeed, the fitness of the person proposing to exercise the license is always one of the main things considered in granting it. It can not be sold for debt under execution or attachment. It is an intangible privilege, without vendable value or quality. It might be abandoned by its owner, or be revoked at any time for certain causes by the public authority granting it. It is not transferable. The fact that the city council and county court are allowed to transfer it without additional charges upon the application of the owner, don't give him the right to transfer it. That he has donated it, or attempted to give it, to one of his creditors, although insolvent, can not make such creditor liable to the trustee in bankruptcy for the value of the license. The object of the statute is to hold only that liable to debts which could be subjected by law to their payment.

The licenses in this case do not appear to have been really transferred by the city or county authorities. It was done only by the licensee. We are of opinion that the court erred in adjudging appellant to pay anything for the licenses. Before this suit was begun, Perry was called before the referee in bankruptcy for examination pending his application to be adjudged a bank

rupt, and was questioned at considerable length by counsel representing certain creditors, by the referee, and by his own counsel. Appellant does not appear to have been present or represented. A stenographic report of his testimony was preserved. Much of it tends to show his motive and condition at the time of the sale attacked in this suit.

In the preparation of the case he was introduced as a witness by the trustee, appellee. He was shown what purported to be a copy of his testimony given before the referee, and asked whether it was true, and whether he would adopt it as a part of the deposition then being given. He said it was true, and he would and did adopt it. It was thereupon filed as a part of his deposition. Appellant's exceptions to it were overruled, and it was considered by the court.

Although we find enough evidence in the record to sustain the conclusion at which we have arrived, without regarding the interpolated copy from the referee's office, we must condemn the practice of presenting evidence in that form. Whether the stenographer, who took the notes of the testimony was duly sworn, or whether the copy is authenticated as it should have been to have entitled its reception, we do not consider. For if so, its injection in that form as the testimony of the witness in this case, was still an improper practice. It was incompetent as evidence in this case. It is nothing here, at best, but hearsay. The fact that the witness said that he said it on another occasion, and in another action, makes it none the less hearsay. The right to confront the witness, to see and hear him testify; to cross-examine him upon the points in issue in the instant suit; to have his own language reported, are matters of right given to a party, and of inestimable value to the court in its endeavor to arrive at the truth. The exceptions to that part of the deposition should have been sustained.

The judgment is reversed on both the original and the cross appeal. The cause will be remanded for proceedings governed by this opinion.

WALLING v. EGGERS, &c.

(Filed January 28, 1904—Not to be reported.)

1. Lands—Adv. rs3 possession—In an action by appellant to recover a strip of ground and to be adjudged the right to use a passway over appellee's lot, and the pleadings put in issue the claim of appellant to the easement, and the claim of appellees as to adverse possession, the burden upon the whole case was upon appellees.

2. Bill of exceptions—Where a bill of exceptions was not filed in time, but no objection was made by the adverse party, and he did not object to the order of court extending the time, but examined it when tendered and made no objection to its being filed, any error that may have been committed as to filing it was waived.

3. Evidence—Where there is a conflict as to ownership of land, proof by one party that he and his ancestors listed the property for taxation and paid taxes on it, and the other party did not list it or pay taxes prior to a certain date, may be admitted as this is an act of claim of ownership to be given such weight as the jury may determine.

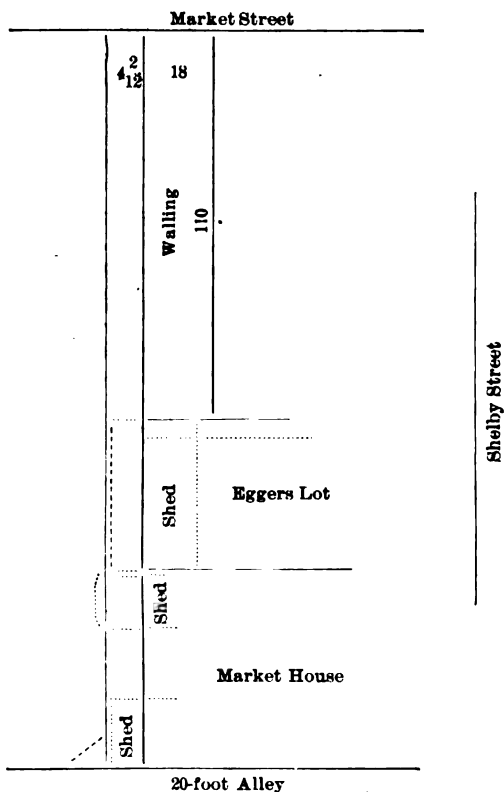
E. L. McDonald for appellant.

Lieber & Lincoln for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellant sued appellees Eggers, and the Shelby Street Market Co., to recover the possession of a strip of land four feet two inches wide, by about feet long, and to have adjudged his right to use a passway over the north side of Eggers' lot running at right angles from the north end of the strip last mentioned, to Shelby street in Louisville. This will illustrate the situation of the property:



In the petition appellant claimed that he was the owner of two lots, which together made one connected body of land fronting 22 feet 2 inches on Market street in Louisville, Ky., and extending south that width 110 feet, and extending further south 94 feet, 4 feet 2 inches wide, to a 20-foot alley; that the appellees had wrongfully taken possession of and obstructed certain parts of the last-named strip; that appellant also owned as an appurtenance to his lot, an easement of the use of a 4-foot alleyway running from the back of the 18 feet of lot described, east to Shelby street.

Appellees filed a joint answer. They do not deny appellant's title, except as to the easement. But, they claim that they and their vendors have respectively been in the adverse, continuous possession of the strip 4 feet and 2 inches wide, and 94 feet long from the 20-foot alley north, for more than fifteen years, claiming it as their own. The reply denied the continued adverse possession of appellees for fifteen years before the bringing of the suit. The effect of these pleadings was to put in issue, first, appellant's claim to the easement over the Eggers lot east to Shelby street; second, the claim of appellees that by an adverse possession and user of fifteen years of the strip 94 feet by 4 feet 2 inches they had acquired the title to it. On the first issue, plaintiff had the burden of the proof. On the second, defendants had the burden. But on the whole case, the burden was on the defendants.

Section 526, Civil Code, is: "The burden of proof in the whole case lies on the party who would be defeated if no evidence were given on either side."

Although plaintiff had the burden as to the easement claimed, and notwithstanding if no evidence had been introduced by either party, he would have lost as to it, yet, under the state of the pleadings, he would have been entitled to a judgment against appellees (defendants) upon the other issue.

So, upon the whole case, appellees would have lost. The court erred in adjudging the burden of proof to be upon appellant. (Section 817, Civil Code.)

At the close of plaintiff's evidence the court gave a peremptory instruction to the jury to find for defendants, upon the ground, so the opinion of the trial judge recites, that plaintiff had failed to show title to himself in the land sued for. As has just been held, defendants admitted the paper title, and, therefore, the prima facie right of possession, to be in plaintiff. Their plea was in avoidance, as relying upon the statute of limitation to bar the right of recovery. To sustain that plea, the defendants should have been required to introduce proof, or suffer a judgment for plaintiff.

The evidence showed, as to the easement claimed, that a common grantor of the Walling and Eggers lots, owning them both, had established this alleyway, and called for it in the deed made, thereby dedicating its use to the lots so conveyed; furthermore that Eggers' grantor while in possession recognized the right and claim of Walling's ancestor to use the passway as a matter of right, and that Wallings and their tenants had so used it until recently. There was enough evidence to have sustained a verdict for the plaintiff, and the direction of the court requiring peremptorily the finding of the verdict for appellee was erroneous. Whether the bill of exceptions was filed in time, appellees did not then object to it, nor did they object to the order of the court extending the time. They examined the bill when tendered, and made no objection to its being filed. They have waived any error that might have been committed in this proceeding. (Downing v. Bacon, 7 Bush, 640.)

As the case must be returned for a new trial, it is well to say that court should have allowed appellant to prove that he and his ancestors listed the property in dispute for taxation and paid the taxes on it, and that appellees did not list it for taxation prior to 1898. This was an act of claim of ownership to be given such weight as the jury might determine, in connection with other facts proven in the record. It was likewise competent to prove.

that appellant's ancestor and agent claimed the property in dispute, and denied the right of appellees to it; and to prove that appellees did not object to appellant's tenants and servants using the strip of property and passway in litigation.

For the reasons indicated the judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

BEARD & CO. v. GOODMAN.

(Filed January 28, 1904.)

Fertilizer—In an action to recover for the purchase price of fertilizer, a peremptory instruction to find for the defendant should not have been given, where the defense was that the statute requiring the article to be labeled was not complied with, but where the facts were that appellants did not keep the fertilizer in stock, but ordered it shipped from Chicago; that after its shipment appellee called their attention to the fact that the fertilizer was not labeled when they notified the shipper who sent the labels which were put on the bags by the appellee who then used the fertilizer. While the statute was not complied with to the letter, it was in spirit and the defense relied on was not available.

Bennett H. Young and N. McN. Mercer for appellant.

Weed S. Chelf for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Paynter.

The appellants are merchants, and they sold the appellee fertilizer of the agreed value of \$333.75. One defense to the action is that it was sold to him in violation of the statute, because none of the bags or packages containing the fertilizer had attached to them any label furnished by the Kentucky Agricultural Experiment Station giving a chemical analysis of the fertilizer, and that for that reason the contract is not enforceable. The facts are these: The appellants did not keep the fertilizer in stock, and informed appellee that it would be shipped to him at his station by Swift & Co., of Illinois. It was shipped by Swift & Co. and reached appellee's station on the 26th of September, and two or three days thereafter, and without the knowledge of appellants, the appellee unloaded it. The bags containing the fertilizer did not have any labels attached to them showing the chemical analysis, and appellants did not know of this fact until informed by appellee, whereupon they telegraphed Swift & Co. for the character of labels required by the statute. The labels were sent promptly, and were delivered by appellants to the appellee, who expressed himself satisfied therewith. The appellee kept and used the fertilizer.

The question is, was this such a compliance with the statute as will enable the plaintiffs to recover the agreed value of the fertilizer. The statute requires that every bag of commercial fertilizer sold or offered for sale in this State shall have attached to it in a conspicuous place a label which shall contain the name and address of the manufacturer, the name of the fertilizer, number of net pounds in each package, etc. A penalty is provided against the manufacturer or vendor who shall sell, offer or expose for sale

any fertilizer without having the labels required by statute on the packages. This court in *VanMeter v. Spurrier, &c.*, 94 Ky., 22, held that one who violated the statute in not furnishing the labels, as required by it, could not recover the value of the fertilizer sold. In that case the labels were never furnished. In the case at bar the labels were furnished, but were not on the packages when they arrived at the appellee's station, and in fact were never placed upon the packages by the appellants. The appellee received the bags of fertilizer and the labels. He received just what the law contemplated he should have, the fertilizer which he bought and the labels giving the information required by the statute. Reduced to the last analysis, the appellee seeks to evade the payment of the contract price of the fertilizer, not because the labels were not furnished him, but because they were not on the bags when they arrived in the car. The labels received gave the appellee the information for his protection which the statute contemplated purchasers of fertilizers should have. If the fertilizer was not of the character represented, a cause of action would exist, and the labels furnished would show the character of fertilizer which the vendor represented he was selling. The purpose of the statute was to prevent the manufacturers and vendors from perpetrating frauds on purchasers, not to enable such purchasers to escape liability for fertilizers sold and delivered to them. While the statute was not complied with to the letter, it was in the spirit. We are, therefore, of the opinion that the defense relied on to which we have referred is not available. The court erred in giving a peremptory instruction to find for the appellee.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judge Hobson dissenting.

OWENS, &c. v. JENKINS, &c.

(Filed January 2^d, 1904—Not to be reported.)

1. Wills—Evidence—Admonition of court—On the trial of a motion to probate a will where evidence was introduced to prove that the physician of the testator and an attesting witness of his will had made statements out of court that testator was not competent to make a will and that his attitude as a witness had been influenced by the payment of fees by the executor, the physician contradicting these statements imputed to him, the bill of exceptions showing that the trial court told the jury they were not to consider the testimony only so far as it tended to contradict the testimony of the physician. Held—That this admonition had no appreciable effect and leaves the testimony of the two witnesses as if it had not been given.

2. Same—Where the testimony of a witness had the effect to tend to impeach that of another the fact that the bill of exceptions do not show that the jury should have been admonished that such evidence should be received only as affecting the credibility of such witness, the giving of such admonition will be presumed where the evidence was not stenographically reported and was so awkwardly expressed as to fail to describe what actually occurred, and the meaning of the court as appears from the bill of exceptions conveys the idea that such admonition was given.

3. Argument of counsel—Where complaint of the argument of counsel was not made at the time, and the court not asked to rule upon it, a party can

not submit to it without objection to the trial court, and if the verdict is adverse to him, take advantage of it upon appeal.

W. O. Jackson and W. M. Cravens for appellants.

W. B. Moody and Turner & Turner for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge O'Rear.

On the trial of the motion to probate the will of George W. Henderson, Dr. Nuttall, the physician who attended upon the testator during his last illness when the will was executed, testified the testator was mentally competent to make a will. Dr. Nuttall was also one of the attesting witnesses to the will. Appellants introduced evidence to prove that Dr. Nuttall had made statements out of court that the testator was not competent, and furthermore that his attitude as a witness had been influenced by the payment by the executor of a rather large bill rendered by the doctor for his professional services to the testator during his last illness. The trial court allowed all this to be shown.

Counsel for appellant seems to be under misapprehension as to the admonition of the court to the jury regarding the effect of this evidence. Their argument is based upon the theory that the court admonished the jury at this point that the evidence just named was to be received only as affecting the credibility of Dr. Nuttall as a witness. The occurrence at the trial as set out in the bill of exceptions shows this state of case: Dr. Nuttall, on cross-examination, was asked by appellants whether he had not made the statements to Mrs. Cravens that the testator, when he made the will, was not mentally capable of understanding what he was doing. He answered that he did not. It was then shown that the doctor had produced a bill of \$500 against the executor for professional services rendered the testator during his last illness. Upon cross-examination he was required to produce his books containing the charges against the testator. His accounts show that he had charged the testator for a number of visits at \$10 each, whereas the other accounts in the same book show generally similar charges to other patients at about the same time from \$1.50 to \$5 each. But even with the charges as contained in this account, it only amounted to about \$310. He was paid \$500. In explanation of this he testified that the testator was almost daily at his office for treatment, and was continuously under his care for which he paid nothing. The witness added: "After his death I didn't have the exact amount on my books, I charged him just enough to make the entire service \$500."

Mrs. Cravens was introduced by appellants as a witness, who testified that Dr. Nuttall had stated to her directly after the death of the testator in substance; that at the time of making the will the testator was practically a dead man, and was not mentally competent to understand what he was doing. She also testified that the doctor admitted to her that he had got the \$500 for having the will made, and that the executor did not want to pay him that amount, and that he told him "to give him the check right there, or he would break the will."

The bill of exceptions at this point shows the following: "The court here

On its own motion said to the jury, they were not to consider the testimony only so far as it contradicted Dr. Nuttall."

We are of the opinion that the court should have told the jury that the testimony of Mrs. Cravens concerning the statement alleged to have been made to her by Dr. Nuttall as to the testamentary capacity of the testator, was to be considered only as affecting the credibility of Dr. Nuttall as a witness. Of the other evidence of Mrs. Cravens just alluded to the theory of appellants is, that the propounders of the will, the executor and the principal devisee, were fabricating evidence in its support, and that they had taken this course to insure the favorable testimony of a witness whose relation to the testator, and whose connection with the execution of the will, made him a very important witness in the case. The suppression or fabrication of evidence is of itself a relevant fact, to be proved against the party committing it, although it is a collateral fact and not connected with the main fact in issue. It is in the nature of an admission by such party against his interest, and raises a presumption against the validity of his claim or defense. It may, therefore, be proven, and is regarded as substantive evidence tending to establish the main fact. (1 Greenleaf on Evidence, section 87; Commonwealth v. Webster, 5 Cush., Mass., 296, 52 Am. Dec., 711; Benjamin v. Ellinger, 80 Ky., 472.)

We are of the opinion, however, that the admonition given the jury by the court did not have the effect claimed by appellants. Indeed, in the form in which it appears in the bill, we can not conceive that it had any appreciable effect, and leaves the testimony of these two witnesses as if the admonition had not been given. For it is to be observed that the court told the jury that they were to consider Mrs. Cravens' testimony only in so far as it contradicted Dr. Nuttall, while as a matter of fact her testimony upon these two points did contradict Dr. Nuttall in every particular, and, therefore, the jury were told in effect to consider Mrs. Cravens' testimony as evidence. This really left the jury without any admonition as to the proper effect to be given to her testimony that was admissible only for the purpose of affecting the credibility of the witness, Nuttall, above discussed. At the same time it left the jury to consider her testimony tending to show a fabrication of evidence by the propounders as affecting the main facts at issue.

We do not mean to hold that the proof of an attempted fabrication of evidence can be made by testimony that a witness had said out of court that he had been induced by the party calling him to give false testimony in his behalf, and that upon the witness's denying that he had made that statement out of court, to prove that he had. This would be to establish a relevant fact by incompetent hearsay evidence only. There must be other evidence tending of itself to establish that fact. In this case the extraordinary charge of the attesting witness for his professional services, as compared with similar charges for like services to others; the failure of his account to show by \$240 the amount received in satisfaction of his bill; although the account appears to have been kept by daily entries, as far as it was kept, and the witness's explanation, were facts from which the inference might have been not unreasonably drawn if the jury saw fit to look at it in that light, that the witness had been improperly biased by the party calling him.

The jury might or might not take that view of it, according to the reputation of the witness, their acquaintance with him, his bearing while testifying, and a number of other familiar circumstances which go to affect or dinarily the credibility of witnesses in jury trials. The witness's explanation of the unusual appearance of his account and charges, in itself and standing alone, was probably sufficient to reconcile the charges with the entire innocence of the propounders and the witness. The testimony of Mrs. Cravens that this witness had made contrary statements to her had the legal effect only to tend to impeach Nuttall's statements, and it, therefore, should have been guarded by the court with the admonition also that her evidence on this point should be received only as affecting the credibility of the witness, Nuttall. This is probably what the court intended to do, and did do, but in the preparation of the bill of exception, which is not a stenographic report of the trial, the matter has been so awkwardly expressed as to fail to describe what actually occurred. The verdict of the jury finding for the propounders of the will is their acquittal of Dr. Nuttall and the propounders of improper conduct in the matter.

The complaint here of the closing argument to the jury by counsel for appellees, can not avail appellants. It was not then objected to. The circuit court was not asked to and did not rule on it. A party can not submit to improper argument, without objection to the trial court, and then if the verdict is adverse to him, take advantage on appeal of the supposed evil effect of the objectionable matter. (I. C. R. R. Co. v. Radford, 23 Ky. Law Rep., 886; Alexander v. Menefee, 23 Ky. Law Rep., 115; Bland v. Gaither, 10 Ky. Law Rep., 1033; C. St. L. & N. O. R. R. Co. v. Coffee, 7 Ky. Law Rep., 451; L. & N. R. R. Co. v. Webb, 11 Ky. Law Rep., 869.)

Perceiving no error prejudicial to appellants the judgment is affirmed.

CINCINNATI TOBACCO WAREHOUSE CO. v. LESLIE & WHITTAKER'S TRUSTEE, &c.

(Filed January 29, 1904.)

1. Warehouses—Advancements—Liens—Where a firm of tobacco dealers procured advancements from a warehouse in consideration that it would consign its purchases to it, the fact that the warehouse company failed and passed to an assignor will not operate to relieve the firm of dealers of their contract to continue to send its tobacco to it, and particularly in this action where the right of the successor of the warehouse company to the tobacco was recognized by the dealers by a part of the remainder of the tobacco included in the contract being shipped to it.

2. Same—While it is true that a common law lien is a personal privilege, and not transferable by assignment of the debt which it secures, where the assignee of a warehouse company which had a contract with a shipper to which advancements had been made that its tobacco should be shipped, a lien so acquired was an equitable lien growing out of an express contract, and is enforceable.

J. I. Blanton for appellant

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Barker.

Leslie & Whittaker resided in Harrison county, Kentucky, and were engaged in the business of buying and selling tobacco for speculation. The Cincinnati Leaf Tobacco Warehouse Co. was a Kentucky corporation, doing business in Cincinnati, O. During the years 1898, 1899 and 1900 these parties had a contract between them, by which the corporation advanced money to the firm from time to time, as they required it, which was invested in the purchase of tobacco, and then consigned to the corporation at its business place in Cincinnati for sale, with the express agreement that the corporation was to have a lien upon the tobacco so purchased, and the debt for advances, commissions, insurance, etc., should be paid out of the proceeds of the sales when made.

Under this agreement the corporation, from August 31, 1899, to September 12, 1900, advanced Leslie & Whittaker the sum of \$5,060.23, and during the same period of time they purchased and consigned, under the contract, eighty-three hogsheads of tobacco, all but thirteen of which had been sold and the proceeds applied to the extinguishment of the consignee's debt for advancements at the time this controversy arose.

Before the sale of the thirteen hogsheads of tobacco above mentioned, and which are in controversy here, the Cincinnati Leaf Tobacco Warehouse Co. became seriously involved financially, if not insolvent, and proper proceedings were had in the circuit court of Kenton county, by which it was placed in the hands of a receiver, and afterwards the receiver was authorized to, and did, sell at public auction in solido all of its assets, whether real, personal or mixed, for the sum of \$1,500,000, the Cincinnati Tobacco Warehouse Co. becoming the purchaser at the sum named. This sale was confirmed by the court, and the Cincinnati Tobacco Warehouse Co., which seems to have been organized for this express purpose, stepped into the shoes of the Cincinnati Leaf Tobacco Warehouse Co., taking up the business of the latter, and carrying it forward without commercial jar or jostle, as if no change had occurred.

About this time, or shortly thereafter, Leslie & Whittaker became involved, and made a general assignment of all their property to W. T. Laferty, of Harrison county, Kentucky, for the benefit of their creditors. The assignee ascertaining that there were thirteen hogsheads of tobacco belonging to his assignors unsold in the warehouse of the Cincinnati Tobacco Warehouse Co., ordered it sold. In accordance with this direction the tobacco was sold, realizing the sum of \$950.

Afterwards certain creditors of Leslie & Whittaker set on foot such proceedings in bankruptcy that the firm were adjudged to be bankrupt under the United States Bankruptcy Act, and their assets passed into the hands of appellee, J. T. Webster, as trustee, for the benefit of their creditors. After qualifying the trustee instituted this action to recover of appellant the proceeds of the sale of the thirteen hogsheads of tobacco, which were sold under the order of the assignee, as above stated. This sum, amounting to \$950, is the matter in controversy here. The question is one of law, there being no undisputed questions of fact. There is no dispute, or question, as to the regularity of the legal proceedings by which the Cincinnati Tobacco Warehouse Co. purchased all of the assets, of whatever kind, of the Cincinnati Leaf Tobacco Warehouse Co.; as to the amount, or time, of the advance-

ments made by the Cincinnati Leaf Tobacco Warehouse Co. to Leslie & Whittaker; nor as to the fact that the tobacco shipped under the contract realized a sum insufficient to pay the amount of the advancements by \$850. But it is contended by appellee that the Cincinnati Tobacco Warehouse Co. did not acquire by its purchase the benefit of the contract existing between the Cincinnati Leaf Tobacco Warehouse Co. and Leslie & Whittaker, or the lien which the latter had, under the express contract, on all the tobacco shipped for the payment of all the advancements made, that the lien of the Cincinnati Leaf Tobacco Warehouse Co. was a personal one, which did not pass by operation of law under the sale, and that, therefore, the thirteen hogsheads of tobacco remaining unsold after the transfer by the court are to be considered as a matter separate and apart from the old contract, and that out of the proceeds appellant was entitled only to collect and receive its commission, drayage, insurance, etc., and had no right to apply it to the extinguishment of the unpaid balance originally due the Cincinnati Leaf Tobacco Warehouse Co.

On the contract appellant contends that, having purchased at the sale by the receiver of the Cincinnati Leaf Tobacco Warehouse Co. all its assets, including the chose in action due from Leslie & Whittaker, consisting of the unpaid balance for the advancements made to them, it also acquired the lien under the contract, and with it the right to apply the proceeds of the sale of all the tobacco, including the thirteen hogsheads, to extinguish the debt. If this can be done there will still be a balance due appellant of \$850.

Upon trial of the case in the court below the learned chancellor entered the following judgment: "It appears further from this record that the whole of the tobacco bought by Leslie & Whittaker was delivered by them to the Cincinnati Leaf Tobacco Warehouse Co. prior to the appointment of a receiver, and prior to the sale by decree of court of its effects; there can, therefore, be no question but that the factor's lien of the Cincinnati Leaf Tobacco Warehouse Co. was a complete lien, perfected by reducing the tobacco to possession. The only question in this case then is, does the Cincinnati Tobacco Warehouse Co., by reason of its purchase at decretal sale of the demand of the Cincinnati Leaf Tobacco Warehouse Co. against Leslie & Whittaker (they being no parties to that suit and not obtaining their consent), succeed to the rights of the Cincinnati Leaf Tobacco Warehouse Co. as against them or their general creditors, they having become bankrupt before a sale of the tobacco by the defendant (appellant); or, stating it more succinctly, does the purchase by defendant defeat or discharge the lien? It seems from the authorities that a lien of this character 'is a purely personal privilege, and can only be set up by the person to whom it accrued, and that he can not assign his claim so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner.' The court holds that these transactions by which defendant (appellant) obtained the debt and the property destroyed the lien, and it is not available to the defendant in this action."

It will be observed that the trial judge placed some stress upon the fact that the Cincinnati Tobacco Warehouse Co. obtained its legal position, with reference to the assets of the Cincinnati Leaf Tobacco Warehouse Co., without the knowledge or consent of Leslie & Whittaker. If this be important,

We think the record shows conclusively that Leslie & Whittaker recognized the Cincinnati Tobacco Warehouse Co. as the successor of the Cincinnati Leaf Tobacco Warehouse Co., and as lawfully assuming and carrying out the latter's contract with them. Five of the hogsheads of tobacco in question were shipped to, and received by, the Cincinnati Tobacco Warehouse Co. after it became the successor of the Cincinnati Leaf Tobacco Warehouse Co.; and Leslie & Whittaker received from it, upon request, the sum of \$269, with which either to purchase tobacco or to pay for tobacco already purchased under the original contract. It seems to us that these facts, under all the circumstances of this case, would go very far towards establishing a ratification by Leslie & Whittaker of the transfer by the receiver of the insolvent corporation to appellant, if it were required to take that view in order to uphold appellant's lien in question; but we do not think this is necessary.

It is true that the authorities hold that a common law lien is a personal privilege, and not transferable by the assignment of the debt which it secures; but we think the court below erred in assuming that the lien of appellant is a common-law lien. Common-law liens arise by implication of law, and not by express contract. The lien here is an equitable one, growing out of the express contract between Leslie & Whittaker on the one part and the Cincinnati Leaf Tobacco Warehouse Co. on the other, by which it was agreed that the latter should have a lien on the tobacco for all the advances made by it to the former, and which appellant claims passed to it by the assignment.

Jones in his work on Liens very elaborately describes the difference between common law and equitable liens, and in section 63, in describing equitable liens, says: "Where in terms the parties agree that one making advances for the purchase of merchandise to be shipped to him shall have a lien on the same, the lien arises upon the purchase of the merchandise before it is consigned to the creditor. The lien in such case attaches to the merchandise purchased and in the hands of the debtor at the time of his bankruptcy, and may be asserted against the debtor's assignee in bankruptcy. Judge Story said that the possession of the property by the debtor was not a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of his general creditors; and, therefore, the agreement to give a lien, or equitable charge, was binding upon the property in the hands of the assignee."

In section 982, *idem*, it is said: "A common-law lien is not a proper subject of sale or assignment, for it is neither property, nor is it a debt, but a right to retain property as security for a debt." And in section 988, still speaking of common-law liens: "A lien is a purely personal privilege, and can only be set up by the person to whom it accrued. He can not assign his claim so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner." In section 991, however, the author says: "An equitable lien reserved by express agreement passes by an assignment of the debt it was created to secure. Such a lien does not depend upon possession as does a common-law lien."

The case of *Hauselt v. Harrison*, 105 U. S., 401, was in all respects similar

in principle to the case at bar. There a merchant advanced money to a tanner with which to purchase hides to be manufactured into leather, under this agreement: "And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced him by the party of the second part, and that all the skins shall be insured for their full value in good companies only."

The tanner, after receiving large advances, became insolvent, and in the contest between his assignee and the merchant as to the lien of the latter on certain hides and leathers, the Supreme Court said: "It was decided in *Gregory v. Morris*, 98 U. S., 619, that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties without a change of possession, even though void as against subsequent purchasers in good faith without notice and creditors levying executions or attachments; and if followed by a delivery of possession before the rights of third persons have intervened, it is good absolutely. Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer (the tanner) had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt (the merchant), and a court of equity would not have hesitated, by an injunction, to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his right as the owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement."

In *Brooks, Waterfield & Co. v. Staton's Adm'r*, 79 Ky., 174, it is said by this court: "Manifestly there is an equity in one who advances money on the agreement and faith that certain property shall be intrusted to him as a security which does not pertain to a general creditor, or to one who extends credit without reference to any particular fund or property as security. From the moment the advances are made there is an inchoate right in or to the property on the faith of which the advance was made, and this right becomes complete if the creditor, with reasonable diligence, pursues his right by reducing the property to possession before any other equity has intervened. Such contracts, when the money has been advanced, and before delivery of possession, are partly executed and partly executory. The delivery of possession completes the contract; and if, at the time the contract was entered into and the advances made, the parties acted in good faith, and there was no insolvency and no design to prefer one creditor to another, the act of possession, when there are no intervening equities, relates back, and the contract is a unit from the time it was entered into and the advance was made."

This case was approved in a later case of *Cook's Adm'r v. Brannin, Brand & Glover*, 87 Ky., 101. In the case of *Stahl v. Lowe*, 18 Ky. Law Rep., 946, it was held that a transaction similar to the one involved in the case at bar created an equitable lien; and in the case of *Atchison's Ass'ee v. Jones & Halsey's Ass'ees*, 8 Ky. Law Rep., 259, it was held: "A firm to

which tobacco had been consigned for the purpose of securing advances made by them thereon having made an assignment for the benefit of creditors, their assignee had the right to hold the tobacco for the purpose of securing the advances against the assignee of the consignor, who, subsequent to the consignment, had also made an assignment for the benefit of creditors."

The Cyclopaedia of Law and Procedure, volume 4, page 69, title "Assignments," states the rule thus: "In the absence of any stipulation in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as an incident to the chose, all securities held by the assignor as collateral to the claim, and all rights incidental thereto, and vests in the assignee the equitable title to such collateral securities and incidental rights. * * * As the right to the chose and its incidents pass to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same."

In the case of *Summers v. Kilgus*, 14 Bush, 449. it was said: "The assignment of a debt carries with it a vendor's or mortgage lien, by which the debt is secured. This has been so often decided by this court as to render the citation of authority unnecessary."

There is a vast difference between the narrow, rigid, personal right to merely retain possession of personal property until payment, which is known as a common-law lien, and an equitable lien arising by express contract between the parties, and which the needs of commerce render absolutely necessary in order to facilitate modern dealing between man and man. It requires no profound examination of the subject to realize how hopelessly crippled would be the industries and resources of the whole State if the farmer, the manufacturer and the dealer could not obtain the aid of the capitalist in the advancement of their business; or that this aid very largely, if not wholly, depends on the ability of the borrower to make the lender secure by a lien on the specific produce of the industry involved in the enterprise.

The lien involved in this action is not the common-law lien of the factor for advancements, but an equitable lien created by express contract. Sometimes these liens resemble each other very closely, and sometimes both statutory and equitable liens coincide, and are identical with, or declaratory of, common-law liens; when this happens the latter are superseded by the former, for, although their forms and terms may resemble, the consequences which flow from their existence, as in the case at bar, are often divergent. Appellant, as assignee of the chose in action purchased at the receiver's sale, became invested thereby with the right to enforce the equitable lien which secured its payment to the Cincinnati Leaf Tobacco Warehouse Co.

Wherefore, the judgment is reversed, with directions to dismiss the petition.

HAMILTON, &c. v. KENTUCKY TITLE CO.

(Filed February 2, 1904—Not to be reported.)

Practice in Court of Appeals—A case will not be docketed in this court without consent of parties except in the manner prescribed by the Code, and a motion to affirm as a delay case will not be entertained until a case has been docketed.

Lane & Harrison for appellants.

Pope Nicholas for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Barker.

The transcript of the record in this case was filed by the appellee January 28, 1904, and a motion then to affirm as a delay case. We have often decided that a case can not be docketed without consent of parties except in the manner prescribed by the Code, by filing the transcript twenty days before the beginning of the term, and that a motion to affirm as a delay case will not be entertained until the case is docketed.

The motion to affirm as a delay case is overruled without prejudice.

PRENTICE v. OLIVER.

(Filed February 2, 1904—Not to be reported.)

New trial—In an action for a new trial where appellant has not shown that he was prejudiced by the judgment, or that his pleadings and proof would have supported a judgment in his favor, the judgment of the lower court in refusing a new trial will not be disturbed.

Geo. A. Prentice for appellant.

Reed & Berry and Oliver & Reed for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted for a new trial in an action which had been pending in the Marshall Circuit Court of the appellee against the appellant to recover the possession of seventy and one-quarter acres of land. The grounds upon which a new trial is sought are as follows: First, unavoidable casualty and misfortune; second, fraud practiced by appellee in obtaining the judgment. The petition does not aver that the appellee did not own the land or that he was not entitled to the possession of it, neither does it aver that plaintiff had filed an answer denying appellee's ownership and right to the possession of it. There is not even an averment that he had a good defense to action (although such averment might be held to be a conclusion of the pleader and insufficient.)

The record of the case in which a new trial is sought is not filed with the petition. Under the pleadings the appellant did not manifest a right to a new trial (Steel, &c. v. Seale, 4 Ky. Law Rep., 42; Overstreet, &c. v. Brown, &c., 23 Ky. Law Rep., 317.) Although the appellant was prevented from attending the trial by illness (the petition does not show whether the case was pending in equity or ordinary), he has not shown himself to be prejudiced by the judgment, or that his pleadings and proof in the action would have supported a judgment in his favor. It may be proper to add that the evidence did not show that the appellee practiced any fraud in obtaining the judgment against appellant.

The judgment is affirmed.

EDWARD THOMPSON CO. v. FENLEY.

(Filed February 3, 1904—Not to be reported.)

Appeals—Jurisdiction—In an action to recover possession of books of the value of \$150 and \$50 damages, where appellant dismissed his action as to the damages sued for, although it is not shown in the bill of exceptions that such an order was made, there was no proof as to the question of damages, and as the claim to it was waived there is no reason why the disclaimer was not as binding as if it had been entered upon the order book of the court.

Frank V. Benton for appellant.

R. S. Holmes for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This was an action brought by appellant in the Kenton Circuit Court to recover from the appellee the possession of the first edition of the American and English Encyclopædia of Law at \$150 and also for \$50 damages for the wrongful detention of the property. It appears from the bill of exception that upon entering upon the trial of the cause in the lower court the appellant, by counsel, in the presence of the court and jury, withdrew from the consideration of the court and jury all question of damages and claims for same. This left the value of the thing in controversy at \$150.

The appellee moved to dismiss this appeal for the reason that this court has not jurisdiction of the matter in controversy. The appellant contends that it is not bound by the recital in the bill of exceptions because it is not shown by an order of court on its record that it dismissed its action for damages. It appears from the record that there was no proof introduced by either party on the trial on the question of damages and, as stated, the appellant waived its claim for damages, and we can see no reason why its disclaimer of same in the manner stated should not be as binding upon it as if entered upon the order book of the court.

Having arrived at this conclusion we sustain the motion of appellee and dismiss the appeal.

COX v. COMMONWEALTH.

(Filed February 4, 1904—Not to be reported.)

Indictment—Horse stealing—Where appellee took the horse and buggy of another and drove it four and one-half miles, leaving them in the road, and the horse was found the next morning dead, the defendant being drunk at the time he took the horse, an indictment charging him with willfully and feloniously stealing and carrying away and converting to his own use the horse, was improperly returned, and the jury should have been instructed under section 1256, Kentucky Statutes.

Max Hanberry for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Joe Cox, was indicted by the grand jury of Lyon county and convicted by a petit jury of the crime of willfully and feloniously stealing and carrying away and converting to his own use a horse, the property of Hugh Wake. The Commonwealth proved that Hugh Wake drove into town of Kuttawa in a buggy drawn by a mare about 4 o'clock in the afternoon, and hitched her on the side of the street near Ashmoore's saloon; that appellant about dark, when considerably under the influence of liquor unhitched the mare, got into the buggy, and drove her about four and one-half miles to a point in the road where he lived; that he then got out of the buggy and went to his home, leaving the mare and buggy in the road; that she was found next morning near Cumberland river bridge on the road road dead and the buggy torn to pieces. Appellant was arrested the next morning in Kuttawa by the city marshal, and when arrested said: "I was in Kuttawa and I suppose they will accuse me of taking the horse. It will keep me out of the poor house for a while." Appellant himself testified that he took the mare and buggy and drove to a point near his house, where the road forks, one branch leading to Ross ferry and the other toward Cumberland river; that he got out of the buggy, tied the lines and turned the mare loose thinking she would go home; that he did not intend to keep her appropriate her to his own use, and that he was drunk at the time.

The trial court properly instructed the jury as to the crime of horse stealing, but appellant contends that he was also entitled to an instruction under section 1256 of the Kentucky Statutes for unlawfully, but without felonious intent, taking and carrying away the horse and buggy. It is doubtful whether the testimony in this case was sufficient to establish a felonious taking of the horse and buggy.

On the contrary, it rather tends to establish the offense denounced by section 1256 of the statutes. Section 264 of the Criminal Code provides that "If an offense be charged in an indictment to have been committed, without particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances or with part only is included in the offense, although the charge may be a felony and the offense without the circumstances only a misdemeanor."

Appellant could have been convicted under the allegation of the indictment and the testimony in the case as well of the offense of unlawfully appropriating to his own use the property of another without felonious intent as of the crime of which he was actually convicted, the latter being but a degree of the former. And the trial court erred in not also instructing under section 1256 of the statutes.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

COOPER v. LANKFORD, &c.

(Filed January 29, 1904.)

1. Assignees—Creditors of assigned estates—Where the assignee on his own judgment and against the advice of creditors elected to continue what was manifestly an unprofitable business and in consequence lost to the creditors of the assigned estate, he should be charged in an action against him with the value of the estate at the time it came into his hands.

2. Same—The fact that the creditors of an assigned estate did not appeal from the settlement of a county court in an action where they filed no exceptions and were not parties does not estop them from prosecuting an action in the circuit court pursuant to section 96, Kentucky Statutes.

O. H. Waddle for appellant.

Virgil P. Smith and W. A. Morrow for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 12th day of February, 1900, C. E. Houston and J. H. Adams, of Somerset, Ky., doing business as Houston & Adams, contracted to sell and deliver to the T. B. Stone Lumber Co., of Cincinnati, O., about 250,000 feet of poplar, oak and chestnut lumber, which was to be manufactured from trees upon a tract of about fifty acres of land which they had purchased from George Gastineau. The lumber company advanced \$300 on the contract under an agreement that it was to be repaid to them out of the lumber as delivered. In compliance with this contract Houston & Adams had a large number of trees cut down, sawed into logs, and hauled to the saw mill of G. R. Gilleland & Co., with whom they had contracted to manufacture them into lumber at the price of \$3 per thousand feet. A sufficient number of the logs were manufactured under this contract and the lumber delivered to Stone & Co. to repay to them the \$300 advanced, and leave a balance of \$142.80 due from them to Houston & Adams. On the 21st day of June, 1900, Houston & Adams found they could not successfully carry out their contract, and they made a general assignment of all their property to W. F. Rainey for the benefit of all their creditors equally. This deed of assignment authorized the assignee to carry out their contract with Stone & Co. Rainey, however, failed to qualify, and the appellant, J. S. Cooper, was appointed in his place. There came into his hands as assignee \$142.80 in money, which was collected by him from the Stone Lumber Co., and about 20,000 feet of manufactured lumber, which was ricked on the mill yard, the value of which is not clearly disclosed by the testimony, but was probably worth \$200; also a number of logs, some of which were on the mill yard, and some lying in the forest, and some trees still standing. After Cooper's qualification as assignee, Gilleland & Co. claimed that a balance was due to them by Houston & Adams, and that they had a lien on the lumber ricked on their yard to secure them. Cooper seems to have held several conferences with some of the local creditors as to what course he should pursue. Some of them insisted that he should at once sell all of the assigned property to the best advantage, and distribute the cash among the creditors. One of them testifies that he offered \$600 in cash for the assets of the firm. This statement, however, is denied by Cooper, who testifies that he found that he could not sell the logs; that he paid to Gilleland & Co. \$91.95 upon their bill and entered into a new contract with them to saw the residue of the logs at \$2.75 per thousand feet, and then proceeded to manufacture the logs into lumber and to deliver it to Stone & Co. under the contract.

The trustee having failed to make any report of his proceedings under the deed of assignment, a rule issued against him from the Pulaski County Court at its July term, 1901, requiring him to do so. In compliance with

this rule he made a settlement of his accounts on the 18th of October, 1901, in which he accounted for \$761.70, proceeds of the assigned estate, and was credited \$767.91, paid out in the manufacture of the logs. In other words, the cost of manufacturing the logs had not only taken all the money received from the lumber, but had also consumed the cash and the proceeds of the manufactured lumber which came into his hands. On the 25th of February, 1902, appellees instituted this suit against appellant for a settlement, and asked that the case be referred to the master commissioner to hear proof of claims and for a distribution of the funds in the hands of the assignee. In his answer appellant set out the facts detailed above; claimed that he had no assets for distribution; that he had acted for what seemed to him to be the best interest of the estate in the course which he had taken, and denied liability. It was adjudged by the trial court from the evidence in the case that the assigned estate was of the value of \$800 at the time appellant took charge of it, and he was credited with \$91 95 paid to Gilleland & Co., and was adjudged to pay over the residue, \$508, for distribution among the creditors.

The main question for decision upon the appeal is, can the assignee of an assigned estate, in his discretion, or pursuant to express authority conferred by the deed of assignment, continue the assignor's business? It will hardly be controverted that as a general rule at common law the effect of a general assignment by a debtor of his property for the benefit of his creditors is to put an end to his business as ordinarily conducted, as effectually as if the assignor were dead and his property passed to his administrator by operation of law, or to his executor by force of his last will. It is the obvious duty of an assignee to proceed without unnecessary delay to convert the assigned estate into money and to apply the proceeds to the payment of his debts. (4 Ency., 296.) Nor can there be any doubt that the assignor can not in a deed of assignment authorize his assignee to continue and carry on the business, either for the benefit of the creditors or for his own benefit. If such provisions in deeds of assignment were tolerated and enforced by courts it would put it in the power of an insolvent debtor to indefinitely postpone the collection of debts due by him, and at the same time subject his property to the risks of business and place it in a position where it might be lost in attempting to carry on the business of his own motion. In the case of *Dunham v. Watamatt*, 17 N. Y. —, reversing S. C., 3 Duer, —, Judge Seldon makes use of the following language: "The true principle applicable to all such cases is that a debtor who makes a voluntary assignment for the benefit of his creditors may direct in general terms a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied, but beyond this can prescribe no conditions whatever as to the management or disposition of the assigned property. In all other respects the assignee must be left to act under the ordinary rules and principles which apply to trustees in analogous cases."

While this is the general rule, there are exceptional cases in which the assignee, with the consent of the creditors, may work up the stock on hand and prepare it for the market, if it is manifest that it will be for the benefit of the assigned estate. The case of *Hill v. Cornwall Bro.*, Ass'ee, 95 Ky.,

586, belonged to this category. There the property assigned was a manufacturing establishment in full operation, with an established business in all parts of the country, and a considerable amount of material on hand to be manufactured. The creditors, with an advisory committee at their head, authorized the continued operation of the factory to work up the materials then on hand, because it was believed that the plant would sell better as a going concern. It was held that the assignee was justified in continuing the business for a short time; and that the creditors were estopped by their conduct from complaining of losses incurred in the operation of the business which was carried on at their suggestion. But the facts in this case do not bring it within the rule of that or similar cases. Nor can it be doubted that the assignee of an estate could apply under section 97 of the Kentucky Statutes to the county court for authority to continue the business as temporarily, or the power of the court to authorize such continuance, when it was manifest that it would be for the benefit of the creditors.

In this case the assignee on his own judgment against the protest of creditors elected to continue what was manifestly an unprofitable business, and in consequence lost to the creditors of the assigned estate the cash and manufactured lumber, equal to cash, and we think he should be charged therewith. But the testimony shows that the logs which came into the hands of the assignee were so small and defective as to be practically of no value for the reason that the cost of manufacturing them into lumber was greater than the value of the lumber after they had been so converted. We, therefore, think that the assignee should not be charged with anything on this account, but only with the cash on hand and the value of the manufactured lumber which came into his hands. The suggestion of appellant that appellees have not pursued the remedy pointed out by the statute and appealed from the settlement made in the county court, is untenable as they filed no exceptions to that settlement, and did not make themselves parties to the proceeding in any way. There were, therefore, not estopped from the institution of this suit in the circuit court as provided by section 98 of the Kentucky Statutes. (*Pickerell v. Thompson*, 22 Ky. Law Rep., 1882.)

But for reasons indicated the judgment is reversed and cause remanded, with instructions to charge the assignee with \$342.80, and credit him with such legal disbursements as he may show himself entitled to, including reasonable compensation, and for other proceedings consistent with this opinion.

CITY OF LUDLOW V. RICHIE.

(Filed January 19, 1904—Not to be reported.)

City attorney—Salaries—In an action by a city attorney against a city for recovery for services rendered, where he was present at a meeting of the council when an ordinance was passed fixing his salary at \$800 a year and providing that his services should include "all legal and other business of the city coming under his jurisdiction," he making no objection to the ordinance and continued to serve the city as its attorney, there can be no recovery thereafter for extraordinary services as such attorney.

Thurber & Jackson for appellant.

W. H. Mackoy for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, W. T. Richie, was city attorney of Ludlow for four years, beginning in January, 1894. The term was for two years. For the first term his salary was fixed at \$200 a year. For the second term, which began in January, 1896, his salary was fixed at \$300 a year. After the end of his period of service he filed this suit on April 10, 1899, to recover of the town \$1,338.16 for legal services on behalf of the city in actions to which it was a party, which were rendered by him while he was city attorney. The only question we deem it necessary to determine is whether these services were in the line of his duty as city attorney, and were covered by the annual salary paid him. It is insisted that it was not incumbent on him as city attorney to represent the city in civil actions to which it was a party.

Ludlow is a city of the fourth class. The act for the government of fourth class cities was approved June 24, 1893. The council first elected under the act organized in January, 1894. The provision of the act as to the city attorney, so far as material, is in these words: "The board of council as soon as they are organized under this charter, or as soon thereafter as practicable, and biennially thereafter, may appoint a city attorney who shall prosecute all pleas of the Commonwealth and all warrants or proceedings instituted for violations of the ordinances or municipal regulations of the city in the city court. * * * The board of council shall fix by ordinance previous to his election or appointment the compensation for his services. * * * It shall be the duty of the city attorney further to attend the meetings of the board of council, advise it in all matters of litigation or legal proceedings, and perform such other duties in his department as the board of council may require." (Kentucky Statutes, §509.)

The city council made the following ordinance: "That in addition to the duties prescribed in charter in section 27, section 48, section 71, it shall be the duty of the city attorney (a) to give legal advice to the mayor and other officers, and the various city boards, if any, and the board of education, in all matters pertaining to their respective offices and duties affecting the interests of the city, and if so required or asked, which advice or opinion shall be in writing for future reference; (b) to prepare the contract, order and bonds and all legal documents of and by and with and for the city, when required to do so by the city council; (c) to attend to all suits now pending or hereafter to be brought, to which the city is a party, and for all services of an extraordinary character which he may be called upon to render for the city as its attorney he shall receive such an additional fee as he and the city council may in each instance agree upon and not otherwise; (d) to advise the city council and the officers of the city, and the various boards of the same, of his own motion and without instruction, if, in his judgment, there is error about to be committed or the best interests of the city to him seem to require such advice and counsel."

After the council organized under the new charter it set about getting up the ordinances, and some time was spent before they were completed. The above is from section 4 of ordinance 816, and was passed on July 12, 1894. Appellee made no objection to the ordinances, but, on the contrary, advised

the council that it was all right. He took charge of the existing litigation against the city and attended to the new suits as they were brought from time to time. He presented no bill or claims for the services sued for to the council during his entire term of service, although some of the suits were disposed of during that term soon after they were brought. When he was re-elected, the following order was made by the council fixing his salary for the second term: "Mr. Dillon moved that the salary of the city attorney be fixed at \$300 per year, and that his services should include all legal and other business of the city coming under his jurisdiction."

This was carried; appellee was present at the time, and made no objection. It is earnestly insisted for appellee that as by the statute it is made the duty of the city attorney to prosecute in proceedings in the city court for violations of the municipal ordinances, to attend the meetings of the board of council and to advise it in all matters of litigation or legal proceedings, the concluding words of the section making it his duty to "perform such other duties in his department as the board of council may require," refer to duties in the line of the things mentioned, and not to civil actions by or against the city. It is also urged by his counsel that in the act for the government of cities of the first, second and third classes it is expressly made the duty of the city attorney to attend to civil actions where the city is a party (Kentucky Statutes, sections 2909, 3166, 3314), and it is argued that the absence of this language in the act governing cities of the fourth class shows that the legislature had in mind making a different rule as to these smaller towns. There is force in the argument. But while the act for the government of fourth class cities does not make it the duty of the city attorney to attend to civil cases on behalf of the city, it does provide that it shall be the duty of the city attorney to "advise it in all matters of litigation or legal proceedings, and perform such other duties in his department in addition to those named as the board of council may require." The word advise is used here in its broad sense. The meaning is, he shall be the legal adviser of the council in all matters of litigation and legal proceedings, and in defining the duties which are required of him in his department the council may properly include attention to litigation as to which it is his duty to advise it. In other words, it is left to the discretion of the board of council in the fourth class cities to determine what duties in his department shall be required of the city attorney. The reason for this is obvious. The needs of the city, the character of the litigation, the experience of the attorney, and other considerations, would determine the council in its action according as the public interests required, and his compensation would be fixed by the council according to the duties required of him. The rule of strict construction is not to be applied to such a statutory provision, but, on the contrary, it is to be liberally construed so as to promote its objects. (Kentucky Statutes, section 480.) As between a municipality and its officers, the charter defining the duties of the officers and regulating their compensation is to be construed in case of doubt to protect the treasury of the city, for claims against the treasury of the city can not be sustained on doubtful implication. By the ordinance adopted by the council pursuant to the statute and acquiesced in by the appellee, it is expressly provided that he is to attend to all suits "now pending or hereafter to be brought to which the city is a party," and then it is provided that "for all services of an extraor-

ordinary character which he may be called to render for the city as its attorney he shall receive such an additional fee or compensation as he and the city council may in each instance agree upon and not otherwise." Some force must be given to the words "and not otherwise." They can only mean that he was not to have an additional fee or compensation except for services of an extraordinary character, and that as to this he and the city council were in each instance to agree. The plain meaning is that if services were required of him which he regarded as extraordinary, he was to call the attention of the council to the matter, and ask an additional compensation. No claim that the services sued for were of an extraordinary character was presented to the city council. It was made his duty to attend all suits to which the city was a party, and while it was recognized that services of an extraordinary character might be required, it was plainly stated that he was not otherwise to receive an additional fee or compensation. During his term he presented to the council claims which were allowed him, amounting to \$157.29. One hundred and ten dollars of this was for expenses and extraordinary services; the remainder was for services in proceedings to collect taxes, or matters not now shown to be extraordinary. This perhaps led to the Dillon resolution when his salary was raised to \$300. The purpose of this resolution was to cut off claim for extraordinary services, and to make the salary exclusive of all other compensation. Appellee accepted his salary paid under this resolution. It was competent for the council, independently of section 3509, Kentucky Statutes, to agree with their attorney as to his compensation, and to pay him a lump sum in full for all services. This was the effect of the Dillon resolution, and there can be no allowance thereafter to appellee for extraordinary services rendered as city attorney. It is not alleged that he rendered any extraordinary services during his first term, nor is it shown by the proof that he performed any such services for which he should now receive compensation in addition to the salary which was paid him as city attorney. It appears from the proof that he attended to considerable litigation for the city in this court, coming here for this purpose, and arguing the cases before the court. For his expenses in so doing he should be paid, if this has not been done, but as he presented no claim to the council for extraordinary services at the time, it must be held that these services were performed by him as city attorney and in the line of his duty, for the council was entitled under the old ordinance to know when he claimed a certain service was extraordinary, so that they could act for the best interests of the city in determining whether the services should be performed or not. The meaning of the ordinance is that services not contracted for as extraordinary were to be rendered by the city attorney as part of the duties of his office. Appellee has in his hands \$126.28, which he collected for the city and retained on his fees, less \$1.60 which he paid out on an appeal, leaving a balance of \$124.68. This is pleaded as a set-off by the city, and judgment should be entered in its favor therefor.

Judgment reversed and cause remanded for a judgment as herein indicated. Chief Justice Burnam dissents.

Whole court sitting.

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KENTUCKY COURT OF APPEALS.

GADDIE v. COMMONWEALTH.

(Filed January 29, 1904—Not to be reported.)

Criminal law—Indictment—An indictment charging the offense of unlawfully breaking a warehouse with intent to steal therefrom where the facts were that a window strip had been prized from the bottom and some nails drawn, but the window remained unmoved and there was no opening made into the interior of the building and no entry made, the effort to break into the warehouse was incomplete and constituted no more than a trespass, and an instruction should have been given at the conclusion of the Commonwealth's testimony to find the accused not guilty.

C. K. Holbert for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barker.

Appellant was indicted, charged with the offense of unlawfully breaking a warehouse belonging to Leischardt & Murdock, in Vine Grove, Hardin county, Kentucky, with intent to steal therefrom.

A trial resulted in a verdict of conviction and a sentence of the defendant to three years in the penitentiary, of which he is now complaining. The bill of exceptions consists of the following agreement of facts: "It is agreed that the evidence herein showed that the act done was committed in Vine Grove, Hardin county, Kentucky, upon the storehouse of Leischardt & Murdock; that one outside window strip, which fixed and held the window firmly in place, had been prized open from the bottom and some of the nails drawn out of it by the defendant, Ed. Gaddie, and the strip left hanging loose from the top; that the window remained unmoved in its place, but was left unprotected on one side, so it could have been easily lifted out, but that there was no opening made to the interior of the building. It is further agreed that the evidence showed that the said act was done with intent that stealing should be committed therefrom."

No entry could have been made into the warehouse after the window strip.

'was loosened. Undoubtedly appellant began to break into the house, but he did not finish the attempt. The term "breaking," as used in the statute, has a well-known and definite meaning at common law with reference to the offense of burglary, and in order to constitute it the action of the defendant must have been such as would, without additional effort, have made an entry possible. The term is used in the statute in its common law sense.

Roberson, in his work on Kentucky Criminal Law and Procedure, section 302, after defining burglary at common law, says: "As we shall hereafter see, the statutes of this State provide against breaking into dwelling houses and other buildings, whether in the night or day, and the foregoing statement, as to 'breaking,' entry, etc., applies equally to these statutory cases." In section 303 he says: "'Breaking,' as used in this connection, implies force; but the slightest force is sufficient. Thus the lifting of a latch, or the turning of a knob in opening a door, the picking of a lock, or opening with a key, or pushing open a closed door, though it is neither latched, bolted nor locked, the hoisting of a window, the removal or breaking of a pane of glass, or unloosening any other fastening of a door or window, which the owner has provided for securing the house from an actual breaking. * * * But any breaking which enables the defendant to take the property out through the breach with his hands is sufficient breaking, if the intent was felonious. On the other hand there is no breaking, where the entering is through an open door, or window, or other aperture, or even pushing further open a door partly open, or raising a window partly raised, and it is held that merely breaking the blinds is not sufficient to warrant conviction when there has been no entry beyond the sash of the window."

Bishop in his new work on Criminal Law, section 91, says: "A breaking, in the law of burglary, is any disrupting or separating of material substances in any enclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein, may be accomplished." Subsection 2 of section 45: "If there are inside shutters, it is enough to pass in the hand for the unaccomplished purpose of opening one of them; but the breaking of an outside shutter is not sufficient while the place remains unbroken."

Greenleaf in his work on Evidence, 16th edition, volume 3, section 76, thus states the rule: "The breaking of the house may be actual, by the application of physical force; or constructive, where an entrance is obtained by fraud, threats or conspiracy. An actual breaking may be by lifting a latch; making a hole in the wall; descending the chimney; picking, turning back, or opening the lock, with a false key or other instrument; removing or breaking a pane of glass, and inserting the hand or even a finger; pulling up or down an unfastened sash; removing the fastening of a window, by inserting the hand through a broken pane; pushing open a window which moved on hinges and was fastened by a wedge; breaking and opening an inner door, after having entered through an open door or window; or other like acts. * * * The breaking must also be into some apartment of the house, and not into a cupboard, press, locker, or the like receptacle, notwithstanding these, as between the heir and executor, are regarded as fixtures."

In the case of *State v. McCall*, Supreme Court of Alabama, 39 Am. Dec.,

314, it appears that the accused had broken open the outside shutters of a window, but had proceeded no further, leaving the window still intact, the court said: "It can not be that the common security of the dwelling house is violated by breaking one of the shutters of a door or window which has several. True it weakens the security which the mansion is supposed to afford, and renders the breach more easy; but an additional force will be necessary before an entry can be effected; there can, under such circumstances, be no burglary committed.

"Suppose the shutters of a door, made by placing plank upon each other until it is two or three double, if the thickness of one of the plank be removed by one intending to commit a burglary, and an entry thus far made, can it be said that the offense was completed? What, in point of principle, is the difference between such a case and one where there are several shutters, an inch or two apart from each other? In neither case can such an entry be made as will enable the aggressor to commit a felony. * * * To constitute burglary an entry must be made into the house with the hand, foot, or an instrument with which it is intended to commit a felony. In the present case there was nothing but a breach of the blinds, and no entry beyond the sash-window. The threshold of the window had not been passed, so as to have enabled the defendant to consummate a felonious intention; and according to the principle we have laid down the charge to the jury was erroneous."

The case of *Rose v. Commonwealth*, cited by the attorney general, has no application to the case at bar. There the accused received a prop which constituted the fastening of a door, thus opening the door and leaving nothing further to be done, in order to effect an entrance. In the case at bar, in order to make an entrance into the warehouse, it was necessary to remove the window by additional force. The effort on the part of the accused to break the warehouse in question was incomplete, and constituted no more than a trespass.

At the close of the Commonwealth's testimony a peremptory instruction should have been given the jury to find the accused not guilty.

The judgment is reversed for proceedings consistent herewith.

LOUISVILLE RY. CO. v. MEGLEMERY.

(Filed January 29, 1904—Not to be reported.)

Street railways—Instructions—In an action for damages for injuries sustained in being struck by a street car from which he had alighted where the evidence as to how appellee was hurt was conflicting, an instruction should have been given which told the jury "that after plaintiff alighted in the street from the defendant's car, so as to be free from injury by its forward movement, the defendant ceased to owe the plaintiff any further duty, except to use ordinary care to avoid injuring him, and if the jury believe from the evidence that the plaintiff was injured by a backward movement, or movement towards the car on his part caused by an approaching vehicle in the street, or from any other cause over which the defendant had no control, * * * the law is for the defendant and the jury will so find."

Fairleigh, Strauss & Fairleigh and Kohn, Baird & Spindle for appellant.
M. A., D. A. & J. G. Sachs for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division:
Opinion of the court by Judge Hobson.

Appellee filed this action against appellant to recover for injuries which he received while in the act of alighting from one of its cars.

The jury to whom the case was submitted found for the plaintiff and fixed the damages at \$1,500. The verdict is not excessive under the evidence. The proof for the plaintiff shows that he is sixty-one years old, and has been one of the magistrates of the city for a number of years. On Sunday, August 25, 1902, during the Knight Templars' conclave at Louisville, he got on one of the motor cars of the defendant at Fourth and Broadway. The motor car had a trailer behind it. When he reached Third and Main he rang the bell to get off. The car stopped. The proof for the plaintiff shows that as he was in the act of getting off, having his right foot on the ground and his left foot on the step, or between the step and the ground, the cars made a sudden lurch forward, and he was struck by the trailer car, which was about nine inches wider than the motor car, and knocked him down, inflicting painful injuries on his leg and head, from which he had not recovered at the time of the trial in April, 1903. He was then still unable to use that leg as before. He was laid up at home for a month, was on crutches about two months, and at the trial could walk all right where it was perfectly level, but in going up and down steps or hills he had to give his left leg a push to get along. At the time of the trial he still suffered from the injury, and it took him twice as long to walk from home to his office as before he was hurt. The proof for the defendant tends to show that the trailer was no wider than the motor car, and that the plaintiff alighted in safety from the car and started across the street when a surrey came by and in backing from the surrey he backed against the trailer car, and was thus struck. Five or six witnesses were introduced on the trial who were present at the time, and saw the occurrence; two or three testified that the accident occurred as stated by the plaintiff, and about an equal number that it occurred as claimed by the defendant.

On this testimony the court instructed the jury as follows:

"1st. The court instructs the jury that it was the duty of the defendant, the Louisville Railway Co., to use the utmost care and skill that prudent men engaged in the same or like business are accustomed to use under the same or similar circumstances, to enable the plaintiff, Ed. Meglemery, to alight from the car in safety, and to move far enough from said car, if such moving away was necessary after so alighting, to prevent his being struck or injured by the trailer with said car; and if you believe from the evidence that the defendant failed to use such care, and that by reason of such failure the plaintiff was prevented from getting out of the way of defendant's car after he alighted therefrom, and was injured thereby, then the law is for the plaintiff and you will so find.

"2d. It was the duty of the plaintiff, Ed. Meglemery, to exercise ordinary care for his own safety in alighting from said car and moving away from the same, if such moving away was necessary; and if you believe from the

evidence that the said Meglemery negligently failed to exercise such care, or negligently remained so close to said car as that he was struck by the trailer and injured, and but for such negligent failure on the part of the plaintiff to move away from said car when he alighted therefrom said injury would not have been received by him, then the law is for the defendant and you will so find."

Appellant complains that the first instruction was not modified so as to show that the plaintiff could not recover if he failed to exercise ordinary care. And it is insisted that this error is carried into the second instruction, and that by it the jury was charged not to find against appellee on account of his contributory negligence unless such negligence was the sole cause of his injury. Appellant also complains that the real issue in the case was not presented to the jury by the instructions, insisting that the following instruction, which it asked, should have been given:

"4th. The court instructs the jury that after the plaintiff alighted in the street from the defendant's car, so as to be free from injury by its forward movement, the defendant ceased to owe the plaintiff any further duty, except to use ordinary care to avoid injuring him; and if the jury believe from the evidence that the plaintiff was injured by a backward movement or movement towards the car on his part, caused by an approaching vehicle in the street, or from any other cause over which the defendant had no control, and that by ordinary care on the part of the defendant's employes in charge of said car the injury to the plaintiff could not have been avoided after they discovered, or could by ordinary care on their part have discovered, plaintiff's peril, and by the exercise of ordinary care could then have avoided injuring him by stopping the car, the law is for the defendant and the jury should so find."

We are unable to see that there was any error in instructions 1 and 2 given by the court. They are to be read together, and when so read state plainly that the plaintiff can not recover if he failed to exercise ordinary care, and but for this would not have been injured. In order to find for the defendant under instruction 2 it was not necessary for the jury to believe from the evidence that the plaintiff's negligence was the sole cause of his injury. If it was due in part to the plaintiff's negligence and in part to the defendant's negligence, then he could not recover if but for his own negligence the injury would not have happened. Instruction 4, which was refused by the court, states the law correctly, and with this instruction before them the mind of the jury would have been brought more directly to the issue they were to try. It defines the duty owing by the defendant to the plaintiff, and shows when and under what circumstances the duty would cease. If presented to the jury the theory of the case on which alone all the testimony introduced by the defendant was given, and on the whole case we conclude that the refusal to give the instruction was prejudicial to the substantial rights of the defendant.

For this error alone the judgment appealed from is reversed and the cause remanded for a new trial.

Whole court sitting.

Judge Paynter dissents.

THIEL v. SOUTH COVINGTON & CINCINNATI STREET RY. CO.

(Filed January 29, 1904—Not to be reported.)

1. Street cars—Damages—Negligence—Where appellant was driving a wagon which was struck by a street car, throwing him from it and killing one who was in the wagon with him, the evidence showing that the car could have been stopped at the rate it was going within six or eight feet, but made no effort to do so, and that the wagon would not have struck it had the car been stopped; that the driver gave a signal to the motorman to stop it, the court erred in giving a peremptory instruction to find for the defendant.

2. Same—Street cars have not the exclusive right to the use of the streets, and in view of the fact that persons may be expected to be upon the street car track at any time or place, the law imposes a duty upon motormen to use ordinary care to discover persons upon the track, and avoid injuring them.

B. F. Graziani for appellant.

Ernst, Cassatt & McDougall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The appellant instituted this action to recover damages for injuries which he received by reason of the alleged negligence of the servants of appellee in causing one of its street cars to collide with a wagon which appellant was driving. It is in substance averred in the petition that while a party riding in the wagon with appellant was paying the toll at the Cincinnati end of the suspension bridge which crosses the Ohio river between Cincinnati, O., and Covington, Ky., a street car, by reason of the negligence of those in charge of it, struck the wagon, causing the horse to take fright and run away over the bridge toward the Covington end of it; that as the horse approached that end of the bridge those in charge of the car which was going to the Cincinnati side from Covington, by reason of their negligence, caused it to strike the wagon and threw appellant from it to his serious injury and damage. The evidence introduced by the plaintiff failed to show that the car which first struck the wagon on the Cincinnati end of the bridge belonged to the appellee. The evidence of the plaintiff himself is very unintelligible and unsatisfactory, evidently resulting from his lack of intelligence and the faculty of describing an occurrence like the one in question. A witness by the name of Besten, introduced by the appellant, gives a very intelligent account of the collision. Preliminary to the statement of this witness' testimony, it is well to state that the bridge is higher in the middle than elsewhere; that there are two car tracks over the bridge; that the west track is used by cars running from Cincinnati to Covington, and the east track is used for cars going from Covington to Cincinnati. Besten testified in substance that the horse which appellant was driving was running away and that the driver was endeavoring to control him; that as the horse approached the Covington side a street car came upon the bridge from Covington; that the horse was running on the east track; that the car was running on the same track; that the space between the horse and the street car was about three hundred feet; that the horse continued to run on the

east track until it got just in front of the street car, when the horse swung from the track, and before the wagon could leave it the car run into the wagon, and threw therefrom the occupants; the plaintiff survived his injuries, but his companion was killed. The street car did not stop until after the collision, and apparently made no effort to do so until that time. Besten testified that within about one hundred feet of the street car the appellant waived his hands as if to notify the motorman to stop the car. The evidence is that the car could have been stopped at the rate at which it was going within the distance of six or eight feet. Under this state of facts the court gave peremptory instructions to find for the defendant.

A jury would have been authorized to conclude that when the horse turned from the track to avoid the street car the wagon would not have struck it if the car had been stopped. The question arises: Should the car have been stopped under the circumstances before the horse reached it? There would have been no trouble in stopping the car before the horse reached it, even after the driver gave the signal to have it stop. Even if there had been no obligation on those in charge of the street car to have discovered the appellant upon the track and avoided injuring him, still if the discovery was made that he was upon the track in a perilous position and might be saved by stopping the car, it was the duty of those in charge of it to do so, and thus have avoided injuring him.

From the circumstances proven in this case a jury might have felt authorized to infer that those in charge of the street car discovered the appellant's perilous position on the track and used no care to avoid injuring him. Street cars are almost as dangerous agencies in the destruction of human life as railroad trains. They are operated upon streets upon which people are constantly traveling. People may be expected to cross the track at any point on the line. Street cars have not the exclusive right to the use of the streets. In view of the fact that persons may be expected to be upon the street car track at any time or place, the law imposes a duty upon motormen to use ordinary care to discover persons upon the track, and avoid injuring them.

In *Passamaneck's Adm'r v. The Louisville Railway Co.*, 98 Ky., 205, the court said: "Persons operating street cars along the public streets of a city must know, and in law are bound to know, that men, women and children have an equal right to the use of the highway, and will be upon it. It was the duty of appellee's servant or agent to be on the lookout, and to take all reasonable measures to avoid injuries to persons who might be upon the street. To be on the watch is no more than ordinary care under such circumstances."

The court erred in giving a peremptory instruction to find for defendant. The judgment is reversed for proceedings consistent with this opinion.

SOUTH COVINGTON DISTRICT, &c. v. KENTON WATER CO.

(Filed January 29, 1904.)

1. Towns—Powers of trustees—Taxation—Where the legislature did not contemplate incorporating a town, but only to create a civil district, and conferred no power upon the trustees to raise revenue to carry out a contract for fire protection, the power to pass by-laws for the preservation of the health of the district did not warrant a contract with a water company to furnish fire hydrants and water therefrom, nor did an amendment to the original act giving authority to require saloons, bowling alleys, and the like to take out a license, and to have the streets and sidewalks improved at the expense of the owners of the property thereon and to authorize the collection of a tax for the payment of peace officers, confer such power to make a contract with the water company, and the trustees of the district were without power to make such contract.

2. Same—Where the trustees of a district had no authority to contract for water for fire protection, the fact that it received water under a contract made for that purpose does not render it liable for its payment because it can not be made to pay for something that it had no power to buy.

3. Same—Persons who deal with public corporations are charged with notice of their powers, and the money of the people of a district can not be misappropriated because the trustees made a contract they had no authority to make.

Tisdale & Gray for appellants.

H. D. Gregory for appellee.

Orlando P. Smith for town of Latonia.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

The South Covington District embraces about four square miles of territory. It was incorporated by an act of the legislature, approved May 12, 1884, as a magisterial district. On April 3, 1893, the trustees of the district granted to the Kenton Water Co. the franchise to lay water pipes in the streets of the district and to furnish fire hydrants thereon and water to the citizens; also to the district in case of fire. For each fire hydrant they agreed to pay the water company \$45 a year. The fire hydrants were put in from time to time and the rent on them up to October 12, 1899, amounted to \$2,819. Of this the trustees had paid \$1,335, leaving a balance due of \$1,484, to recover for which this suit was brought. When the contract was made a town had grown up on a part of the district near the Latonia race track, and was called Milldale. In the classification of the towns of the State Milldale, Kenton county, was designated a town of the fifth class, but in *Stevens v. Felton*, 18 Ky. Law Rep., 248, it was held that the territory, which included many farms, was not incorporated as a town by the original act, but only as a civil district, and that the legislature did not create a town or incorporate one by the act classifying the towns of the State. After this the town of Latonia was incorporated, and its limits have been since extended until something like three-fourths in value of the property in the South Covington District is now within the town of Latonia, and all the fire plugs, for the rent of which the suit was brought, are within the town. Both the town of Latonia and the South Covington District were made defendants to

the suit, and judgment having been rendered against the South Covington District and the action dismissed as to the town of Latonia, both the district and the water company appeal.

The first question arising is whether, under the charter, the trustees of the district had authority to make the contract sued on. The charter, so far as material, is as follows:

"That so much of the county of Kenton as may be embraced within the following boundary, to wit (here follows boundary), is hereby established as a separate justice and election district in said county; and the inhabitants thereof are created a body-politic and corporate, by the name and style of the 'South Covington District,' in Kenton county, Kentucky, for the purposes hereinafter mentioned.

"2d Two justices of the peace and one constable shall be elected for said district by the qualified voters thereof, at the times and in the manner and having the qualifications required by the Constitution and laws of this Commonwealth; and the elections for said district shall be held at a suitable place to be selected by the trustees of said district; said voting place may be chosen by the trustees and notice thereof shall be given by posting written notices in five or more public places in said district for ten days before said election is to be held.

"3d. The government of said corporation shall be confined to a board of five trustees, having the qualifications of owners of real estate and resident within said district, who shall be chosen once in two years on the first Monday in August by the qualified voters within said district, and who shall serve two years and until their successors are elected and qualified; the first election hereunder for trustees to be in August, 1886.

"4th. Said trustees may select one of their number chairman, who shall preside at all their meetings; and in case of his absence, they may select a chairman pro tem. They shall select a clerk, treasurer, and other corporation officers, and appoint policemen for the place and remove same at discretion and appoint others in their stead. They may meet at such times and places as they deem proper or as the chairman may appoint, upon petition of two of the board; and a majority of those elected shall constitute a quorum to do business; they shall keep a record of their proceedings. They may pass such by-laws, rules and regulations for the preservation of the health, good government and police protection of the persons and property of the district as they may deem proper, not in conflict or inconsistent with the Constitution or laws of the State, and provide for their observance by adequate penalties for a violation of the same, to be enforced before a justice of the peace; and all fines or forfeitures therein collected shall be paid to the treasurer of the board, to be used in improving the public thoroughfares within the said district. They may make regulations to prevent stock of any kind from running at large in said district, provided they think it necessary; and may provide a pound for impounding stock that may be taken up, and the cost of impounding shall be a lien on the stock. They shall have the management of the public roads in said district, except turnpike roads operated by companies running through said district, and shall keep the same in good repair, and for that purpose a tax of 10 cents on the \$100 of all real estate in said district, which is to include the 6 cents road tax in said district at the

valuation put thereon by the assessor of Kenton county. They may grade and macadamize, either with rock or gravel, any public road passing through or into said district within the limits thereof. They may pay a collector of the tax herein levied and fix his compensation, etc." (Acts 1883-1884, volume 2, page 1818.)

The remaining sections of the act provide that the tax referred to may be collected by suit and when it shall be payable; that actions shall be prosecuted or defended in the name of the trustees of the corporation; that all police shall be sworn as constables and that constables and justices of the peace in the district shall exercise like powers and receive the same fees as constables and justices in Kenton county; that at all elections the qualified voters residing in the district may vote at the voting places therein, but not elsewhere; and that the trustees may require persons residing in the district to work on the roads and have like remedies against those failing to work as are given to surveyors of public highways.

It is insisted for the water company that the power to pass such by-laws, rules and regulations for the preservation of the health, good government and police protection of the persons and property of the district as they deem proper empowered them to provide by contract for water for fire protection. On the other hand, it is insisted for the district that the latter part of the section shows that such by-laws, rules and regulations are referred to as may be enforced by adequate penalties before a justice of the peace. On behalf of the water company we are referred to authorities holding that a city may contract for water under a power to pass ordinances respecting the police and to preserve health. (1 Dillon on Municipal Corporations, section 146.) But this rule can not be applied to a civil district where the trustees are given so limited power as in the act quoted. In construing the act we must bear in mind the condition of things under which it was passed. It was an agricultural district. Two justices of the peace and one constable were to be elected for it. The power conferred upon the trustees as to the levy of taxes is limited to a tax of 10 cents on the \$100 worth of real estate in the district, and this is to be applied to improving and keeping in repair the roads. They are not allowed to levy taxes for any other purpose, and no other means of revenue is provided. The powers of the trustees were apparently granted to provide police protection, prevent stock from running at large, and improve the roads of the district. The district was at that time entirely unsuited for a general system of water mains or fire plugs, and to have provided therefor at the common expense would have been unjust to the larger part of the property owners, for the fire plugs in contest are located on a small portion of the district in area. The provision of the charter that the trustees may pass such by-laws, rules and regulations for the preservation of the health, good government and police protection of the persons and property of the district as they may deem proper, and provide for their observance by adequate penalties to be enforced before a justice of the peace, must be read in connection with the other provisions of the charter defining the powers of the trustees, and in the light of the circumstances to provide for which the charter was enacted. As the legislature did not contemplate incorporating a town, but only intended to create a civil district, and conferred upon the trustees no power to raise revenue and carry

out a contract for fire protection, the power to pass by-laws for the preservation of the health of the district did not warrant the contract in question, and under the original charter the trustees were not authorized to make the contract. By an act approved April 14, 1888 (Acts 1887-8, volume 3, page 170), the charter was amended. By the amendment the trustees were given authority to require saloons, bowling alleys, billiard tables, and the like, to take out a license and fix the cost thereof; also to have the sidewalks of the streets and roads improved at the expense of the owners of the property fronting thereon, and to assess and collect a tax of 5 cents on the \$100 on all real estate in the district not used for agricultural purposes, to be applied by the trustees in the payment of police or other peace officers in the district. In respect to the power to pass by-laws for the health and good government of the district the amendment added nothing to the powers of the trustees under the original charter. It was simply passed for the purposes named, and left the trustees with the same powers as to by-laws and ordinances as they had before except as to the matters referred to. They had no more authority after this amendment was passed than before to make an ordinance for fire protection, for they had under their charter no other powers than those conferred by it, and the amendment did not enlarge their powers except as to the licensing of saloons, the construction of sidewalks and the 5 cent tax to pay the police officers. We, therefore, conclude that the district trustees were without authority to make the contract in question.

But it is insisted for the water company that, although the trustees had no authority to make the contract, still the district received the benefit of it, and must pay therefor to the extent that it has assets, and in support of this we are referred to the case of Nicholasville Water Co. v. Town of Nicholasville, 18 Ky. Law Rep., 592, and the authorities therein cited. The distinction between this case and that is apparent. There the town had authority to contract for a water supply. Although the contract was not legally made, still the city was required to pay for what it had received under it on a quantum meruit. To the same effect are the other authorities cited. But here the district was without authority to contract for a water supply. To hold it liable for what it has received would be to make it pay for something which it had no power to buy. Persons who deal with public corporations are charged with notice of their power, and the money of the people of the district can not be misappropriated because the trustees made a contract they had no authority to make; and to apply the money of the district to a purpose not warranted by the charter would be to misapply it. In Dillon on Municipal Corporations, section 457. It is said: "The general principle of law is settled beyond controversy, that the agents, officers, or even city council, of a municipal corporation can not bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but

are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. * * * It results from this doctrine that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corporation under any circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract."

Further on, in sections 459-460, the question of the liability of the corporation upon an implied promise is discussed, and it is said that this principle applies to cases where the money or property of another is received under circumstances which impose an obligation upon the municipality to do justice with respect thereto. (1 Smith on Municipal Corporations, sections 227, 663.) In the case before us there can be no implied liability on the part of the district to pay for the water received, because it had no power under the charter to take any action in regard to a water supply, and its receiving the water was without its corporate powers. To hold it liable for water which it received would be to impose an implied liability upon it for an act which it had no power to do. This can not be done.

Judgment reversed and cause remanded, with directions to dismiss the petition. The judgment in favor of the town of Latonia is affirmed.

GRAY TIE AND LUMBER CO. v. FARMERS BANK OF SMITH'S GROVE.

(Filed January 29, 1904—Not to be reported.)

Original opinion, 24 Ky. Law Rep., 2319.

E. W. Hines and M. M. Logan for appellant.

John M. Wilkins and Wm. Cromwell for appellee.

Appeal from Warren Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

We have carefully re-examined the record and reconsidered the question suggested in the petition for rehearing. Neel was not a general agent for the transaction of the business of his principal, authorized to make drafts on his principal as might be necessary. He was not empowered to exercise a discretion as to drawing drafts. He was authorized to receive, count and mark the ties which he bought, and then to give a draft for the ties which were thus delivered to him. He gave a great many such drafts which were paid, and his authority to make drafts, under these circumstances, is undoubted. But it can not be inferred from this that he had authority to make drafts for ties which he had not received and which were in fact not in existence.

Before he went to Evansville his only authority was to receive the ties on the river, and then give a draft for the price after they were thus counted and marked. In the case in question his authority was enlarged, and he

was allowed to go into the woods and receive and mark the ties, and give a draft therefor before the ties were hauled to the river, but this was the only change that was made in his authority. This is shown not only by the positive and uncontradicted testimony of Neel & Gray, but also by the form of draft which was given to him to fill out, on which the paper sued on was drawn. He had no authority to give a draft before he received the ties. While one who lends his credit to another, by putting in his hands a note or bill to be used for raising money, is bound thereon to an innocent party who purchases the paper, although there may have been no consideration for it between the parties, still this principle can have no application to a bill put out by an agent unless the agent had authority thus to lend the credit of his principal to another. Power so extraordinary can not be presumed in the absence of proof; and the proof conclusively showing that no power was conferred on the agent to lend the credit of his principal, and that his only power was to draw drafts for the ties after he had gone in the woods and counted and marked them, the drafts in question are void to the extent that the ties were not in existence, although it is valid to the extent of the six thousand and eighty-one ties which were in existence and were received and marked by the agent.

The petition for rehearing is, therefore, overruled.

WALTER, &c. v. BRUGGER, &c.

(Filed February 2, 1904—Not to be reported.)

1. Deed of trust—Construction of statutes—Where a deed of trust conferred the power to mortgage property and in a certain contingency to sell it, where a mortgage was executed upon it in pursuance to the deed of trust it was not violative of section 2356, Kentucky Statutes, because the trustee neither sold the property nor attempted to sell it.

2. Same—Where a deed of trust was executed for the purpose of raising money to discharge debts against the property, the person lending money was not required to look to its application.

A. H. Marret, C. A. Walter and D. M. Rodman for appellants.

M. A., D. A. & J. G. Sachs for appellees Pauline and Ferdinand Brugger.

Edward F. W. Kaiser for appellees Wolke & Liebert.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

This controversy arises out of a deed of trust which the appellants and others made to A. J. Speckert, trustee, and a mortgage which he executed by virtue thereof. From the recitations in the deed of trust the Walters were indebted to Jacob Gast in the sum of \$190, and that there were liens on the property for apportionment warrants and for State and city taxes on the property conveyed by the deed of trust, and that repairs were needed upon it. The deed of trust imposed upon Speckert the duty of paying the claims against the property and to make needed repairs. There was no money in Speckert's hands to discharge these assumed liabilities. The deed confers upon Speckert the right to mortgage the property and also to sell it

on a certain contingency. The contingency did not happen, and he did not sell it, but he borrowed from the appellee, Pauline Brugger, \$650, and to secure which he executed a mortgage as trustee upon the property described in the deed of trust. This action was instituted by the mortgagee to sell the property in satisfaction of the debt.

The first question is, did the petition state a cause of action? It does not set out as fully as it should have done the facts with reference to the execution of the deed of trust and the trustee's powers under it, but we are of the opinion that this defect was cured by the answer making an issue upon these questions. The deed of trust is a very peculiar one; however, it expressly authorizes the execution of a mortgage upon the property, and we are of the opinion that it sufficiently shows that the purpose was that Speckert should execute a mortgage on the property to raise money to discharge the claims which he, as trustee, was to pay.

It is urged that Speckert did not have the right to execute the mortgage because of section 2356, Kentucky Statutes. It reads as follows: "No sale of any real estate by a trustee, by virtue of a deed of trust, or pledged to secure the payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge unless the sale thereof shall be in pursuance to a judgment of court, or shall be made by an assignee under a voluntary deed of assignment, or the maker of such deed or pledge shall join in a writing evidencing the sale."

The trustee did not sell the real estate or attempt to pass the title to it. The section does not deny the power of trustees to pledge real estate to secure a debt when a deed of trust confers such authority. It denies a trustee the right to sell real estate held by virtue of a deed of trust or where pledged to secure the payment of a debt, except in pursuance to a judgment of a court.

The concluding clauses of the section quoted gives exceptions to the general rule stated, but it is not necessary here to point them out. The foregoing conclusion is supported by *Abbott v. Yager*, 98 Ky., 424. It is urged that it was the duty of Mrs. Brugger to see to the application of the money which she loaned Speckert.

Section 4846, Kentucky Statutes, reads as follows: "Where lands are devised to be sold on special or general trust, or are conveyed or devised to trustees or executors in trust to be sold generally or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase money unless so expressly required by the conveyance or devise."

This deed of trust was made for the purpose of raising money to discharge claims against the property in question, and did not expressly require the purchaser to look to the application of the purchase money. Mrs. Brugger, who loaned the money, was not required to look to the application of the money to the discharge of the debts. We are of the opinion that the court did not err in rendering a judgment ordering the sale of the property to satisfy the mortgage debt. At the sale the appellee, Wolke, became the purchaser, which sale was confirmed, and the purchaser paid the purchase money. By an amended petition the appellants sought a new trial of the case, which was denied. Although the court might have erred in enforcing the mortgage and ordering the property sold to satisfy the mortgage debt, still the court had jurisdiction of the subject-matter and of the parties and

rendered judgment. It is not a void judgment. It is the policy of the law to uphold judicial sales. It was not the business of the purchaser to determine whether the judgment under which the sale was made was erroneous or not. The appellants sought a new trial and to invalidate the sale and make the purchaser lose the amount of the purchase money paid under the judgment of the court. This can not be done.

The judgment is affirmed.

MONONGEHELA RIVER CONSOLIDATED COAL AND COKE CO. v.
CAMPBELL.

(Filed February 2, 1904—Not to be reported.)

Negligence—Damages—Where appellee was injured because of a defective platform upon which he was compelled to walk in carrying coal boxes, and he was not aware of a change in the platform upon which he was injured, and which caused the injury, it appears that the negligence of the appellant was gross, and a verdict against it in an action by appellee for damages will not be disturbed.

Gibson, Marshall & Gibson for appellant.

Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Paynter.

The appellee was an employe of the appellant on its steamer known as "The Raymond Horner." On the night of February 2, 1902, a crew of about ten persons were engaged in carrying coal in boxes from a barge to the steamer. There were handles at each end of the boxes. The man in front of a box walked with his back to it and the man carrying the rear end walked with his face to it. A platform was provided which extended from the steamer to the barge. The men began the work of transferring the fuel in the early part of the night, some witnesses stating between 6 and 7 o'clock, p. m., and they worked until after 11 o'clock, when the deck of the steamer was filled, as desired, with coal. The second mate, who had charge of the force, had the platform changed, so that the end of the platform on the steamer was about two or two and one-half feet lower (as shown by the evidence of the appellee) than the end on the barge, so that there was a down grade of two or two and one-half feet in a platform twelve feet long. The evidence of the plaintiff tends to show that cleats should have been nailed at the lower end of the platform to have prevented it from slipping. The evidence shows that the appellee and the man at the front end of his box were the leaders of the crew, and as they came from the barge with a box of coal the man at the front end stepped upon the platform and started to walk over it, and as the plaintiff stepped on the platform it fell. The box of coal fell on him, bruising his legs and seriously injuring his back, from which he had not recovered when this case was tried. One witness testified that as he stepped on the platform "it scooted from under him and dropped down."

The weight of the evidence shows that when the platform was changed the

end on the steamer was very much lower than it was before it was so changed, and that the plaintiff was not aware of the change when he stepped upon the platform. The jury was authorized to conclude from the testimony that the appellee did not know but what suitable cleats had been placed at the foot of the platform. We do not think the evidence supports the claim of the appellant, that the appellee helped to make the change in the platform. If the testimony of the plaintiff is true, there was gross negligence in the re-arrangement of the platform for the use of the employes in carrying the coal. The appellant claims that the platform did not fall. Three witnesses testified that it did fall and two testified that it did not. Certainly it was not against the weight of the evidence, much less flagrantly so, for the jury to find that the platform slipped and fell.

The appellant further contends that appellee fell in consequence of the sleet upon the platform, and if the platform fell, it was produced by the appellee's fall upon it; and that, therefore, the sleet was the proximate cause of the injury. It was the duty of the appellant to furnish the appellee a reasonably safe place to work. If the platform furnished was slippery, and men were likely to fall upon it, the greater the reason why it should have been made secure by cleats. If the slippery condition of the platform caused the appellee to fall upon it, and it was thus caused to fall, because it was not properly secured by cleats, then the defective and insecure condition of the platform was the proximate cause of the injury. Our conclusion is that the verdict of the jury is not against the weight of the evidence, much less being flagrantly against it.

The judgment is affirmed.

MARION COUNTY v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 2, 1904—Not to be reported.)

Railroads—In an action by a county against a railroad company seeking to recover for the price of rails and ties which were purchased by another company that had failed and which were turned over to a succeeding company acquiring its line and stock subscriptions, where nothing is shown that it committed any breach of trust in buying the ties and rails, and where the transaction occurred more than twenty years before the action was brought, whether the claim was barred by limitation or not, it was undoubtedly stale, and one which the chancellor would not enforce.

C. S. Hill, H. W. Rives and W. H. Sweeney for appellant.

Helm, Bruce & Helm, Chas. N. Burch and W. C. McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

The Cumberland & Ohio R. R. Co. was incorporated by an act of the legislature of Kentucky, approved February 24, 1869, to construct and operate a railroad from the Ohio river to the Tennessee line. The company obtained subscriptions from Shelby and Henry counties, and built a part of the northern portion of its line. It also obtained a subscription from Marion, Taylor and Green counties, and partially constructed its line from Lebanon to Greensburg; but there was a considerable gap between the two pieces of

road which were begun, but not in running order. In this condition of things the company failed, and on March 18, 1878, an act was passed by the Kentucky Legislature reciting the fact that the company had become insolvent, and the danger of the property being lost to the stockholders. By it two corporations were created out of the old, one known as the Northern Division of the Cumberland & Ohio R. R. Co., and owning the northern end of the road, and the other known as the Southern Division of the Cumberland & Ohio R. R. Co., and owning the southern section of the road between Lebanon and Greensburg. (Louisville & Nashville R. R. Co. v. Marion County, 89 Ky., 581.) Soon after this the Louisville & Nashville R. R. Co. leased of the southern division its incomplete line; Marion county had subscribed for \$300,000 of stock in the old company and issued to it bonds for this amount; the county voted its stock in favor of the lease. By the arrangement a mortgage for \$300,000 was placed on the road to raise funds to complete it, and the mortgage bonds were delivered to the L. & N. R. R. Co., which then took charge of the road and completed it. About the year 1900 Phillips, the surviving trustee named in the mortgage, brought an action in the Marion Circuit Court, asking a settlement with the L. & N. R. R. Co., and an application of the net profits to the payment of the bonds. In the circuit court the action was dismissed, but on appeal the judgment was reversed, and it was held that the trustee could maintain the action. (Phillips v. Southern Division Cumberland & Ohio R. R. Co., 23 Ky. Law Rep., 1530.) On the return of the case to the circuit court proceedings were taken to make the settlement, and a commissioner's report was filed, Marion county being a party to the action; but before final judgment was rendered in that action the county filed the suit now before us against the Louisville & Nashville R. R. Co. v. Phillips, Trustee, &c., alleging, among other things, that about \$100,000 of the proceeds of the subscription of Marion county to the Cumberland & Ohio R. R. had been used by it in buying a lot of rails and cross ties that were stacked or piled near Lebanon when the company failed, and were turned over to the Louisville & Nashville R. R. Co., and used by it in disregard of the condition set out in the original subscription by Marion county. On behalf of Marion county it is insisted that the fund invested in the rails and ties was a trust fund, and that it can be followed into the hands of the L. & N. R. R. Co. The petition sought this relief. The circuit court sustained a special demurrer to the petition on the ground that there was another action pending between the same parties for the same subject-matter. He also sustained a general demurrer to the petition, which was filed at the same time, on the ground that it stated no facts sufficient to constitute a cause of action against the L. & N. R. R. Co. The petition of Marion county having been dismissed, it appeals.

The two suits seem to us to involve the same things, and there was certainly no reason why all the matters set up in this suit could not be presented and determined in the old suit brought by Phillips, trustee. But aside from this the court properly held that the petition stated no cause of action against the L. & N. R. R. Co. The conditions upon which the subscription of Marion county was made, so far as material, is in these words: "That the money so subscribed shall be expended when found necessary on

the work on said road in the county of Marion, and not out of it, in procuring the right of way, in grading and in the necessary masonry therein for said roadbed."

It will be observed that it was not stipulated that all the money so subscribed should be expended on the items named, but only that the money "when found necessary" should be thus expended. The items upon which the money was to be expended, when found necessary, are the procuring of the right of way, the grading and the necessary masonry for the roadbed in Marion county. The railroad company who was to expend the money was to determine what was necessary for the purposes named, and was at liberty to use the remainder of the fund for other purposes as it needed it. In doing this, it acted as trustee, and was bound to a reasonable judgment. But it is not averred that the railroad company failed to procure the right of way, or failed to do the grading or the necessary masonry for the roadbed in Marion county, and no facts are shown sufficient to charge it with any breach of trust in buying the ties and rails which were necessary to put the road in operation. Besides, all this was more than twenty years before this suit was brought. The rails and ties were turned over to the L. & N. R. R. under the lease which Marion county voted for and assisted in making. The L. & N. R. R. Co. had no notice of any breach of trust by the old company, and obtained its rights from the stockholders in that company, who not only assented to the lease to it, but actively participated in the arrangement by which it took charge of the property, including the rails and ties now in contest. All this being more than twenty years before this suit was filed, whether the claim was barred by limitation or not, it was undoubtedly stale, and one which the chancellor would not now enforce.

Judgment affirmed.

KEPHART, &c. v. HIEATT.

(Filed February 2, 1904—Not to be reported.)

Wills—Where a testatrix devised her property to her three children, share and share alike, and to be held in trust for them until the youngest should reach the age of twenty one, and in another clause provided that if all of them die without issue her property should descend to her collateral heirs, and two of her children died without issue, her purpose was simply to provide that her estate should go to her collateral heirs in case her children all died before the period of distribution, and was not intended as a limitation on the estate devised to them after the expiration of the trust created.

W. B. Moody, Turner, Turner & Cureton and Barbour & List for appellants.

John D. Carroll for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Hobson.

Anna M. Hieatt died a resident of Henry county in the year 1881, leaving three children surviving her. The two oldest children died without issue, the third, Willie Hieatt arrived at the age of twenty-one years several years ago.

The only question to be determined here is whether he took under his mother's will the property devised in fee simple on his arriving at age. The material provisions of the will are as follows:

"2d. I will all my real, personal and mixed estate to my children, share and share alike, to be held in trust by their guardian and trustee for them until the youngest shall arrive at the age of twenty-one years of age.

"3d. It is my will that should all my children die without issue, then it is my will that the remainder of the estate at that time, in that event I will to my brother, James Kephart's, children, and my sister, Bettie Smith's, children, Elias Kephart's child, share and share alike, equally between them.

"4th. I appoint my brother, Thomas Kephart, my executor and trustee for my children, as well as guardian for them, and I request that he be permitted to qualify without security, and in the event of his death or failure or refusal to qualify, I then appoint my brother-in-law, A. G. Smith, executor, guardian and trustee, and desire that he be permitted to qualify upon the same condition without security."

In *Thackston v. Watson*, 84 Ky., 206, the testator gave to his executor the entire management and control of the estate until his son was twenty-one years old, and directed that the estate should be paid over to the son and be delivered up to him by the executor "when he should arrive at the age of twenty-one years, if he should live that long;" but that in case his son should die without bodily heirs all his estate should be converted into money by his executor and equally divided between certain of his relatives. It was held that the son, upon arriving at the age of twenty-one years, became vested with an absolute estate in fee simple.

In *Wilson v. Bryan*, 90 Ky., 482, the testator directed that his estate should be kept together and jointly used and enjoyed by his children until the youngest became of age, and then the land to be equally divided among his sons then living, adding this provision: "If any of my sons should die without any bodily heirs his portion of my estate to be divided amongst his brothers and sisters that may then be living." It was held that when the youngest became of age the estate of the sons in the land became absolute. In *Webster v. Webster*, 98 Ky., 632, the testator devised an estate to his daughters, Hettie and Euphemia. The will contained this clause: "In case either of my daughters, Euphemia R. and Hettie C. Cunningham, should die without children, then, and in that event, it is my will, and I so direct that the estate of the one dying shall be equally divided among all my then living children." By the will the final distribution of the estate was not to be made until five years after the death of the testator, and it was held that the limitation referred only to the death of the devisees before the period of distribution.

These cases control the one before us, which is stronger for the application of the rule than any of them. The testatrix left three little children. She directed the executor and guardian to hold the entire estate until the youngest child was of age, her purpose being to provide for the children during their minority. The property is devised to the children, share and share alike, subject to this trust, and if all had survived the period of distribution they would have been then entitled to a division of the estate. The third clause

of the will providing that in case all the children die without issue, then the remainder of the estate is to go to certain collateral kindred, refers to estate in the hands of the guardian and trustee or to the children before distribution. The purpose of the testator was not to place a limitation on her own children in favor of her collateral kindred, but simply to provide that the estate should go to these collateral kindred in case her children all died before the period of distribution. She devises the estate to her children, and the third clause was not intended as a limitation on the estate devised to them after the expiration of the trust created in the second clause.

There is nothing in the case of *Dorsey v. Maddox*, 103 Ky., 233, inconsistent with the conclusion we have announced. In that case no period of distribution was provided for, and there was no time to which the death without issue could be properly referred. Section 2344, Kentucky Statutes, is not a new provision, but was in force when the cases above were decided and was relied on in those cases.

Judgment affirmed.

SUPREME COUNCIL KNIGHTS OF EQUITY OF THE WORLD v.
HEINEMAN.

(Filed February 2, 1904—Not to be reported.)

Insurance—Suicide—Where the insured committed suicide, the policy providing that it shall not cover death by suicide whether sane or insane, and the petition alleges that at the time of his suicide he had not sufficient mind to understand that he was taking his life, the jury, under instructions embodying the law, returned a verdict upholding the policy, and it being within their province to judge of the questions involved, their verdict will not be disturbed.

Furber & Jackson for appellant.

Myers & Howard for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

Joseph Heineman, the husband of appellee, was a member of the appellant order, and, as such, held an insurance policy on his life for the sum of \$1,000, payable to appellee at his death. He committed suicide in 1892, and appellee was entitled to the value of the policy, unless precluded by what is commonly known as the "Suicide Clause." Section "E" of the policy provides, in substance, that it shall not cover death by "suicide, whether sane or insane."

It is alleged in the petition that at the time of his suicide Joseph Heineman did not have sufficient mind to understand that he was taking his life. This allegation was placed in issue by the answer, and constitutes the crucial question in this case.

In the case of the *Manhattan Life Insurance Co. v. Beard*, 28 Ky. Law Rep., 1748, which was in all respects similar to the one at bar in principle, it was held, following the reasoning of the cases of *Mutual Benefit Life Insurance Co. v. Daviess' Ex'or*, 87 Ky., 541, and *Bigelow v. Berkshire Life Insurance Co.*, 93 U. S., 264, that where the policy provided that "if within

"two years the insured die by his own act, sane or insane, this policy shall be void, and all payments made upon it shall be forfeited to the company." there could be no recovery in case of suicide, unless the mind of the insured was sufficiently gone when he took his life as to render him unconscious that he was taking his life at the time he committed the act. The pleadings in this case bring the question of law involved squarely within the opinion of the case cited.

The facts show that Joseph Heineman suffered a sunstroke about a year before his death; that after this his mind appeared unsettled at times, and he was exceedingly nervous; that from time to time he suffered fainting or sinking spells, becoming unconscious, and remaining so for several minutes; that these fainting spells increased in frequency up to the time of his death. He suffered intense pains in his head, one of the witnesses testifying that he was never free from them. Two physicians gave it as their opinion, upon hypothetical questions embracing the foregoing facts, that he was insane. He committed suicide by swallowing the contents of a vial of carbolic acid. The jury under the instructions, which embodied the law as set forth in the case cited herein, returned a verdict for the appellee. To judge of the questions of fact involved was peculiarly within the province of the jury, and perceiving no error in the record the judgment is affirmed.

PFISTERER v. PETER & CO.

(Filed February 2, 1904.)

1. Damages—Master and servant—In an action to recover damages for personal injuries resulting from falling from a scaffold, it being the duty of the master to furnish reasonably safe tools and place to work, the servant was under no duty to discover defects in the scaffold, and unless he knew of their existence, or they were patent and obvious to a person of his experience, he will not be precluded from recovery.

2. Same—An instruction denying the right of recovery in an action resulting from defective platform. If the servant had equal means with the master of knowing that the platform had been constructed in a reasonably safe manner, was erroneous.

Gardner & Moxley, Caruth, Chatterson & Blitz for appellant.

O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellant, Henry Pfisterer, against the appellees, Joseph H. Peter & Co., to recover damages for a personal injury which resulted to him from the falling of a scaffold on which he was standing while in their service, which, it is alleged, was caused by the negligence of the defendant in its construction. There is no dispute as to the facts, which may be stated briefly as follows: On the 30th of May, 1902, the plaintiff, and Lee Black, laborers in the employ of the defendant, were directed to assist Dietsch, their foreman, in placing a large stone sill, weighing about 1,000 pounds, in the doorway of a school building. The doorway was

immediately over a similar opening into the basement of the building, which was about eight feet deep; and the excavation extended out several feet in front of the building. Three iron lintels, five inches wide, had been laid side by side across the opening, the ends of which rested upon the walls of the building, and four courses of brick were laid on top of them, to bring the wall up to the point where the stone doorsill was to be placed. The front lintel projected about one and a half inches beyond the face of the brick wall, leaving about three or three and a half inches on the wall, which was covered by courses of brick. The brick hod carriers, who had been employed by the brick masons, had used two wooden joists, twenty feet long, two and one-half inches thick, and twelve inches wide, laid one on the top of the other as a gang way. One end of these joists rested on the projection of the iron lintel, and the other on the ground, spanning the excavation below. Dietsch, appellee's foreman, took these joists apart and laid three of them side by side, using the projection of the lintel as a rest for the end next to the building, and allowing the other, end to rest on the ground. Stobs were driven at the end on the ground to prevent their slipping, and a trestle was placed under them to prevent them from swagging, and by his direction this platform was used as a place to stand on while they were engaged in lifting the stone from the ground below and placing it on the wall. About the time they got the stone sill so that they could place it in position the iron lintel on which the platform rested turned over, and that end of the platform went down, precipitating the men, stone sill, and four courses of brick, into the excavation below. The stone fell upon one of appellant's hands, crushing it very badly. Upon the trial the defendant, J. H. Peter, testified that he had nothing to do with the placing of the iron lintels or the brick work; that his contract only covered the stone work on the building; that before sending the plaintiff and his foreman to place the sill he had gone out and looked at the wall to see whether it was ready to receive the sill; when he discovered that the iron lintels had been laid with their flat side down, instead of on edge, as they were usually placed; that if they had been properly placed by the brick masons a dozen men could have stood on the platform, and the lintel would not have turned over.

Dietsch also testified that when he went out to place the sill he noticed that the sills were laid flat. As the lintels were covered by four courses of brick, one standing on the platform could not see how much of the lintel rested on the wall, but by going into the basement and looking up this fact could be easily ascertained. Plaintiff testified, and his testimony is uncontradicted, that he had had no experience in building scaffolds, and that he did not discover that the lintels were laid flat, instead of being placed on edge, and that he would not have known that they were not in proper position if his attention had been called to the matter, or that they would have been stronger if placed on edge. There is proof that he assisted in driving the stobs at the end of the joists which rested on the ground by direction of Dietsch. The trial resulted in a verdict and judgment in favor of the defendant, and upon this appeal it is insisted that the court erred in instructions Nos. 1, 2 and 3, given to the jury over the objection of the plaintiff, and which read as follows:

"1st. Gentlemen of the Jury: The court instructs you that it was the duty

of the defendants, Peter & Co., to furnish a reasonably safe place for the plaintiff to do his work in. Now if you believe from the evidence that the scaffolding on which plaintiff was working at the time complained of was not in a reasonably safe condition for plaintiff to do his work, and that that fact was known to the defendants, or any of them, or any agent of theirs, superior in authority to plaintiff, or by the exercise of ordinary care they or any of them could have known that it was not in a reasonably safe condition, if it was so; and if you further believe from the evidence that such fact, if it did exist, was not known to the plaintiff, or that he did not have equal means of knowing the same with the defendants; and that by reason of it, not being in a reasonably safe condition, if it was so, plaintiff was precipitated and injured, then you should find for the plaintiff, unless you believe from the evidence that the plaintiff was guilty of contributory negligence, in which event you should find for the defendants.

"2d. But, gentlemen, if you believe that the scaffolding was in a reasonably safe condition, or if you believe that it was not in a reasonably safe condition; that it was not known to be so, or by the exercise of ordinary care could not have been known to be so by the defendants, or any of them, or its agents superior in authority to plaintiff; or if you believe, even though it was not in a reasonably safe condition, that such fact was known to the plaintiff, or that he had equal means of knowing the same with the defendants, then you should find for the defendants.

"3d. The court further instructs you that when the plaintiff, Pfisterer, entered into the employment of the defendants, J. H. Peter & Co., he undertook to assume all risks ordinarily attendant upon such employment; and if necessarily attended with danger, it was his duty to exercise ordinary care and to avoid being injured."

These instructions are predicated upon the general proposition that if the information of the master and servant as to the place of work are equal, and if both are either without fault, or in equal fault, the servant can not recover damages of the master; or, in other words, that while the law imposes upon the master the duty of providing the servant a reasonably safe place in which to work, that an equal and corresponding duty also rests upon the servant to know that the place is safe. This was undoubtedly at one time the rule in England and in some of the American States, notably South Carolina, Maine, Massachusetts, New York, New Jersey and Mississippi. But it found no permanent abiding place in the jurisprudence of most of the American States, and has been distinctly repudiated time and again by the Federal courts and by this court. The early case of *Bogenschutz v. Smith*, 84 Ky., 330, seems to squint in this direction, and cites some English and American decisions which undoubtedly support the rule contended for. But the opinion in that case does not approve the doctrine in all cases, as the learned judge who wrote the opinion, in winding up the discussion of the case on this question, says: "We do not mean to decide that there may not be cases where the servant has the right to rely upon the judgment of the master as to the safety of the premises or the material to be used, or that the servant is bound to inform himself as to them."

And in numerous subsequent opinions the doctrine has been disaffirmed, and the rule announced that the duty of furnishing reasonably safe tools,

materials and place to work was primarily on the master, and that the servant was under no duty to discover such defects, and unless he knew of their existence, or they were patent and obvious to a person of his experience and understanding, that he would not be precluded from recovery. In *Louisville & Nashville R. R. Co. v. Foley*, 94 Ky., 224, the court said: "The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for the use of employes, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employe by reason of the defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, the rule would not amount to much as either an incentive to the employer to do his duty or protection to the employe against personal injury. The limit of inquiry in such a case as this is whether, as a matter of fact, the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective. The rule, of course, does not apply where examination and inspection is in the line of the employe's duty."

In the *Ashland Coal and Iron and Railway Co. v. Wallace*, 101 Ky., 626, the court said: "The degree of care required of the master and the servant in particular cases is generally different. While each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances, the primary duty on the part of the master to use care to furnish a reasonably safe place for the servant is more important than the duty of the servant to use reasonable care to protect himself. * * * The servant has the right to presume when directed to work in a particular place that the master has performed this duty, and to proceed with his work, relying upon this presumption."

The same doctrine is announced in *Louisville & Nashville R. R. Co. v. Vestal*, 105 Ky., 498; *Champlon, & Co. v. Carter*, 21 Ky. Law Rep., 210; *Vandyke v. Packet Co.*, 24 Ky. Law Rep., 1285; *Crabtree Coal Mining Co. v. Sample*, Adm'r., 24 L. R., 1703; *Covington Sawmill and Mfg. Co. v. Clark*, 25 Ky. Law Rep., 96, and in *Adams Express Co. v. Smith*, 24 Ky. Law Rep., 1915, it was expressly held that the trial court properly refused to instruct the jury that if the servant had equal means of knowledge with the master, it was not liable upon the ground that it was the duty of the master to furnish a reasonably safe place to work in, and it was not the duty of the servant to get off of a platform and inspect it from underneath. In *Baltimore & Ohio R. R. Co.*, 149 U. S., 386, the court said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kind of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and can not be obviated. But

within such limits the master who provides the place, the tools and the machinery, owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

The A. & E. En. of Law, volume 20, page 55, 2d edition, admirably epitomizes the law in these words: "Masters owe to their servants the duty of providing them a reasonably safe place in which to work and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required, and the dangers, that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract, of employment, and the servant is entitled to rely on the assumption that the master has performed the work imposed on him by law of providing a reasonably safe place to work. But if the place is unsafe because of the nature of the work, and the servant suffers injury in consequence thereof, he can not hold the master liable, providing reasonable precautions were taken by the master to avoid injury. The risk of injury from such cause is one of the risks assumed by the servant; or if the place is obviously unsafe so as to charge the servant with knowledge thereof, and he, nevertheless, enters on the work, he assumes the risk."

Applying this rule, masters have been held liable for negligence in the construction of scaffolds and platforms erected as a safe place for the use of the servant. (*Maning v. Hogan*, 68 N. Y., 615; *McManara v. MacDonough*, 102 Cal., 575; *Rice, & Co., Malt Co. v. Paulson*, 51 Ill. App., 123) We are of the opinion that instructions 1 and 2 are erroneous in so far as they deny plaintiff the right to recover, if he had equal means with the master of knowing that the platform had not been constructed in a reasonably safe manner.

While the third instruction is not objectionable as the abstract statement of the legal proposition, it does not fit the facts of this cause. The law imposed upon the plaintiff the duty of exercising ordinary care for his own safety, not knowingly to expose himself to unnecessary and obvious risks when he accepted employment from the defendant, but he did not assume risks that were unknown to him, and which were not necessarily incident to his employment, nor risks which the defendant by the exercise of ordinary care could have guarded against. It is the duty of a servant to obey the reasonable demands of his master, and he had the right to believe that he would not be required to incur risks growing out of the negligent construction by the defendant of the scaffolding upon which he was required to stand in performing the work in obeying the orders of his master.

For errors pointed out the judgment is reversed and cause remanded for proceedings consistent with this opinion.

ILLINOIS CENTRAL R. R. CO. v. JORDAN.

(Filed February 2, 1904.)

*1. Railroads—Damages—Jurisdiction—Where one in operating a hand car, which was struck by a train injuring him, was guilty of the grossest kind of negligence, the disposition of the questions can not be made under the rules of law which prevail in this jurisdiction, where the accident did not occur, but must be done under the laws of the State where the accident happened.

2. Same—Verdict—Evidence—In an action against appellant by its section foreman, whose hand car was struck by one of its trains injuring him, where its evidence tended to show that after discovering the hand car upon the track it sounded its whistle and applied the brakes, but appellee's evidence tended to show that this was not done until about the time the hand car was struck, the question was for the jury to determine, and being of the opinion that the case should have gone to the jury, it can not be said that the verdict is palpably against the weight of the evidence, and it will not be disturbed.

J. M. Dickinson, Pirtle & Trabue and N. P. Moss for appellant.

Shelbourne & Kane and R. L. Evans for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Paynter.

Appellee was a section foreman for appellant at Idlewild, Tenn. A fast train of appellee was due there at 5:51 a. m., but was four or five minutes late. It was the duty of the appellee to go to his work at 6 a. m. Under the rule of the company, well known to him, it was made his duty to have the track cleared of the hand car twenty minutes before the time any freight or passenger train was due to arrive. In violation of this rule the appellee had the hand car upon the track, his crew, with himself, boarded it, and started south to their work. After going about three quarters of a mile, at the entrance of a cut about fifteen hundred feet long, the car was stopped, and one of the crew went back a short distance to listen for the past-due train. He reported that he did not hear it; the appellee and the crew proceeded with the hand car until they were nearly to the south end of the cut, when they discovered the approach of the belated train. The hand car was stopped, and the crew made an effort to remove it from the track, but failed to remove one corner of it, and the crew, other than appellee, fled to a safe place. Appellee either remained or returned, as to which the evidence is conflicting, and was making an effort to remove the car when he was struck by the train, or the hand car was struck by it, and thrown against him, seriously injuring him. He acted in violation of the rule of the company; was guilty of the grossest kind of negligence in imperiling the lives of his crew and the persons on the approaching train, by operating the hand car under the circumstances. While it was a commendable act to remain and endeavor to remove the hand car from the track, and thus possibly save the lives of the persons on the train which he had, by his reckless conduct, imperiled, still it was suicidal in character. The uncontradicted evidence shows that after those in charge of the train discovered the hand car on the track it was not possible to stop the train before it struck it. The disposition of the questions can not be made under the rules of law which prevail

in this jurisdiction, but must be done under the law of Tennessee, where the accident happened. In *Louisville & Nashville R. R. Co. v. Whitlow's Adm'r*, 19 Ky. Law Rep., 1981, the court said: "The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, if the defendant was guilty of negligence which is the direct and proximate cause of intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable to be reduced or mitigated by reason of the intestate's contributory negligence.

Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence under our rule is never applied in mitigation of damages. * * * At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this State, can not be applied so as to alter or affect the right of action which arose in the State of Tennessee."

The recovery is sought under the Tennessee law. If the case were to be disposed of under the law of this State the court would reach a conclusion different from the one forced upon it by the Tennessee law. So much of the statute law of Tennessee as is pertinent to the inquiry reads as follows:

"Section 1298. In order to prevent accidents upon railroads the following precautions shall be observed. * * *

"4th. Every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

"Section 1299. Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"Section 1300. No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damages done to persons or property on its road. The proof that it has observed said precautions shall be upon the company."

In *Chesapeake, O. & S. W. R. Co., &c. v. Foster*, the Supreme Court of Tennessee was called upon to construe the statute, and in doing so said: "The other assignment is made on the final recital in the bill of exceptions: 'The jury having considered the case, returned and asked the court whether, if they found that the defendant had not strictly complied with all the statutory rules and precautions as given in the charge, yet that the defendant's (plaintiff's) own want of care and gross neglect was the direct cause of his injury and death, they could not find for the defendant; to which the court replied they could not, but should consider such contributory neglect on the part of the deceased in mitigation of damages. If they found the railroad company wanting in full performance

of the statutory duties, plaintiff would be entitled to some damages in any event. It is insisted that this action of the court was erroneous, and that he should have answered the question of the jury in the affirmative. Taking the case as stated in the question, the contention is that, inasmuch as the gross neglect of the deceased was the direct cause of his injury and death, his negligence should operate, not merely in mitigation of damages, but as a bar to the action, notwithstanding the failure of the railroad employees to observe the precautions prescribed in section 1166 (now 1298) of the Code.

"Learned counsel make an able and forcible argument in support of this view; yet we think it contrary to the obvious meaning of the statute. The response of the trial judge is in conformity to the construction announced by this court in numerous decisions, some of which we cite: *Railroad Co. v. Smith*, 6 Helsk., 174; *Hill v. Railroad Co.*, 9 Helsk., 828; *Railroad Co. v. Walker*, 11 Helsk., 383; *Railroad Co. v. Nolln*, 1 Lea, 523; *Railroad Co. v. Smith*, 9 Lea, 470."

"Section 1166 of the Code (Thomp. & S.), prescribes certain precautions to be observed by railroads for the prevention of accidents. The next two sections declare, in the plainest terms, the legal consequences of observance and nonobservance.

"By section 1167 it is declared in every case of nonobservance the railroad shall be liable for the damages done, and by section 1168 it is declared in every case of observance it shall not be liable at all. By the positive language of the statute liability flows from nonobservance and nonliability follows observance. Neither liability nor nonliability is made to depend on the cautious or incautious conduct of the person injured. Both are to be determined by the conduct of the railroad employees. The injured person may be ever so negligent in the one case, and yet recover something, while in the other case he may be entirely without negligence, and yet recover nothing. At common law contributory negligence may bar the action, but under the statute it is to be considered only in mitigation of damages."

The Tennessee statute requires every railroad company to keep some one upon the locomotive, always upon the lookout ahead. If any person, animal, or other obstacle, appears upon the road, the alarm whistle must be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident. By the interpretation of the statute given by the Tennessee Supreme Court, a failure to do any of the things required by it upon the part of a railroad company makes it liable in damages, although such failure may not have been the cause of the injury. The uncontradicted evidence is that both the engineer and fireman were on the lookout when the train was within a mile of the place of the accident, and one or both of them continued to be until the accident happened. The engineer and fireman both testified that within about three hundred feet of the place where the car was on the track the fireman discovered its presence, told the engineer, who put on the emergency brakes, and sounded the alarm whistle. This statement is not contradicted as to the time they discovered the hand car on the track.

The issue of fact is, did the engineer, after discovering the hand car, sound the alarm whistle and put the brakes down, and use every possible means to stop the train and prevent the accident? The evidence of appellant tended

to show that it was done. The appellee's evidence tended to show that the alarm whistle was sounded, the brakes were put down about the time the engine struck the hand car. It was for the jury to determine, if it believed the testimony introduced by the appellee, whether the alarm whistle was sounded and the brakes put down as soon as possible after the firemen discovered the hand car on the track. While this court would probably have reached a conclusion different from the one reached by the jury, it can not substitute its conclusion for that of the jury, for if it did so it would be invading the province of the jury. On the issue of fact stated we are of the opinion that the case should have gone to the jury, and we can not say the verdict is so palpably against the weight of the evidence as will justify the granting of a new trial.

The judgment is affirmed.

METROPOLITAN LIFE INSURANCE CO. v. MOORE.

(Filed February 16, 1904.)

1. Insurance—Construction of statutes—By the provisions of section 679, Kentucky Statutes, an application for insurance shall not be received in evidence in any controversy between the parties interested in the policy unless it is attached to the policy, and unless so attached it shall not be considered a part of the policy or of the contract.

2. Same—A provision in an insurance policy that no obligation is assumed by the company "unless upon the date of delivery the insured is alive and in sound health," when it is not shown that the unsoundness of health did not occur between the application and medical examination and the delivery of the policy, the company must rely upon the statements in the application, to avoid a recovery in the policy, and not upon the clause in question.

R. H. Cunningham and F. M. Sackett for appellant.

John G. B. Hall and C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Paynter.

This appeal brings in review the judgment of the court on a policy for \$5,000 on the life of Abram R. Moore for the benefit of the appellee, Annie M. Moore. The policy did not have attached it to a correct copy of the application as signed by the applicant, and not being so attached, section 679, Kentucky Statutes, declares that it shall not be received as evidence in any controversy between the parties to or interested in the policy, and shall not be considered a part of the policy or of the contract between such parties. (Provident Assurance Society v. Beyer, 23 Ky. Law Rep., 2460; Rice v. Rice, 23 Ky. Law Rep., 685; Manhattan Ins. Co. v. Meyers, 22 Ky. Law Rep., 875; Provident Assurance Society v. Muryear, 22 Ky. Law Rep., 980; Supreme Commandery v. Hughes, 24 Ky. Law Rep., 984.) In view of the statute as interpreted by this court the application can not be considered in determining the rights of the parties to this controversy.

There is another defense based upon a condition in the terms of the policy itself, and which is as follows: "No obligation is assumed by this company upon this policy until the first premium has been paid, and the policy duly

delivered, nor unless upon the date of delivery the insured is alive and in sound health."

It is pleaded in the answer that the insured was not in sound health when the policy was delivered, and, therefore, it is argued that the policy is void and never created any obligation upon the company. The policy seems to have been delivered on the 6th of November, 1901, and the insured died in June, 1902. It was not pleaded that there had been any material change in the health of the insured between the date of the application and the time the policy was delivered. The information obtained by the application and the medical examination necessarily relates to the family history of the insured, his previous condition of health and the condition of his health at the time of the examination. It will be observed that in the condition quoted it is stated the policy is not binding "unless upon the date of delivery the insured is alive and in sound health." This clause does not have reference to any unsoundness of health at the time of or previous to the application and medical examination. Although insured had not been in sound health at that time, and there had been no material change since then and the delivery of the policy, the clause would not render it void. When it is not shown, as in this case, that the unsoundness of health did not occur between the application and medical examination and the delivery of the policy, the company must rely on the statements in the application to avoid a recovery on the policy, not upon the clause in question.

As to what is the meaning of the words "sound health" it is unnecessary here to define or to state what unsoundness of health would prevent recovery, nor as to what delay would estop the insurance company from pleading the clause of the policy referred to as a defense to an action on the policy. There is another reason why the appellant did not show its right to prevent a recovery upon the policy. The annual premium on the policy was \$295.15. If its theory be correct, that the insured was not in sound health and the policy was not obligatory upon it, then before it could prevent a recovery on the policy it should have tendered back the premium it received. If the policy created no obligation on it, then the company assumed no risk for which it was entitled to be paid the \$295.15, or any part of it, nor is it entitled to withhold it. It has not earned any part of it. Suppose the company had brought an action to cancel the policy for the reason that the insured was not in sound health when it was delivered. Most certainly would it have been necessary for it to tender back the money it had received to maintain the action. The mere fact that the insured had accepted the policy when not in sound health, and for that reason it was not obligatory upon the company, would not impose a penalty of \$295.15 for the benefit of the company.

When a party seeks to cancel a contract upon the ground of fraud, or otherwise, he must first offer to restore what he received in consideration of the contract. If A. practices fraud upon B. in the exchange of property and B. seeks to recover the property which he let A. have, he is not entitled to maintain an action unless he tenders back what he received in the trade. This rule is applicable to the case at bar.

The judgment is affirmed.

TENNENT SHOE CO. v. STOVALL & BRAND, &c.

(Filed February 2, 1904—Not to be reported.)

1. Mercantile agencies—Assignments—Where goods were bought upon the faith of statements made to a commercial agency and an assignment of the purchaser followed, the fact that he was adjudged a bankrupt did not prevent the creditor from proceeding in the circuit court under an order of attachment and retaking goods sold by him, where the statements upon which the goods were sold were not true, it was error to peremptorily instruct the jury to find for appellees, the purchasers of the goods.

2. Same—Representations made to a commercial agency as a basis of credit have the same legal effect as if made to the seller of goods.

Lee & Hester for appellant.

T. N. Crutchfield for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

Stovall & Brand were merchants in Mayfield, Graves county, Kentucky. The appellant is a corporation organized under the laws of the State of Missouri, having its residence and place of business in St. Louis.

One the 25th day of February, 1901, the appellant sold and delivered to Stovall & Brand \$1,266.23 worth of shoes on credit. In June of the same year, the firm made a general assignment for the benefit of their creditors, and subsequently were adjudged to be bankrupts under the general bankruptcy act of the United States, and their property passed into the hands of J. N. Crutchfield, trustee. After the assignment appellant instituted this action in the Graves Circuit Court, charging that the goods in question had been purchased by the firm for the purpose and with the intent of defrauding it, well knowing that they were then insolvent, and not intending, at the time of purchase, ever to pay for the goods; that appellant elected to treat the contract of purchase as void and reclaim its goods, for the possession of which it prayed judgment. As an ancillary remedy an order of delivery was sued out, and about \$500 worth of the shoes seem to have been found undisposed of, and taking into the possession of the officer in charge of the writ; and this constitutes the subject-matter in controversy here.

Stovall & Brand filed an answer, denying the material allegations of the petition, and then J. N. Crutchfield, the trustee in bankruptcy, intervened by petition, adopted the answer of Stovall & Brand, and prayed to be adjudged the rightful possessor of the merchandise involved in the litigation.

A trial was had, which resulted, after the close of appellant's (plaintiff's) testimony in the court giving a peremptory instruction to the jury to find for appellee (defendant). To review this judgment appellant has brought the record to this court. The representations complained of by appellant as false were not made to it direct, but consisted in reports of the firm's financial standing, made by T. L. Stovall, a member of the firm, who had active charge of the store, to certain mercantile agencies, of which appellant was a member. The evidence leaves no doubt that these reports showed the firm to be abundantly solvent, and in excellent financial condition, and that at the time they were made the firm was insolvent. Within a very short time after the purchase from appellant the partners drew out of the business

sums aggregating \$7,500, and several of the clerks were allowed to overdraw their accounts in sums out of all proportion to their salaries.

T. L. Stovall, who was placed upon the stand by appellant, while showing in his evidence that the reports made by him of the firm's standing to the various mercantile agencies, as a basis of credit, were untrue, in fact insisted most earnestly that he did not know at the time they were false, and that they were not made for the purpose of fraud or deceit.

In the case of *Drake v. Holbrook*, 23 Ky. Law Rep., 1941, which involved a question similar in principle to the one under discussion, this court said: "It was pleaded, and not denied, that the appellee, Holbrook, was the owner of one half the stock, and was secretary and treasurer of the company. This being true, he can not be heard to say he did not know the resources and liabilities of the company. It was his business, as secretary and treasurer, to know the financial condition of the corporation, and any statements made by him as to the financial condition of the corporation to the appellants would authorize them to rely thereon as the truth. Appellee being in condition to know, and it being his duty to know, will not be permitted to say he in fact did not know the truth as against his own statement to appellants."

In this case Stovall was the partner, and, according to his own testimony, had charge of the mercantile interest of the firm. He was bound to know its resources and liabilities, and when he undertook to make a statement to the mercantile agencies, to constitute a basis of credit for his firm, he could not afterwards be heard to say that he did not know its real condition. The representations made to the mercantile agencies, as the basis of credit, had the same legal effect as if made to the appellant. (*Eaton, Cole & Burnham Co. v. Avery*, 38 Am. Rep., 389.)

In the case of *Dietz's Ass'ee v. Sutcliffe*, 80 Ky., 650, it is said: "It is well settled that where the vendor has been defrauded by his vendee, the former may elect to treat the contract as a nullity, and bring his action for the recovery of the specific property, or trover for their value, and this doctrine proceeds upon the idea that the contract of sale having been rescinded at the election of the vendor, he is still vested with the title." To the same effect is *Longdale Iron Co. v. Swift's Iron and Steel Works*, 91 Ky., 191, and *Reager v. Kendall*, 19 Ky. Law Rep., 27.)

The representations made by Stovall to the mercantile agencies were false. They were made for the purpose of establishing his firm's standing for credit in the commercial world. If appellant relied upon, and was deceived, by them, and thereby induced to extend the firm a credit which would not have been done had the truth been known, this constituted such a fraud upon appellant as authorized it, under the authorities herein cited, to elect to treat the contract as void, and reclaim such of its goods as were undisposed of and could be identified. The court erred in peremptorily instructing the jury to find for appellees.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

HAVING v. CITY OF COVINGTON.

(Filed February 3, 1904—Not to be reported.)

Pesthouses—Damages—Smallpox—In an action to recover damages from a city for confinement in pesthouse the action of the trial court in sustaining a demurrer to the petition was proper. A municipal corporation in the preservation of the health and safety of the public may remove an infected patient to a pesthouse even against his will and consent.

B. F. Graziani for appellant.

F. J. Hanlon for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by the appellant in the Kenton Circuit Court for the recovery of the sum of \$5,000 in damages against the appellee, the city of Covington, alleged to have been sustained by him by the acts of the appellee city through its officers and agents, committed in substance as follows: That the city, through its common council, purchased real estate and erected a pesthouse thereon; that in the month of February, 1902, appellant was afflicted with a contagious disease known as smallpox; that the city, through its agents and employes, did, on the date aforesaid, go to appellant's house and assault and beat appellant and took him by force against his will while he was sick and unable to protect himself and carried him to this pesthouse; that this house was unfit for any one, well or sick, to remain in; that the roof was broken, the sides of the house open, so that the rain, snow and ice could come in and upon him; that he was placed in a filthy, unhealthy and damp room, and compelled to remain there for several weeks as a prisoner, against his wish and protest; that the bed, bedding and covering and place where he was kept was unfit for any one to occupy; that because of said cold, sleet and snow and other elements, the filthy condition of the rooms and bed clothing, he suffered both mental and physical pain and anguish; that the ravages of the disease with which he was afflicted was increased by reason thereof. The petition contained two paragraphs, one for the assault and battery and the other for his sufferings by reason of the unsanitary condition of the pesthouse. The appellee filed a motion to require the appellant to elect which cause of action he would prosecute. This motion was sustained, and the appellant elected to stand on the cause of action set out in the second paragraph, and he withdrew so much of his pleading as set out the assault and battery.

The appellant does not complain of the action of the court in requiring him to elect. The court then sustained a demurrer to the petition of appellant, of which appellant complains. It is agreed that the official who committed the wrongs complained of are personally liable for the injuries received. The only question to be determined is, can the city be made liable therefor?

Under the authority of the case of *Hengehold v. The City of Covington*, 22 Ky. Law Rep., 463, it was decided that it was lawful to remove an infected patient to the pesthouse, even against his will and consent. There are two general principles underlying the administration of government of muni-

cipal corporations. The one is that a municipal corporation, in the preservation of the peace, public health, maintenance of good order and the enforcement of the laws for the safety of the public possesses governmental functions and represents the State. The other is, where the municipal corporation exercises those powers and privileges conferred for a private, local or merely corporate purposes, peculiarly for the benefit of the corporation.

Under the former the city is not liable for the malfeasance, misfeasance or nonfeasance of its officers. Under the latter it is. With reference to the matters alleged in the petition of appellant the city, by its officials, was acting for the preservation of the public health and in a governmental capacity and as an arm of the State government and not in its private capacity peculiarly for the benefit of the corporation. All the authorities support this conclusion, and there is no deviation from these principles except where the city is made liable by an express statute. (24 Ky. Law Rep., 1804; 13 Bush, 226; 17 B. M., 728; 89 Ky., 279; Dillon on Mun. Corp., volume 2, 1200; 88 N. W., 695; Am. & Eng. Enc., 2d edition, volume 20, 1193; 57 Fed. Rep., 905; 62 Minn., 278.)

There being no statute making the city liable, we are constrained to affirm the action of the lower court in sustaining the demurrer to appellant's petition.

Wherefore, the judgment is affirmed.

Whole court sitting.

GOLDSMITH v. CLARK.

(Filed February 3, 1904—Not to be reported.)

Liens—Innocent purchasers—In an action to recover balance of purchase price of land where appellee was not a party to an action where the holder of a lien note recovered judgment, the appellee having held his notes long before the owner of the note in the former action held his, an answer setting up this state of fact and asking credit by this note was properly stricken out, and appellee having no knowledge of any other lien at the time he became the purchaser of the notes, the judgment in the former action can have no force or effect as to him, he being an innocent purchaser without notice.

W. A. Barry and R. L. Stith for appellant.

J. S. Sprigg for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that on the 19th of December, 1899, one Catherine Pearman sold and conveyed to appellant, T. T. Goldsmith, about forty-five acres of land; that appellant paid her all the purchase money except \$96, for which he executed two notes, payable to Pearman, due in one and two years, and that on that day Catherine Pearman sold and conveyed these notes to Alfred Clark. After these notes became due, and on the 30th of October, 1903, the appellee instituted this action against the appellant to recover the amount of the two notes, with their interest, and to enforce his lien on the land for the payment thereof. Appellee answered, admitting the allegations of the petition, but alleged in substance that one Floyd Davis,

who had sold this land to Catherine Pearman, assigned and transferred a note to the amount of \$45 to one C. W. Quiggins, executed by J. C. Bogard; that Quiggins instituted an action against Bogard and recovered a judgment on this note, caused an execution to be issued thereon which was returned endorsed "no property found." Quiggins then instituted an action in equity, alleging in substance that by mistake the deed to this land was made to Catherine Pearman when it should have been made to J. C. Bogard and Catherine Pearman; that they were joint purchasers thereof and this note was the balance of the purchase price; that to this action Quiggins made as defendant Catherine Pearman, J. C. Bogard and this appellant; that the court in that action adjudged that Quiggins had a lien for this debt, interest and cost, and directed the enforcement thereof by the sale of the land, but directed that if appellant Goldsmith should pay this judgment, then he should have a credit on the amount he owed as the balance of the purchase price. And also alleged that he had paid this judgment, interest and cost, amounting to \$87.55, and asked that this amount be credited on the notes which appellee held against him. Appellee was not a party to the action referred to in the answer, and it appears that he was the owner of these notes long before Quiggins brought the action on his note.

Appellant in his answer referred to the action of Quiggins v. Pearman, &c., and asked that it be read in connection with his answer and as a part thereof. On motion of appellee this part of his answer was stricken from the record, to which appellant excepted, but he did not ask, nor did the court make, an order making that action, or any part thereof, a part of this record. The appellant filed his schedule with the clerk, without notice to the appellee or an agreement with reference thereto, and directed the clerk to copy the whole of the record in this action and three papers in the Quiggins action, to wit, the petition of Quiggins, the answer of J. C. Bogard and the judgment of the court. Thus it will be seen that these papers are not properly a part of this record, but it appears from them and the appellant's brief that there was an issue as to Bogard having any part or parcel in the property purchased from Floyd Davis. It is agreed that there was no lien reserved in the deed from Floyd Davis to Catherine Pearman, but, on the contrary, it was stated that all the purchase price was paid, and also that appellee had no notice of any claim of any pre-existing lien against this land by either Floyd Davis or Quiggins.

There is nothing in this record to show, nor can we understand, upon what principle the court adjudged Quiggins a lien upon this land. We are of the opinion that the judgment in the Quiggins case can have no binding force or effect upon the rights of appellee, he not being a party to that action and being an innocent purchaser of these notes without any notice of any prior claim or equity on the part of any one, his purchase of these notes being long prior to the assertion of any claim against this land. The appellant is silent as to the first time he knew of the ownership of these notes by the appellee. It is indicated in the record that he must have known it from the date of their execution as they were sold and transferred to appellee on that day. The appellant was derelict in not causing the appellee herein to be made a party to the action of Quiggins v. Pearman, &c., that appellee might be permitted to litigate and prevent the enforcement by Quiggins of any lien

on this land, and in the event of failure to suffer a credit of the Quiggins claim on the notes he held against the appellant. As between appellant and appellee the one most in fault should suffer the loss.

For these reasons the judgment of the lower court is affirmed.

TWYMAN'S ADM'R v. BOARD OF COUNCILMEN CITY OF FRANKFORT.

(Filed February 8, 1904.)

1. Pesthouses—Powers of city council—Smallpox—In an action by an administrator for the death of his intestate, alleged to have resulted from exposure incident to confinement in a pesthouse, the acts of appellee having been done for the protection of the public health, a duty appertaining to it in its public and not corporate capacity, there can be no recovery, even though the duty was negligently done by those to whom its performance was entrusted.

2. Same—Board of health—The fact that deceased was removed to the pesthouse by the order of the mayor or other officers, there being no board of health, though there was an ordinance authorizing the appointment of such board, the failure to appoint such board can not affect the question, it being but an agency or instrumentality in the hands of the municipality in protecting the public health, and the means employed being just as effective.

John W. Ray and B. G. Williams for appellant.

Ira Julian for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Wesley Twyman, as administrator of the estate of James Twyman, deceased, sued the appellee, City of Frankfort, in the Franklin Circuit Court, for \$20,000 damages for the death of his intestate, alleged to have been caused by the negligence of its police officers in wrongfully exposing the intestate to inclement weather while he had smallpox by removing him from a comfortable home to the pesthouse used for smallpox patients, which was badly crowded, poorly ventilated, and wholly unfit for the purpose for which it was used.

It was averred in substance in the petition that the appellee, as a city of the third class, is empowered to enact ordinances to prevent the introduction of contagious diseases in its corporate limits, to adopt quarantine laws and enforce the same within ten miles of its limits, establish hospitals, boards of health, and make all necessary regulations for the protection of the public health, that in pursuance of the powers enumerated, the appellee has enacted many ordinances for the protection of the public health, and it has established a pesthouse for persons affected with contagious diseases, but has never appointed a board of health, for which reason it directed its mayor, other officers and agents to enforce the ordinances, and to remove any and all persons afflicted with smallpox to its pesthouse, and such officers and agents acted under the authority thus conferred in doing the negligent acts complained of, whereby the intestate lost his life.

A demurrer was filed to the petition by appellee, and the same having

been sustained by the lower court, the appellant refused to plead further; the petition was thereupon dismissed and appellee given judgment for its costs. The case is now before this court, and the only question presented upon the appeal is, does the petition state a good cause of action?

If the acts complained of in the petition were done by the appellee in the effort to protect the public health, which is a duty that appertains to the city in its public, and not in its corporate or private, capacity, it would seem that there can be no liability upon its part, even though such duty was negligently performed by those to whom its performance was entrusted.

"The power or even duty on the part of a municipal corporation to make provision for the public health, and for the care of the sick and destitute, appertains to it in its public, and not corporate, or, as it is sometimes called, private, capacity, and, therefore, where a city under its charter, and the general law of the State enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein." * * * (Dillon on Municipal Corporations, sections 977, 989, 981-2; City of Richmond v. Long's Adm'r, 17 Grattan, 375; Sherbourne v. Yarbo Co., 21 Cal., 113.)

Perhaps no better statement of the law on this subject can be made than is found in the following quotation from 15 Am. and Eng. Ency. of Law, 1141, viz.: "While the difficulties surrounding all attempts to state a rule embracing the torts for which a private action will lie against a municipal corporation have been often deplored, yet it is believed that the following formula is both accurate and complete. So far as municipal corporations of any class, and, however incorporated, exercise powers conferred upon them for purposes essentially public, purposes pertaining to the administration of general laws, made to enforce the general policy of the State, they should be deemed agencies of the State, and not subject to be sued for an act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters they should stand as does the sovereignty whose agency they are, subject to be sued only when the State by statute declares that they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed, powers intended for the private advantage and benefit of the locality and its inhabitants, there seems to be no sufficient reason why they should be relieved from liability to suit and measure of actual damage, to which an individual or private corporation exercising the same powers for purposes essentially private would be liable."

We find the same principle announced in Taylor v. City of Owensboro, 98 Ky., 271, wherein it is said by this court: * * * "The municipal corporation in all these and like cases represent the State or the public; the police officers are not the servants of the corporation, and hence the principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability." * * *

In the same case it is further said: "The above principle is sustained by an almost unbroken line of decisions of the courts of this country and by this court in the cases of Pollock's Adm'r v. Louisville, 13 Bush, 221; Jolly's Adm'r v. Hawesville, 89 Ky., 279; Prather v. Lexington, 13 B. M., 559."

We do not regard the cases of Clayton v. Henderson, 20 Ky. Law Rep., 86;

Paducah v. Allen, 23 Ky. Law Rep., 701, and *McGraw v. Marlon*, 98 Ky., 678, cited by counsel for appellant, as authorities in point. The two cases first mentioned involved the illegal action of the boards of councilmen of the cities of Henderson and Paducah in improperly locating pesthouses in violation of the statute, thereby creating nuisances to the injury of the property rights of contiguous residents, and endangering the lives of their families, and towns and cities can always be held liable for nuisances created or maintained by them. And in the case last mentioned, though the city of Marlon was held liable in damages for the arrest and prosecution of McGraw for peddling without license, the arrest was made under a void ordinance which was enacted for municipal revenue, of which the city of Marlon was the sole beneficiary. It is well settled that a city may be held liable for an act resulting in injury to another, where the city derives some special benefit from such act.

Counsel for appellant relies upon *Aaron v. Broiles, &c.*, 64 Texas, 318; *Dallas v. Allen*, 40 S. W., 324. The former was an action against the board of health, mayor and marshal of Fort Worth, and not against the city, and upon the state of facts presented it was held that the persons sued were liable. We have been unable to find or examine the case of *Dallas v. Allen*, *supra*, but conceding that the Texas doctrine is as contended by counsel for appellant, it has not been accepted in this State, and is, we think, against the weight of authority outside of it. We are unable to see how the failure of the appellee city to appoint a board of health can affect the question under consideration. A board of health would be but an instrumentality or agency in the hands of the municipal government to be employed in protecting and maintaining the public health. Any other means to the same end that would prove as effective as a board of health might be employed by the city, and still the duties to be performed would be such as grow out of the exercise of powers purely governmental.

It is insisted for the appellant that the appellee city participated in the alleged negligent acts of its officers in the manner of removing the intestate to the pesthouse, because it directed the removal. It is not, however, contended that the city council gave any special direction to remove the intestate to the pesthouse, though it is conceded that it adopted proper ordinances under which to care for the public health. It can not be denied that it is the duty of the city authorities to enforce these ordinances by removing those who are afflicted with contagious diseases to the place provided for them. We fail to see, therefore, how in performing these duties the city can become a participant in the negligent acts of those who simply have in hand the removal to the pesthouse of persons thus afflicted. At most, only the officers or agents guilty of such negligence may be held liable therefor. Taking all that is alleged in the petition to be true, and it must be so considered for the purposes of the demurrer, it shows beyond question that the acts complained of were such as appertained or were incidental to appellee's duty to the public, and were done for the protection of the public health. The power exercised was, therefore, solely for the public good.

Finally, it is insisted for appellant that in any event this action was authorized by section 6, Kentucky Statutes, which provides that: "Whenever the death of a person shall result from an injury inflicted by negligence or

wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants causing the same." * * *

The statute was enacted to conform to section 241 of our present Constitution, which confers the same right. We can not believe that the statute and provision of the Constitution, *supra*, were intended to give a right of action against a municipal corporation for the death of a person occurring as the result of the act done, as in this case, in the performance of a duty which the municipality owed to the public, and the doing of which was but the exercise of power purely governmental. It seems to us that to hold otherwise would practically do away with municipal authority in the matter of preserving the public health, which would result in consequences disastrous to the public welfare, and ruinous to every city in the State.

For the reasons indicated the judgment is affirmed.

Whole court sitting.

GREEN'S ADM'R v. MAYSVILLE & BIG SANDY R. R. CO.

(Filed February 8, 1904—Not to be reported.)

1. Railroads—Damages—Negligence—Where appellant's intestate attempted to swing upon a moving freight train and in doing so slipped falling under the car, which crushed him to death, there being no proof of negligence on the part of the servants in charge of the train, a peremptory instruction to find for appellee in an action against it for damages was proper.

2. Same—View by jury of place of accident—While section 818, Civil Code, authorizes the trial court to allow a view of the place of an accident by the jury, it does not compel the court to grant such view, and it is in the discretion of the court to grant or refuse it.

W. T. Cole and A. D. Cole for appellant.

E. L. Worthington and W. H. Wadsworth for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Settle.

Walter Green, an infant six years of age, was run over and killed by a freight train of the appellee, Chesapeake & Ohio R. R. Co., lessee of the roadbed, track and other property of its co-appellee, Maysville & Big Sandy R. R. Co.

The death of the infant occurred in Greenup county near a public crossing, a short distance from the depot, at the junction of appellee's railroad and that of the Eastern Kentucky R. R. Co. The appellant, Charles Green, soon after the death of the infant was by an order of the Greenup County Court appointed and duly qualified as administrator of his estate, and as such administrator he instituted this action in the circuit court against the appellees, seeking to recover of them \$25,000 damages for the death of his intestate upon the ground, as averred in the petition, that his death was caused by the negligence of the servants of the appellee, Chesapeake & Ohio R. R. Co., in charge of the train which ran over and killed him. The acts of negligence complained of as specifically set forth in the petition are that the train was operated at an excessive and dangerous rate of speed, to wit, three miles

an hour, without any signal of its approach, or lookout from the engine or cars; that appellee failed to have a watchman, or device of any kind, at or near the place where the intestate was killed to warn travelers or protect them from moving engines or cars; and further, that by the exercise of reasonable diligence on the part of appellee's servants the intestate could have been seen by them in time to have prevented the injuries of which he died.

The alleged acts of negligence complained of in the petition were specifically denied by the answer, and in addition it was averred therein that the intestate was not at or near the public crossing when killed, and that his death was caused by, and would not have occurred but for, his own negligence in grabbing at the steps of a car while it was in motion, which averments of the answer were denied by the reply. Upon the issues thus made a trial was had, and upon the conclusion of appellant's evidence the jury, in obedience to a peremptory instruction from the court to that effect, found for the appellee following which judgment was entered dismissing the petition, and allowing appellee its costs. Thereupon the appellant filed grounds and entered motion for a new trial, which was refused by the lower court. Appellant complains of the refusal of the new trial by that court, and by this appeal asks a review of its rulings, and a reversal of its judgment.

Four grounds were presented in support of the motion for a new trial: First, error of the trial court in refusing to permit the jury on appellant's motion to view the place of the accident; second, in refusing to permit the appellant to file an affidavit in support of his motion to have the jury view the place of the accident; third, in excluding certain evidence over the appellant's objection; fourth, in granting the peremptory instruction. As to the first of the grounds mentioned, it may be remarked that while section 318, Civil Code, authorizes the trial court to allow a view of the place of an injury or accident by the jury, it does not in every instance compel the court to grant such view. It is in the discretion of the court to grant or refuse it.

As said by this court in *Henderson and Corydon Gravel Road Co. v. Cosby*, 103 Ky., 184: "As to whether the jury should have been sent to view the place was a matter in the discretion of the court. The court must always determine from the peculiar facts in each case as to whether it is necessary for the jury to view the premises to enable them to get a proper understanding of the case."

We have been unable to find in the record any affidavit that was offered to be filed by appellant in support of his motion that the jury be allowed to view the place where his intestate was killed. Indeed it seems to be admitted that no such affidavit was offered, and in its absence the lower court was doubtless unable to see that there was anything in the case that required a view by the jury of the place of the accident, which would probably have delayed the business of the court, and entailed unnecessary cost upon the parties. The affidavit should have been prepared and tendered when the motion to file it was made, for such tender was necessary in order to get the affidavit and order rejecting it, together with appellant's exception thereto, made a part of the record that this court might determine whether or not its rejection by the trial court was error. But in view of the evidence in-

roduced by appellant upon the trial we are clearly of opinion that he was not prejudiced by the court's refusal to permit the jury to view the place where the intestate lost his life. It appears from the evidence that the intestate was killed at a public crossing near appellee's railroad track, about 100 yards from the Riverton station and about 400 yards from the corporate limits of the town of Greenup.

The freight train by which he was killed was passing over the crossing.

The intestate seemed to have been playing or waiting by the side of the railroad track near the crossing. As the train was slowly moving westward, not faster than three miles an hour, and after the locomotive and several of the cars composing the train had passed him, he commenced to grab at the stirrups of one of the cars, with the evident purpose of "swinging" to the train or climbing on it. In grabbing at the car he ran a few steps with it, and in doing so his foot slipped, or he stumbled on the cross ties and fell, or was thrown under the car, and killed by the wheels passing over his body.

Wm. Wurtz was the only eyewitness to the death of the intestate, and upon being introduced by appellant he said: "He (the boy) was on the crossing. He hit three or four times at the wheels, and he started to catch onto the car, and he followed it, and finally, I reckon, he got hold of it; I couldn't tell, and directly I seen him pitch forward and go under the wheels." * * *

The witness was on the other side of the train from the boy, but saw him between the cars and under them. He also testified that quite a number of the cars had passed him before he attempted to grab one of them, and that there were seven or eight cars behind him, that is, between him and the rear end of the train. There could have been no recovery in this case without some proof of negligence on the part of appellee's servants in charge of the train, and if there was no proof whatever of such negligence the court did not err in granting the peremptory instruction. We are of opinion that there was no evidence of negligence in this case. It is doubtless true that the appellant's intestate was seen by the engineer and fireman as the locomotive passed him, but if so the evidence did not show that he was then in such close proximity to the moving train as to be in any danger; consequently there was nothing in his position to excite the apprehension of the engineer or fireman as to his safety. They no doubt concluded that he was waiting for the train to pass that he might cross the railroad in going to some house on the other side. Having passed the boy and the crossing, it was not the duty of the engineer or fireman to look backward, but it was their duty to keep a lookout ahead of them.

In *Pedigo's Adm'r v. L. & N. R. R. Co.*, 24 Ky. Law Rep., 338, which was an action to recover for the death of a person by coming in contact with some part of a moving train after the passing of the locomotive, it was said by this court that "after the engineer had passed the crossing, it was not his business to look back to see what might be transpiring in the county road."

The fact that appellant's intestate by reason of his tender years was not a trespasser in being upon the ground belonging to appellee's roadbed did not authorize a recovery, unless his peril in attempting to "swing" to the train

was known, or might by the use of ordinary care have been discovered by those in charge of the train in time to have prevented his death. The mere fact of his presence near the track, but not in a place of danger, did not require those in charge of the train to stop it, and warn him to get further away, as they could not have anticipated his doing so reckless a thing as "swinging" to the train as it passed him.

It is contended, however, that those on the train saw him running with it, and grabbing at one of the cars, and they might have stopped the train in time to have saved his life. We are unable to find in the record any evidence that conduces to show that the boy was seen by those in charge of the train when he attempted to grab the car. It is urged that the conductor who was in the caboose must have been a witness to the death of the boy, as he asked a Mr. Sparks as the train passed Riverton station who it was that had been killed. We do not think such an inquiry proves that the conductor saw the train run over the boy. The caboose was the rear car of the train, and if the conductor was standing in the rear, or on top of the caboose, he doubtless saw the body of the boy on the track after the train passed over it. But if he or others on the train had seen him when he made the attempt to get on the car it is manifest that they could not have prevented the accident, for, according to the evidence, it would have been impossible to have stopped the train in time to have saved his life.

The witness, Wurtz, in speaking of what happened to the boy, said: "It threw him under the track quicker than you could have throwed a cat. It looked to me like I never seen a fellow go under a train so quick in my life."

The entire occurrence, beginning with the boy's grabbing at the car and ending with his being thrown under the train, occupied but a moment's time, and it is manifest that nothing that might or could have been done by those in charge of the train would have availed to prevent his death. The boy, by reason of his infancy, was not chargeable with contributory negligence, but his death can not, in our opinion, be charged to the appellee, as the evidence wholly failed to show that it was caused by negligence on the part of its servants in charge of the train. The lower court did not err, therefore, in giving the peremptory instruction. A careful reading of the bill of evidence reveals no error to appellant's prejudice in the admission or rejection of evidence by the lower court.

Wherefore, the judgment is affirmed.

THOMPSON, &c. v. THOMPSON.

(Filed February 3, 1904.)

1. Judgments—Liens—Appellee can not set off a judgment against himself in favor of a widow with a judgment assigned to him against her husband, where the personal estate of the decedent did not equal the amount of the exemptions allowed and which judgment would not have been a lien against the property set apart to the widow under an appraisement, and an order of the trial court allowing such set-off will not be upheld.

2. Exemptions—Upon the death of a decedent property exempted by statute from distribution and sale ceases to be part of his estate and immediately

vests by operation of law in the widow for the benefit of herself and children, and it is not necessary that it be appraised and set aside to make it her property, the statute fixing that.

Sam C. Hardin for appellants.

W. L. Brown and G. C. Brook for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

It appears that prior to April, 1898, W. H. Thompson, husband of appellant, instituted an action in the Laurel Circuit Court against appellee, J. M. Thompson, for the recovery of several thousand dollars. During the pendency of this action, and in the month of April, 1898, W. H. Thompson died intestate. His widow, Lula, appellant herein, administered on his estate, and the action was revived in her name as administratrix, and prosecuted to judgment. From this judgment an appeal was taken by J. M. Thompson, and this court reversed that judgment, and directed that the lower court enter judgment in favor of Lula Thompson as such administratrix for the sum of \$400 and the cost of that action in the lower court. The judgment was entered at the May term, 1902, in conformity with the opinion of this court. Appellant caused an execution to be issued on this judgment, and placed it in the hands of the sheriff of the county of appellee's residence, which was returned by the sheriff, with the endorsement "no property found to make this f. fa. or any part thereof." She then instituted this action in equity, in the nature of a bill of discovery, making the appellee and his wife, Sallie Thompson, and the Standard Coal Co., defendants, alleging that the appellee was the owner of the stock in the Standard Coal Co., and had transferred the same to his wife for the purpose of covering up, cheating and defrauding his creditors. The defendants in that action answered, denying these allegations. The appellee, J. M. Thompson, in addition to traversing the allegations of the petition, pleaded what he termed a set-off or counterclaim, to wit, that he had purchased from one Pugh a judgment obtained in the Laurel Quarterly Court for the sum of \$170, with interest and cost of \$8, against W. H. Thompson. He claimed to have purchased this judgment the 23d day of May, 1902, and on that day Pugh assigned and transferred it to him, and he asked that this judgment be set-off against the judgment which the appellant held against him, and proffered to pay the difference between the two to appellant. She filed her reply, in which she denied the right of appellee to set-off this claim against her judgment, for the reason, as she alleged, that when her husband died in April, 1898, she was left as his widow, with three small children, Leslie, Blanche and Mabel Thompson, who were all under the age of ten years, and children of the decedent, W. H. Thompson, and were living with and dependent upon her for a support; that W. H. Thompson at his death did not have the personal property on hand exempted to her and the children under section 1408 of the Kentucky Statutes. All the personal property then on hand was appraised by the appraisers and set apart to her and the children, and amounted to only \$210.15. The appraisers specified these articles in their appraisement, but did not file it in the county court until the end of the litigation hereinbefore referred to, and on the 30th of May, 1902, added

in substance to this appraise bill the following, and signed and filed it with the county court:

In lieu of ten head of sheep not on hand.....	\$15 00
In lieu of spun yarn and manufactured cloth	20 00
In lieu of family Bible	8 00
In lieu of loom	15 00
In lieu of plow and gear	10 00
In lieu of wagon	50 00
In lieu of sufficiency of provisions, including breadstuff to sustain the widow and three infant children, there being no growing crop or live stock on hand at the death of W. H. Thompson out of which to set it apart, the sum of.....	200 00
In lieu of one horse not on hand	100 00

The appraisers set these sums apart to the widow and children, to be taken out of the judgment against appellee. The appellee filed a rejoinder to this reply, claiming that as he became the owner of the Pugh judgment on the 28d of May, and this appraisement took place on the 30th of May, his rights in this judgment were fixed, and he was entitled to a set-off against the judgment in favor of appellant against himself before she and her children obtained any interest in the judgment against him. The lower court seems to have taken appellee's view, and adjudged that he was entitled to a set-off of the one judgment against the other, and that he be required to only pay her the difference. The appellant has appealed, and asks a reversal. It appears from the record that this judgment against appellees, together with the articles of property named in the appraised bill, and set apart to the widow and children, constituted the whole of the personal estate left by W. H. Thompson at his death. And it also appears that the burial expenses of the decedent and the cost and charges of the administration of his estate have not been paid. The effect of the judgment of the lower court gives appellee, under his assigned Pugh judgment, which was not a lien upon any part of the decedent's estate, precedence over the statutory claim of the widow and children and other preferred claims under the statutes.

At the death of W. H. Thompson the property specifically exempted by statute from distribution and sale at once ceased to be a part of his estate, and vested instantly by operation of law in the widow for the benefit of herself and the infant children residing with her. It was not necessary that the appraisers should appraise and set it apart to make it her property, the statute fixed that. The appraising and setting apart of the property is merely for the purpose of designating the individual pieces of property and valuing them, and supplying their places with other property, and separating it from the balance of the estate when required. But in this case there was no other property left after giving to the widow and children the amount allowed by law, except the balance of this \$400 judgment against appellee, and this balance will probably not more than pay the preferred claims. Appellee, by the assignment of this claim by Pugh, obtained no greater rights than Pugh had. If Pugh had presented this judgment in the settlement of decedent's estate, it can not be contended that he could have defeated the exemptions of the widow and children and the preferred claims. (*Mallory's Adm'r v. Mallory's Adm'r*, 92 Ky., 319.)

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Judge O'Rear not sitting.

OBERDORFER, &c. v. WHITE.

(Filed February 4, 1904—Not to be reported.)

Conveyances—Where the evidence shows that where a deed was executed when it was the purpose to execute a mortgage, and the paper was only intended to be a mortgage, the judgment of the chancellor in setting the conveyance aside will be sustained.

Lieber & Lincoln for appellants.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

On May 15, 1900, Nina Iola Payne (now White) signed, acknowledged and delivered to Lewis Oberdorfer a deed by which, "in consideration of \$1 and other good and valuable consideration," she conveyed to him in fee simple her one-third interest in a tract of land in Jefferson county, worth about \$9,000, in which her father, then fifty five years old, held a life estate. On July 26, 1901, she filed this action, alleging that the deed was only intended as a mortgage, and seeking to have it so adjudged. Oberdorfer and his wife, Sophia, were made defendants to the action, he having on May 22, 1900, conveyed the land voluntarily to her. On final hearing the court set aside the deed from Oberdorfer to his wife as fraudulent, and adjudged the deed executed by Miss Payne to be good only as a mortgage for \$407.39. From this judgment Oberdorfer and wife appeal.

The evidence fully sustains the learned chancellor. It leaves no question that the grantor understood she was only making a mortgage on the property. While there is some conflict in the evidence as to the amount paid by Oberdorfer, when we consider the circumstances, we have no doubt that the amount fixed by the chancellor is correct. A deed absolute on its face may be shown to have been executed as a mortgage. The rule on this subject is thus well stated in 8 Pomeroy's Equity, section 1196: "Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of purchase, or other agreement, may in equity, by means of extrinsic and parol evidence, be shown to be a mortgage as between the original parties, and as against all those deriving title from or under the grantee, who are not bona fide purchasers for value and without notice. The principle which underlies this doctrine is the fruitful source of many other equitable rules—that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and, therefore, in reality a mortgage. The general doctrine is fully established, and certainly prevails in a great majority of the States, that the grantor and his representatives are always allowed in equity

to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance can not be a mortgage; if there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption of course arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases agree that the evidence must be clear, unequivocal and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees."

Under this rule the proof in the record is sufficient to sustain the chancellor's judgment. Appellant did not ask the enforcement of the mortgage. This he can have in a separate suit if his debt is not paid.

Judgment affirmed.

ENTERPRISE FIRE INS. CO.'S REC'R, &c. v. ENTERPRISE FIRE
INS. CO., &c.

(Filed February 5, 1904—Not to be reported.)

Insurance company—Insolvency—In an action by the receiver of a fire insurance company and creditors for the recovery of a sum which was alleged to have been paid to a bank in contemplation of insolvency, the corporation never having had any assets except the agreement of its various policy holders to pay the losses of their fellow members when assessed, it being an assessment company, these agreements constituting the only resources of the company, it can not be said to have become insolvent, because on the day it went into liquidation it possessed all it ever did, and having first liens on an amount of property greatly in excess of its outstanding insurance, it can not be insolvent.

E. L. Hutchinson for appellants.

G. C. Webb and Geo. Denny for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by J. L. Watkins, receiver of the Enterprise Fire Insurance Co., and H. H. Sayler, for himself and on behalf of various other creditors of the company, against the Enterprise Fire Insurance Co. and the Union Savings Bank to recover the sum of \$2,449.80 which it is alleged was paid by the insurance company to the bank in contemplation of insolvency, and for the fraudulent purpose of preferring it to other creditors, in violation of the provisions of the statute commonly called the act of 1856.

The Enterprise Fire Insurance Co. belongs to that class known as assess-

ment or co-operative fire insurance companies, organized under the provisions of subdivision 5, chapter 32, Kentucky Statutes. In order to intelligently discuss the question before us it will be necessary to examine the law under which the corporation was organized, and ascertain its rights, powers, duties and liabilities. Section 703, Kentucky Statutes, provides: "Twenty-five or more persons residing in any one or more adjoining towns, or in any county, or in not exceeding ten adjoining counties, who collectively own property of the value of \$50,000 or more, may become a corporation for the purpose of co-operative or assessment insurance against loss or damage of property by fire, wind or lightning, by making and acknowledging a certificate, setting forth their intention to form such a corporation, the county or counties, town or towns in which it intends to do business, its corporate name, and the place where its principal office is to be located. Every person insured in such a corporation, who shall sign an application for insurance, as required by the certificate of incorporation or the by-laws of the corporation, shall thereby become a member thereof."

Section 708 provides for the organization of the corporation.

Section 704 authorizes the commencement of business, upon filing in the office of the insurance commissioner the articles of incorporation required, together with a sworn statement by three of the incorporators, that bona fide agreements have been entered into for the insurance of an amount not less than \$100,000 within the territory in which it proposes to do business.

Sections 706 and 707 are as follows:

"Section 706. The directors of every such corporation shall issue policies of insurance, signed by their president and secretary, agreeing in the name of the corporation to pay all damages, not exceeding the amount insured, which shall not be more than \$5,000 on any one risk, done to dwelling houses, barns and their contents, and other property not more hazardous in cities or villages, detached at such distance as the by-laws of the corporation may prescribe, and their contents, and live stock owned on the premises, caused by fire, wind or lightning, during the time mentioned in the policy. Every corporation may issue more than one policy to one person, firm or corporation having separate or detached buildings which it is not prohibited from insuring by this act or its by-laws. Every policy issued shall have attached thereto a printed copy of the by-laws and regulations of the corporation.

"Section 707. Every person insured in and by any such corporation shall give his undertaking in such form as the corporation may prescribe, which form shall be uniform between and by all the insured, to pay his pro rata share of all losses or damages sustained by any member thereof, from any cause specified in the policy to the corporation. He shall also pay such reasonable sum for expenses as the by-laws may require. Every policy holder sustaining a loss or damage, from any cause specified in the policy, shall notify the president or secretary of the corporation within sixty days after such loss or damage, and the proper officers of the corporation shall at once proceed to ascertain and adjust such loss or damage in the manner provided for by the charter and by-laws of the corporation and the provisions of this act."

Section 709 authorizes the corporation to borrow money on its credit suffi-

cient to pay losses where it has no money on hand for that purpose, and also for assessment on the members to repay.

Section 710 limits the amount of the indebtedness which the corporation may incur, except for payment of losses, to an amount that will not require an assessment of more than 50 cents on each \$100 of insurance in force.

Section 711 regulates the giving of notice and the requisites of assessments against the members.

By section 712 actions are authorized to be brought by the corporation against members to recover all assessments which they may neglect or refuse to pay, and further authorizes, where the corporation is compelled to bring actions to collect assessments, that, in addition to the amount assessed, there may be recovered 50 per cent. as a penalty for the neglect and refusal to pay. The corporation is also given a first lien upon the property insured to secure the payment of the assessments and calls legally made under the contract of insurance. Fire insurance companies organized under this act are strictly co-operative in character. They have no assets, and are not required to have any, except the agreements of the insured to pay such assessments as may be necessary from time to time to make good the losses which may occur to their fellow members. The members of the corporation occupy a dual relationship to each other; they are both insured and insurers.

The Enterprise Fire Insurance Co. organized under this act, and began to do business. Losses having occurred, to pay which it had no money on hand, it borrowed sums from the Union Savings Bank, which, with interest after various renewals, amounted to the sum of \$2,449.20. In April, 1901, it owed, in addition to the debt due the bank, losses which it was unable to pay, the total indebtedness aggregating in round numbers the sum of \$13,000; at which time it concluded to go out of business, and wind up its affairs, a resolution having been passed by the board of directors for that purpose, which also directed the levy of an assessment upon the policy holders for the purpose of paying all its indebtedness. The company collected by this assessment about \$5,000, out of which it paid off the indebtedness to the bank in full, some arrears in salaries, and \$835.59 on fire losses, which at that time amounted to \$7,000.

On the 15th day of June, 1901, the company was placed in the hands of a receiver by legal proceedings, and subsequently this action was instituted. The issues were made up in the pleadings, so as to present to the court the question of fraudulent preference, within the provisions of the act of 1856, and upon final trial the circuit court dismissed the petition, from which judgment this appeal is prosecuted. The first question to be determined is whether or not the receiver can lawfully maintain this action. In the case of *Ray, Receiver v. First National Bank of Louisville*, 23 Ky. Law Rep. 717, which involved a question similar in principle to the one at bar, it was said: "The majority of the court, however, are of opinion that inasmuch as the insurance company could not have recovered any part of the money in question from the bank upon the grounds relied on in the petition herein. * * * it necessarily follows that the receiver (the appellant) can not prosecute this action."

This case seems to be conclusive of this question, and we are, therefore, left to determine only the rights of appellant, H. H. Saylor, and those im-

whose behalf he sues, and who are creditors by reason of fire losses sustained by them. As said before, the members of the corporation occupy the dual relation of insured and insurers. The corporation never had any assets except the agreement of its various policy holders to pay the losses occurring to their fellow members when assessed. These agreements constituting its only resource, and being authorized under the statute to do business as an insurance company, relying upon these agreements as a fund with which to pay losses, can it be said to have become insolvent, when the facts show that it possessed on the day it went into liquidation all that it ever possessed? Undoubtedly, theoretically, at least, it is true that a co-operative fire insurance company can not be said to become insolvent with reference to the losses due to members because, under the statute, they are all insurers of each other, and, if necessary, each is bound to pay into the corporate treasury, upon assessment, a sum (not exceeding the face value of his policy) sufficient to make good all losses, which would exclude the idea that the corporation could be insolvent as to the losses, because, in the final analysis, if we may suppose such a state of affairs, each member sustaining a loss might become his own insurer; that such a system is unsound, financially, is obvious, but this is an infirmity in the law which permits it.

In the case of *Bangs v. Gray*, 12 N. Y., 488, a question arose as to whether or not the members of an insurance company similar to the one under consideration were bound only for a pro rata of a loss, taking into consideration all of the members, solvent and insolvent; or whether the solvent members would have to make good the entire loss. It was held that the solvent members were bound for the whole loss, the court saying: "Indeed I do not see how to answer the argument of appellant's counsel, that upon the other construction a company having some insolvent members must necessarily fail whenever the occurrence of a loss compels it to make an assessment. If it can only assess to the amount of the loss and the necessary expenses, and if such assessments must be upon all the members, good and bad, the portion of such loss which ought to be paid by the insolvent members must be left unpaid; and as the insured is entitled to recover the whole amount of his insurance, there will necessarily be a balance which there will be no means of paying."

Now the debt of the bank consisted of money borrowed to pay losses, as authorized by the statute. If this money had not been borrowed, the losses in question must have been paid by assessments on the members, some of whom are the parties now complaining. The corporation did not have at the time the loan was made, nor at any subsequent time, and has not now, any funds with which it could have repaid the bank, except the liability of the members to assessment. Now can it be said that a co-operative insurance company has been guilty of fraud, as against its members, by repaying to the bank the money which those members owed, and which they were bound to repay? Surely not. The bank as a creditor, and these appellant members as creditors, do not stand upon the same footing. The bank is not a member of the insurance corporation; it is only a creditor. The complaining members are also, in one sense, creditors of the corporation, and in another are its debtors. Suppose we make the bank return the money it has received, it does not thereby cease to be a creditor; its debt will still remain

due; and to what source must it look for repayment? Only to the members of the corporation. It would have a right to, at once, demand that an assessment be made upon the various members for such pro rata as would produce in the aggregate a sum sufficient to pay its debt. If the first assessment was not sufficient, then another, and still another, would, perhaps, have to be made, until finally, if it was necessary, those very complainants here would be forced to pay back the money they received from the bank. Such circuity of action will not be indulged in. As between themselves the members occupied the reciprocal relation of debtor and creditor; but as between the bank and them they were all debtors. Thus far we have considered this case only with reference to the theoretical problem of the corporation's insolvency; as a matter of fact, however, the record shows that at the time it went into liquidation there were outstanding, in round numbers, insurance policies of the value of \$700,000, every dollar of which was liable to assessment, to the extent of its face value, to pay losses. The statute gives the corporation a first lien upon the property insured for the assessments due; the total indebtedness amounts to about \$13,000; it is shown that, in affecting insurance, the principle of insuring for not more than two-thirds of the value of the property was adhered to; we have, therefore, first liens on nearly \$1,000,000 worth of property to pay \$13,000. It can not be that a corporation with such assets and such liabilities can be said to be insolvent.

It may require some trouble and expense to collect the necessary assessments; but we have no doubt that they can be finally collected, and a sum realized sufficient in amount to pay off the comparatively small indebtedness.

The judgment is affirmed.

PAGE, &c. v. SOUTHERN CONSTRUCTION CO., &c.

(Filed February 4, 1904—Not to be reported.)

Damages—Right of way—Where several actions were pending by property owners against a railroad company for damages for right of way, and other actions by the railroad against property owners to condemn property for right of way, and these actions were consolidated without objection, it can not be insisted that the judgment was erroneous in upholding the company's right to maintain its action on the contract for right of way.

M. C. & G. D. Givens for appellants.

W. E. Bourland, Lockett & Lockett, J. M. Dickinson and Pirtle & Trabue for appellees.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Paynter.

Several actions were pending, some by the property owners against the Kentucky Western Railway Co., to recover damages for the appropriation of land for the right of way, and some by that company against certain property owners to condemn property for the right of way. These actions were consolidated without objection. The railway company filed an answer, making an issue upon some of the averments in the petitions. Subsequently it

and its codefendant, the Southern Construction Co., filed an amended answer, and made it a cross petition against more than fifty persons who had guaranteed the right of way for a railroad between Dixon and some point on the Illinois Central R. R., and sought to make them pay the balance due growing out of the acquisition of the right of way.

Some of the defendants were served, and others entered their appearance. None of them objected to the answer as a cross petition before the judgment was rendered or questioned the right of appellees to have the issue raised by it determined. It is too late for those who had been summoned to answer it, or those who entered their appearance thereto to question the correctness of the form of procedure. The answer of the Kentucky Western Railway Co. contains averments showing it was duly incorporated under the laws of this State, and that it had the right to acquire a right of way for a railroad. The answer, as amended, constituted the cross petition, so the necessary averments were made to show the railway company had the right to maintain the action on the contract. (*Curry v. The Kentucky Western Railway Co.*, opinion delivered February 3, 1904.)

It is insisted that the judgment is erroneous, because it is in favor of certain persons who are not parties to the action. Some of them were parties to the record. It is true the appellee, the Kentucky Western Railway Co., was entitled to the judgment, but it in effect waived its right to it and let it go in favor of the parties to whom the amount recovered was due. In effect it was a judgment in favor of that company for the use of the parties named therein. It is bound by it, and now asks to have it affirmed. Certainly the judgment for that reason is not prejudicial to appellants. The reasons we have given for affirming the judgment were sufficient for the refusal of the lower court to deny appellants a new trial.

Both judgments are affirmed.

COMMONWEALTH, FOR USE, &c. v. MOREN, &c.

(Filed February 4, 1904—Not to be reported.)

1. Sheriffs—Sureties on sheriffs' bonds—Where a sheriff's bond was ex-
 outed in 1890 prior to the enactment of the Kentucky Statutes, the sureties
 in the bond are not liable for the collection of the county levy.

2. Same—Suits against sheriffs—In an action upon a sheriff's bond for the
 recovery of the county levy the petition is defective where it shows that
 the amount of claims allowed by the fiscal court were for an amount greater
 than the taxes in his hands for collection.

3. Same—Defective petition—Where it is not alleged in the petition that
 the annual settlements required by law to be made with a sheriff were not
 made, it is defective.

James Sparks and D. K. Rawlings for appellants.

J. A. Craft and J. W. Alcorn for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hobson.

J. W. Moren was the sheriff of Laurel county for the years 1891, 1892, 1893

and 1894. In each of those years a county levy was made and placed in the hands of the sheriff for collection. In April, 1899, the fiscal court appointed Charles R. Baugh to make a settlement with Moren, as sheriff, for the county levy of each of the years referred to. Baugh filed a report, which was approved by the court, no exceptions having been filed thereto, and thereupon the above four suits were filed against Moren to recover from him and his sureties the balance found due from him by these settlements, in which Moren was given no credit except for his commissions, or substantially none. The circuit court sustained a demurrer to the petition in each of the four cases.

The first suit, which was brought to recover for the year 1891, is based on the State revenue bond executed by Moren. It has been held by this court in several cases on sheriffs' bonds executed since the Kentucky Statutes took effect that the sureties in all the bonds are liable for the county levy. But the bond sued on was executed in the year 1890, before the statutes referred to were enacted, and under the law then in force, as construed by this court, the sureties in the sheriff's revenue bond are not liable for the county levy. (*Anderson v. Thompson*, 73 Ky., 132; *Elliott County v. Kitchen*, 77 Ky., 389.) No suit can, therefore, be maintained on this bond for the county levy.

The second suit is based on the county levy bond executed by Moren for the year 1892, but the petition is defective for the reason that it shows that the amount of claims allowed by the fiscal court, and to be paid by the sheriff, were for an amount greater than the amount of the taxes in the hands of Moren for collection. It is alleged in the petition that "because of defendant Moren's failure to pay said indebtedness out of the taxes collected by him under said levy, except to the extent shown in the original petition, the plaintiff, Laurel county, was compelled to, and did, subsequently pay the whole of said indebtedness." In *Owens v. Ballard County Court*, 71 Ky., 611, a petition containing in substance the same averment was held insufficient. The court said: "The petition alleges, only by implication, that the county was entitled to the money by reason of having since paid out of other moneys the claims of county creditors allowed for the year 1863. The county, if such claims have been paid, can be substituted to the rights of such creditors; but in order to make such a pleading good, so as to protect the rights of the sheriff and his sureties, the county should make specific allegations as to the names of the creditors, and the amounts allowed and paid by the county."

The petition before us is equally defective as the one held bad in that case. The same defect exists in the petitions in the third and fourth cases brought to recover on account of the county levy for the years 1893 and 1894 on the State revenue bond executed by Moren for those years. There is another and more substantial defect in all the petitions. It is the duty of the fiscal court annually at its October term to appoint a person to settle with the sheriff. (Kentucky Statutes, 1884, 4146.) It is presumed that the officials did their duty; and it is not alleged that these annual settlements were not made. But the suits are all brought on the settlement made by Baugh under the order entered at the called term in April, 1899, or nearly five years after his term had expired, which were confirmed without notice to him in any way. When the settlement is made at the time set by law it is the duty

of the sheriff to take notice of the law and be present, but he is not bound to take notice of the proceedings of the fiscal court at subsequent terms. A judgment where the court has no jurisdiction of the defendant is a nullity. Were the rule otherwise, a man might be deprived of his property with no opportunity to be heard. The orders of the fiscal court confirming the settlements made by Baugh being entered without notice to Moren, were not binding on him, but void, and no suit can be maintained on such orders against him, he not being present when the orders were made, having no notice of them, and having at no time agreed to the settlements. We, therefore, conclude that the court properly sustained the demurrer to the petition in all four of the cases.

The judgments appealed from in all four cases are, therefore, affirmed.

JEFFERSON COUNTY v. BOARD OF VALUATION AND ASSESSMENT OF KENTUCKY.

(Filed February 4, 1904.)

1. Railroads—Construction of statutes—Where a railway company operates its trains over another line of railway under a contract by which it pays the latter road so much each year, such an operation is a lease within the meaning of section 4081, Kentucky Statutes, and constitutes a franchise within the meaning of that section.

2. Same—Where a county seeks a mandamus against the Board of Valuation and Assessment to compel it to certify to it the proportionate part of a franchise of a railway company for taxation, the questions raised not having been decided in a former case and the county not being a party to that litigation, a judgment dismissing the petition was erroneous.

S. B. Kirby, Wm. Cromwell and C. C. Marshall for appellant.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker.

This action involves the right of Jefferson county to a mandamus against the Board of Valuation and Assessment, compelling them to apportion and certify to that county its proportionate part of the franchise of the Chesapeake & Ohio Railway Co. for local taxation.

There are two questions raised by appellees: First, that Jefferson county is not entitled to tax any part of the franchise in question as an original proposition; second, that that question has been adjudicated against it in the cases originating in the Franklin Circuit Court, and passed upon by this court in the case styled "The Southern Railway in Kentucky, &c. v. Coulter, Auditor," 24 Ky. Law Rep., 208. These two questions will be discussed in their order.

Section 4077, Kentucky Statutes, is as follows: "Every railway company or corporation, and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car com-

pany, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require."

Sections 4078, 4079, 4080 and 4081 provide the manner by which the value of the franchise of the corporations, for fiscal purposes, is ascertained. Section 4081 is as follows: "If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock, as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into, which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or taxing district bears to the whole length of lines in this State."

The facts show that the Chesapeake & Ohio Ry. Co., on the 1st day of January, 1896, entered into a lease or agreement with the Louisville & Nashville R. R. Co., by which it acquired the right to, jointly with it, use its line of railroad from Lexington to Louisville, Ky., for the term of one hundred years, at an agreed rental of \$60,000 per annum. A copy of the lease or agreement is filed in the record, and without setting it out in full, we note the following terms, as expressive of the use which the two corporations were thereafter to have in the road in question.

In what may be called the preamble it is recited that, "whereas the second party (the Chesapeake & Ohio Ry. Co.) wishes to use in common with the first party that part of the railway of the first party between Louisville and Lexington, Ky.," etc. In the first part of the agreement it is said that "the first party hereby grants to the second parties, jointly and severally, the right to use jointly with the first party its line of railway," etc.; and in the sixth clause of the agreement the second parties accept the "grant of the right to jointly use the railway in question."

It is contended by appellee that this is not a lease within the meaning of the statute, and, although the Chesapeake & Ohio Ry. Co. operates its trains, both freight and passenger, over the line of the Louisville & Nashville R. R. Co., from Lexington to Louisville, as freely and fully as if it owned the road, it can not be said that it owns, operates, leases or controls it within the meaning of section 4081 of the Statutes, and, therefore, although the line in question passes through a portion of Jefferson county, the corporation can not be said to operate its franchise therein, within the meaning of the section of the statutes quoted, it being insisted that the agreement between the two roads, for the joint use of the line, is not a lease, but a "mere traffic arrangement."

It will be observed that section 4077, after enumerating the various classes of public utility corporations, among which is included railroads, provides that they "shall, in addition to the other taxes imposed by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised."

When it is remembered that Louisville is one of the termini of the railroad in question; that it is the largest city in the State, having a population of over 200,000 inhabitants, and that this agreement, whether it be a lease or "mere traffic arrangement," by which an annual rental of \$60,000 is paid, was effected principally, if not solely, for the purpose of obtaining an entrance into the city, it is difficult to comprehend that method of reasoning which would hold that the corporation does not exercise its franchise therein. But we do not think that the language of section 4081 leaves any room for construction on this subject. Railroad corporations are not the only ones whose franchises are to be taxed under the statute; express companies, sleeping car companies, dining car companies, palace and chair car companies, and other like corporations, are all included in the list enumerating whose franchises are to be taxed, both for State and local purposes, whenever they are operated.

Now if a railroad corporation is not to be considered as operating its franchise along and over a line which it does not own, or does not possess the exclusive right to use, but merely has a "traffic arrangement" over, then, for the same reason, the express companies, sleeping, dining, palace and chair car companies can not be said to operate franchises within the State, for it is common knowledge that these corporations do not either own or lease lines of railway, but have "traffic arrangements" by which their rolling stock is operated over the lines of railroad corporations; and it would follow, therefore, that, although they are specially enumerated in the statute, they could not be assessed for a franchise tax. Could it be said that the Adams Express Co. does not operate its franchise in Louisville because it reaches that city exclusively by means of "traffic arrangements" with various railroad corporations? Suppose, instead of having the "traffic arrangement" in question with the Louisville & Nashville R. R. Co. from Louisville to Lexington, circumstances had been such that this great corporation would have been forced to reach Louisville from the State line over the tracks of the Louisville & Nashville R. R. Co., by an agreement similar to the one it now has from Lexington; then, under the reasoning of appellee in this case, it would not operate a franchise in the State at all. Neither

the letter nor the spirit of the statute in question will admit of the construction sought to be placed upon it by the appellee. We think the Chesapeake & Ohio Railway Co. operates its franchise in Jefferson county, and the arrangement it has with the Louisville & Nashville Railroad Co., for the joint use of its line, is a lease within the meaning of the law.

The second contention of appellee is equally untenable as the first. Several years ago various railroad corporations, among which was the Chesapeake & Ohio Ry. Co., instituted actions in the Franklin Circuit Court, seeking to enjoin the Board of Valuation and Assessment from certifying any part of their franchises to various counties for local taxation. These cases were consolidated, and the petitions dismissed by the circuit court. An appeal was prosecuted to this court, and that judgment affirmed in the case of the Southern Ry. in Kentucky, &c. v. Coulter, Auditor. A careful reading of the opinion shows that these various corporations contended that their franchises were not liable to local taxation, for reasons not necessary to be here set forth. All of these propositions of law were decided adversely to them, and it was held that their franchises were liable to local taxation under the statute.

The question raised in this case was not involved in that. The county of Jefferson was not a party to that litigation, and the question as to whether or not it was entitled to have its proportionate part of the franchise tax of the Chesapeake & Ohio Ry. Co. certified for local taxation was not, and could not, have been involved therein. What the court decided was, that those counties then applying were entitled to tax the franchises of the corporations, but it was nowhere held, either by express language or implication, that any county not then applying was not entitled to tax them. The court undertook to decide, and did decide, the rights of the counties then before it, but not the rights of any others. There might be room for argument that the question involved in this case was adjudicated adversely to the railroad in the case cited, but not for the position that it was settled in its favor.

For these reasons the judgment dismissing appellant's petition is reversed for proceedings consistent with this opinion.

SCOTT, &c. v. POWERS, LITTLE & CO.

(Filed February 5, 1904—Not to be reported.)

1. Lands—Conversion of by husband—Where various conveyances of different tracts of land to the husband show a conversion of the wife's estate and reduction of it to the possession of the husband, a court of equity will not interpose to provide for the wife to the exclusion of the husband's creditors.

2. Advertisement of lands under execution sale—Subsection 2 of section 1682, Kentucky Statutes, requiring lands to be advertised fifteen days before sale, where a sale was made after only ten day's advertisement it must be set aside.

J. Smith Hays and W. D. Jackson for appellants.

J. D. Atkinson and C. F. Spencer for appellees

Appeal from Powell Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that appellees, Powers, Little & Co., recovered a judgment in the Harlan Circuit Court against the appellant, John Scott, and one J. I. Forrester for the sum of \$292.15, with interest from the 1st of August, 1897, and \$2.29 cost, and the appellees, Haynes, Henson & Co., recovered in the same court at the same time a judgment against the same parties for the sum of \$368.30, with interest from the 1st of August, 1897, and also \$2.29, with interest from date, and the sum of \$10.85 costs. On the 9th of April, 1898, an execution was issued on each of these judgments and placed in the hands of the sheriff of Powell county, the place of residence of appellant, John Scott, for collection. The sheriff levied these executions upon a tract of land belonging to Scott, and on the 6th of June, 1898, sold the land to satisfy these executions. It appears from the returns of the sheriff made on each of the executions that he sold the whole survey to each of the appellees at the price of \$337.98, stating that it was the amount of each of appellee's debts, interest and sheriff's commissions. It is shown by the judgments in each of the cases that this is incorrect. The judgment in the Haynes, Henson & Co. case being for a greater sum than \$337.98, and in the other case a much less sum. We suppose that the plaintiffs in the execution, the appellees here, must have agreed to buy the land jointly and as equal partners, and the one owning the lesser judgment agreeing to pay the other the difference between their claim and the \$337.98.

On the 1st of November, 1899, the appellees, the purchasers of this land under their executions, notified the appellants, under the provisions of section 1689 of the Kentucky Statutes, that they would, on the 16th of November, 1899, enter a motion on the docket of the Powell Circuit Court for a judgment for the possession of the land so purchased by them, and described the land by metes and bounds. The appellants answered, and stated that the levy and the sale made under the execution were void; among the reasons for its being void was that the sheriff advertised it for only ten days before the sale. They further alleged that this land belonged to Mary Scott, the wife of John Scott. The issues were made up, proof taken, and the lower court adjudged that the defense to the motion was insufficient, and directed a writ of possession to issue for this land to the appellees. Of this judgment the appellants complain.

With reference to the claim of appellants that this property belongs to Mary Scott, the facts with reference to her claim and right to the land are in substance as follows: It appears that the appellants married about the year 1878; soon after their marriage her mother gave her about \$300 in money; she owned a small piece of land which she sold for \$75; the husband, John Scott, owned a small piece of land which he sold for \$300, which appellants claim were invested in saw logs and was an entire loss to him; they claim that her money was invested in a tract of land bought of one King; the purchase price agreed to be paid was \$1,500; that appellant, John Scott, as the agent of his wife, sold walnut and poplar logs from this land and paid the balance of the purchase price, and besides this he sold \$2,100 worth of timber off this land. He invested this money in another tract of land purchased from one Carter for the price of \$3,500. He sold the timber off this land, with which he paid the balance of the purchase price, and then

sold other timber and both tracts of land to one Eager for the price of \$3,500; with the purchase price of this land and timber he had about \$5,000, or \$5,500, in cash, which was invested in the land in controversy herein. All these deeds were taken to and in the name of John Scott. They claim that Mary Scott did not know that these conveyances were made to John Scott. They say that in January, 1898, Mary Scott first learned that these deeds had been made to her husband, and she demanded that the deed to the Powell tract of land be made to her, and her husband, John Scott, recognizing his obligation to her, they joined in a deed, and conveyed this Powell county land to one Roy Hoskins and on the same day Roy Hoskins conveyed it to Mary Scott. And on the 28th of September, 1899, the appellants conveyed this land to one Green Osborne, an uncle of appellant, Mary Scott. This deed to Osborne was made after the levy of the executions. The deeds from appellants to Hoskins and from Hoskins to Mary Scott were made after the institution of appellees' actions, and were not acknowledged before a clerk or official of any character.

There was no proof that appellant, John Scott, agreed to have any of these conveyances made to his wife, or when he received the little estate of his wife that he agreed, in consideration thereof, that he would have the King land, in which he claims it was invested, conveyed to her, and even if he had, under the authority of the case of *Darnaby v. Darnaby's Ass'ee*, 14 Bush, 486, she could not assert her claim now to the property as against the rights of creditors of her husband, they having no notice of her equities. The evidence of the various conveyances of the different tracts of land to the husband show a conversion of the wife's estate (if she had any), and reduction to the possession of it by the husband, and when this is done a court of equity will not interpose to provide for the wife to the exclusion of the husband's creditors. (4 Bush, 379.)

Under all the facts and circumstances of this case we are satisfied that the deeds from appellants to Hoskins and from Hoskins to Mary Scott and the deed from appellants to Osborne were made in an attempt to defraud appellees, or to prevent the collection of their judgments. We are of the opinion, however, that the lower court erred in granting to the appellees the writ of possession for this land for several reasons, amongst others being section 1689 of the statutes authorizes a purchaser of land under an execution sale to obtain a writ of possession upon notice after obtaining a conveyance therefor. It is nowhere alleged or proven that appellees had obtained a conveyance for this land, nor is there any conveyance to them by the sheriff copied in this record. The record is silent upon this question. Another, it is alleged in the pleadings of appellants that this land was sold under these executions and was only advertised ten days next preceeding the day of sale, and this allegation is proven by the officer's returns on the executions copied in the record. Subsection 2 of section 1683 of the Kentucky Statutes requires advertisements in such cases to be posted for fifteen days next preceeding the day of sale. As stated, it appears from the sheriff's returns of the executions he sold this land separately and to each of the appellees for half of both judgments, and it also appears from the record that the price for which the land was sold was greatly inadequate, and that same was worth several times the amount of both debts. For these errors the sales made

under the executions should be quashed. The appellees, by reason of their levies, have a lien upon the land, and on the return of this cause to the lower court they should be allowed to sell so much of the land as will pay their debts.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent with this opinion.

CAMPBELL, &c. v. COMBS.

(Filed January 6, 1904—Not to be reported.)

Boundary of lands—Limitation—Oral agreement—The agreement by the father and his sons entered into orally with the owner of an overlapping patent as to a division, the agreement being observed for a long period of time, was binding upon the children and their vendees.

J. J. C. Bach and N. H. Miller for appellants.

Bailey P. Worten and Jesse Morgan for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Nunn.

Appellee secured a judgment for \$210 against appellants for a trespass upon her land, by cutting and hauling away timber trees therefrom. Of this judgment appellants complain. The facts, in substance, are as follows: Prior to the year 1860 Nicholas Combs was the owner by patent from the Commonwealth of Kentucky of several tracts of land on First creek, and McCager Napier was the owner of lands on Sixteen Mile creek. One of Napier's patents for 400 acres was issued to and in the name of his sons, Patrick B. and McCager S. Napier. This patent extended over the ridge between Sixteen Mile creek and First creek, and a portion of it was situated on the waters of First creek, and it was on this portion of the 400-acre patent where the trespass was committed. A portion of the lands patented to Nicholas Combs extended over this dividing ridge, and was situated on Sixteen Mile creek. The proof shows without much, if any, contradiction that in the year 1860 Combs and Napier, for himself and boys, entered into an oral agreement by which it was agreed that the top of the dividing ridge between First and Sixteen Mile creeks should be the line between their lands; that Napier and his children were to have all of the land of Combs on Sixteen Mile creek and Combs all the Napier lands on First creek. At the time of this agreement Combs lived on First creek and Napier and his boys on the other creek, and each from that time recognized this agreed line, and claimed to it as long as they lived, and their children and heirs recognized it as the true line until the year 1894, when appellants, as vendees of Patrick B. Napier and McCager Napier, Jr., took possession of that part of the 400-acre patent in controversy. Appellee claims under a division of the lands of Nicholas Combs, and her part in the division fell on this 400-acre patent. Appellee and those under whom she claims have been in the actual, adverse possession of the lands in controversy since 1860. The only question to be determined is whether this agreement made by McCager Napier for himself and boys was binding upon the boys. The agreement, being oral, was not

binding, of itself, on any of the parties; but when the parties to the agreement and those interested execute it, and acquiesce in it, they ought not to be allowed to revoke, as in this case, twenty-five or thirty years after the agreement was made. In the case of *Alexander v. Parks*, 24 Ky. Law Rep., 2113, this court said: "We do not mean that such an agreement is irrevocable. Any party to the agreement may renounce it, within the proper time, or avoid it by the institution of proper proceedings," etc. The case of *Grigsby v. Combs, &c.*, was one which involved the same question as in the case before us. The court in that case said: "We are of the opinion, however, that both in principle and by authority an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of agreed corners between neighbors, or agreed division fences, and these amicable arrangements have been sanctioned by repeated adjudications." These cases and the authorities therein cited are conclusive of this case.

Perceiving no error, the judgment of the lower court is affirmed.

ANDERSON, &c. v. MUNDO & MCGRAW.

(Filed January 6, 1904—Not to be reported.)

Parent and child—Adopted child—Property of child—Under section 2072, Kentucky Statutes, providing that one adopting child shall be under the same responsibilities as if the child were his own, the property of such child can not be reached by creditors of parent on the ground that provision for maintenance had been borne by parents.

Wm. P. McClain for appellants.

Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Addie R. Anderson, as surety for her husband, was indebted to appellees in the sum of \$359.32, which was reduced to judgment in 1901. An execution having been returned "no property," this suit was filed by the creditors, seeking to subject a fund arising from a sale of land, the title to which appeared to be in Edna Earle Anderson, an adopted daughter of appellant, Addie R. Anderson. It was claimed by the creditors, and accordingly adjudged by the trial court, that the land was bought with money belonging to the debtor, the title being taken to the daughter to defraud creditors. The proof shows that Mrs. Anderson and her husband, when in apparently easy circumstances, took their niece, Edna Earle, when about eighteen months old, to rear as their own child. They had no children born to them. Later they adopted Edna Earle by proceedings in court, under the statute (section 2071, Kentucky Statutes, 1899), as their heir at law. In the meantime the child's parents and certain of her uncles had given to her various sums, amounting to about \$1,100, which had been turned over to G. W. Anderson, husband of appellant, Addie R. Anderson, to keep till the child should arrive at twenty-one years of age, or till it was required in her education. The foster parents continued to hold her money separate from their own, paying her ordinary expenses of schooling, clothing, etc., with

their own means, as parents ordinarily do. A short while before the girl arrived at twenty-one her money was invested in the land. In the meantime the foster parents had lost most of their means, and were not able to complete the education of the daughter, who was being trained as a musician. So she sold the land, and deposited a part of the money in bank to her own credit, intending to finish the course in music with it. It was this purchase money that was attached for the debts of the parents. The proof is overwhelming that the money belonged to the girl. There was not a syllable of evidence to the contrary. The foster parents had a right to adopt this child. They had a right to assume toward her a relation of duty and care. Having done so, they might use a not unreasonable proportion of their means in educating her and clothing her during her minority, exactly as if she were their own child, without ground of complaint from their creditors. Indeed she was adopted before the liability to appellees was created. The debtors' duty to the child was prior in time, and certainly equal in dignity to, if not greater than, their obligation to their creditors, appellees. Therefore, it is not a case of "being generous before being just."

To the claim of the creditors that the foster parents became creditors of the child, Edna Earle, by spending their own means in educating and clothing her, when she herself had means, it is a sufficient answer that the statute (section 2072) places the person adopting a child "under the same responsibilities as if the person so adopted were his own child." Appellant seems to have done no more for this child than was reasonable for a mother to have done for her own daughter, under the circumstances.

The judgment of the circuit court subjecting any part of the fund must be reversed and the cause remanded, with directions to dismiss the petition so far as appellant, Edna Earle Anderson, is concerned.

BOHNE, &c. v. BLANKENSHIP, &c.

(Filed January 6, 1904—Not to be reported.)

1. Public highways—Where one dedicated land as a public highway which dedication was accepted by the public, owner of adjacent lands not authorized to appropriate it to his own use where public use had temporarily been abandoned.

2. Same—Injunction—Where a strip of land was dedicated as a highway, a subsequent purchaser of a lot adjacent to the strip has an interest in the strip in the nature of an appurtenance to his lot, and he may maintain an action for an injunction to prevent obstruction of it.

Charles Carroll for appellants.

Fairleigh, Strauss & Fairleigh for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge O'Rear.

The parties to this appeal and suit have title to adjoining lots from a common grantor. In the deed to appellees the grantor reserved a fifteen-foot strip of land adjoining a railroad right of way as a public highway, expressly dedicating it to the use of the public. The county court, by an order

of record, has accepted the proposed dedication, but has not allotted hands to work it. Appellees built a fence across and along the passway so as to hinder its use by the public. Appellants sue to restrain the continuing of the obstruction. Appellees admit the right of the public to the passway, but say that, until the proper public authorities have actually taken charge of the road and put it in fit condition for travel, they may obstruct it with impunity.

We are of opinion that after land has been dedicated by the owner to the use of the public as a highway, and the dedication has been accepted by or on behalf of the public, as has been done in this case, the right of the public to use it without hindrance from the owner of the burthened estate is complete. It will not do to say that, if the public authorities fail to keep a road in proper repair, the owner of the adjacent premises may appropriate it to his private use, even temporarily. The public lose none of their rights, once acquired, to use a highway merely because some public servant has omitted to do his duty in keeping the way in repair.

It is also claimed that appellants, owners of an adjacent property, had no such particular interest as warranted their suit for relief against the maintenance of a public nuisance by injunction. But appellants have an interest in the free and unobstructed use of the passway beyond that of the public generally. The way in question was dedicated by the former owner when he divided the original tract of land into lots for sale, intending thereby clearly to afford a way of outlet from appellants' lot. Their use of the passway is in the nature of an appurtenant to their lot, the obstruction of which gives them a right of action for relief by injunction. Damages recoverable from a solvent interferer in such case is not an adequate remedy.

The judgment of the circuit court dismissing appellant's petition is reversed and the cause is remanded, with directions to enter judgment granting the injunction prayed for.

BLOOM v. WANNER.

(Filed January 6, 1904—Not to be reported.)

1. Landlord and tenant—Notice—Where a contract of tenancy provided that in the event the premises were sold within a certain time and that upon a certain date after notice in writing that the purchaser desired possession, the notice was not a statutory one and personal service was sufficient.

2. Same—Evidence—The fact that a notice to a tenant was mailed was admissible in evidence upon an issue as to its service.

Marrett & Marrett for appellant.

Crawford & Kreiger for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Division.

Opinion of the court by Chief Justice Burnam.

On the 7th of October, 1901, B. S. Nicholson leased to the appellant, Sol Bloom, two houses on East Jefferson street, in Louisville, for a term of five years at a rental of \$25 per month. By the terms of the lease Bloom agreed to surrender the possession of one or both houses, in the event they were sold by his lessor during the continuance of the lease, to the purchaser,

thirty days after the receipt by him of notice in writing that the purchaser desired the possession thereof. On the 18th of August, 1902, Nicholson sold and conveyed these houses to the appellee, Julius Wanner, and on that day wrote, addressed and mailed to the appellant, properly stamped, the following communication: "Louisville, Ky., Aug. 18, 1902. Mr. Sol Bloom: I have sold the houses, numbers 531 and 533 East Jefferson street, to Mr. Julius Wanner, and he asked me to notify you that he wanted possession of said property thirty days from this date, and I hereby notify you, as required by your lease, to give Mr. Wanner full possession of said property within thirty days from this date, in as good order as you received it, ordinary wear and tear excepted, according to the condition of the lease." On the 18th of August, 1902, the appellee, Julius Wanner, directed to the appellant, at his proper address, the following properly stamped letter: "Louisville, Ky., Aug. 18, 1902. Mr. Sol Bloom, City—Dear Sir: having purchased the property of B. S. Nicholson, 541 and 543 East Jefferson, I hereby notify you that I wish possession of this property thirty days from the date of sale, August 18, according to your contract with him. Mr. Nicholson has no doubt notified you of the transfer as he promised to do. You would oblige me by turning over to me the leases and any money collected in advance at that time on this property." On the 19th of September, 1902, the appellee, Wanner, sued out a writ of forcible detainer against the appellant, Bloom, for the possession of these houses, and a trial before a justice of the peace resulted in a judgment for the appellant. The appellee within three days filed a traverse of the finding of the jury with the justice of the peace, and carried the case to the circuit court. Upon the trial in the circuit court appellee was permitted, over the objections of appellant, to read as evidence of notice to appellant to vacate the property the letters quoted supra. The appellant was then introduced as a witness, and testified that he had seen an account of the sale of the leased property to appellee in a newspaper, and that on the 15th of September he went to his office and paid him \$25 as rent for the houses for the month beginning with the 15th of September and ending with the 15th of October, 1902, and took a written receipt therefor, which he produced. He did not deny, however, the receipt by him of either of the written notices. Appellee admitted the execution of the receipt, but stated that he supposed the money was paid to him for the rent of the property for the thirty days for which appellant was permitted to occupy it after his purchase, and testified that appellant agreed at that time to surrender the property at the end of thirty days from the 13th of August, 1902. The trial in the circuit court resulted in a judgment for appellee, and Bloom has appealed.

The main ground relied on by him for a reversal is that the trial court erred in admitting as evidence the written notice mailed to him by Nicholson and appellee on the 13th and 18th of August, respectively, and insists that the notice required by the written contract was the statutory notice, which, to be effectual, required personal service upon the appellant. In our opinion the contention of appellant is not well taken. The contract between the parties provided for thirty days' notice in writing. There is no stipulation for a personal service, or that the course provided by the statute should be followed. Whilst the mere mailing of the letters to appellant

which contained the written demand for the possession created no legal presumption that such letters and notices were actually received by him, it was proper testimony upon the question, and, in the absence of any denial of their receipt by him, was sufficient to warrant the conclusion by the trial court that they had actually been received by him. (Sullivan, &c. v. Kuykendall, 82 Ky., 468, 56 Am. Rep., 901.)

Several technical objections are relied on by appellant, but, in our opinion, the judgment appealed from is in conformity with the weight of the evidence, and the judgment is, therefore, affirmed.

WOODRUFF, &c. v. COMMONWEALTH.

(Filed January 8, 1904—Not to be reported.)

1. Criminal law—Appeals—Where there is any evidence to support the verdict in a criminal action it will not be disturbed upon appeal.

2. Same—Misconduct of juror—The question as to misconduct of juror raised for the first time on motion for new trial will not be considered upon appeal because, pursuant to section 281, Criminal Code, it is not subject to exception.

W. H. Yost for appellants.

Hunter Wood & Son for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge O'Rear.

Appellants were convicted and sentenced to life imprisonment under an indictment charging them with the murder of Robert H. Coffey. Although some seven grounds for a new trial are set out in the motion before the circuit court, only two are presented by the brief of counsel for appellants in this case, namely: First, that the verdict was influenced and brought about by passion and prejudice, and was contrary to the evidence; and, second, that the court erred in refusing a new trial on account of the misconduct of one of the jury. An examination of the other grounds, not discussed in the brief, fails to disclose wherein the court erred to any extent.

There was a great conflict of evidence concerning appellants' guilt. If the witnesses for appellants were believed, it would be impossible for the jury to have returned their verdict. On the other hand, if the evidence of the Commonwealth witnesses was believed, there was enough to sustain the verdict in this case. In the criminal practice in this State there is probably no question as thoroughly fixed as that this court can not, and will not, interfere with the verdict of a jury where there is any evidence to support it. An examination of the following cases, not mentioning a great number of others, would seem to be sufficient to conclude this inquiry; Travis v. Commonwealth, 96 Ky., 77, 16 Ky. Law Rep., 253; White v. Commonwealth, 96 Ky., 180; Nantz v. Commonwealth, 16 Ky. Law Rep., 610; Vowells v. Commonwealth, 88 Ky., 193; Patterson v. Commonwealth, 86 Ky., 313; Jackson v. Commonwealth, 100 Ky., 239; Pace v. Commonwealth; Barnes v. Commonwealth, 101 Ky., 556; Nelson v. Commonwealth.

The alleged misconduct of the juror, George W. Embry, is that Embry

became incompetent to proceed with the trial on account of mental aberration, characterized in the argument as temporary lunacy. It was attempted to be shown upon the motion for a new trial, where the matter was first presented to the trial court, that Embry was laboring under a hallucination that he was being tried for some offense; that certain officers of the court and other persons were his prosecutors. On the contrary, a number of the jurors, the physician who had attended Embry, and the sheriff who had custody of the jury, all testified that Embry's indisposition was physical only, did not affect his mind, and did not disqualify him from his duties as juror; that his intellect was clear, and his will and judgment apparently uninfluenced by his physical condition. It furthermore appeared that the condition of the juror (the trial having lasted for several days) was brought to the attention of the learned trial judge, who personally examined the juror and questioned him at the time concerning his ability to proceed with the trial, and, being satisfied from his answer and from the inspection of the court that he was able, the trial was proceeded with without objection. We are satisfied, from an examination of the record, that the juror was not incompetent because of any mental infirmity; at least it is not shown that he was. But a more serious objection to the consideration of this ground is presented by the fact that the question arose for the first time upon the motion for a new trial. Under the provision of section 261 of the Criminal Code the decisions of the court upon the motion for a new trial are not subject to exceptions, and consequently are not reviewable on appeal. (*Smith v. Commonwealth*, 100 Ky., 133; *Sawyers v. Commonwealth*, 18 Ky. Law Rep., 657; *Terrell v. Commonwealth*, 18 Bush, 246; *Kennedy v. Commonwealth*, 14 Bush, 243; *Redmond v. Commonwealth*, 82 Ky., 334; *Brown v. Commonwealth*, 14 Bush, 400; *Fuqua v. Commonwealth*; *Vinegar v. Commonwealth*, 20 Ky. Law Rep., 412.)

The record fails to show any error of the trial court to which appellants objected or excepted. Under the repeated adjudications of this court, we are without power to examine further the matters complained of in argument as constituting the grounds for this appeal.

Therefore, the judgment must be affirmed.

LOGSDEN v. STERN.

(Filed January 6, 1904.)

Husband and wife—Evidence—By the provision of section 606, Civil Code, as amended by the act of February 23, 1898, both the husband and wife may testify as to the facts within their knowledge, but they shall not be allowed to testify as to the same facts or transaction.

Harry A. Shaw and J. D. Reed for appellant.

W. P. Lincoln and Leiber & Lincoln for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Division.

Opinion of the court by Judge Nunn.

It appears from the record that appellee, Mrs. E. Stern, is the owner of a
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store in the city of Louisville, and that her husband, Jacob Stern, is the manager thereof, and that some two or three years since either the appellant, Jesse G. Logsdan, or his son, Tony Logsdan, purchased of E. Stern, her husband, Jacob making the sale, a suit of clothes at the price of \$12.50. Some time after the sale the appellee, by her husband and manager, instituted a suit for the balance of this account, to wit, \$6.50, against appellant, Jesse G. Logsdan, and obtained an attachment, and caused the Continental Tobacco Co., for whom appellant was laboring, to be summoned as garnishee. The case was tried in the justice's court, and appellee was defeated.

Then appellant instituted this action in the circuit court to recover \$1,600 damages for the malicious prosecution of this suit in the justice's court without any probable cause. The theory of appellant was that the suit of clothes was sold to Tony Logsdan, and that he was in no way responsible to appellee for same: while appellee contended that the suit was sold to appellant for his son, Tony, and that he assumed the payment of the purchase price. On the trial of this action many exceptions were taken by the parties, but all were immaterial, and did not seriously prejudice the rights of the parties, except possibly one, and that was appellee introduced as a witness in her behalf her husband, the manager of her store, after she had testified for herself. The facts with reference to this matter were these: Appellant introduced himself and son, Tony, both sustaining appellant's contention that the clothes were not sold to or on his behalf, but to the son, Tony. Then appellee introduced as a witness one Smith, who stated that after the clothes were sold he was in the storeroom of appellee, Mrs. E. Stern, and she asked him if he knew the Logsdens. He answered her that he knew the old gentleman very well when they lived in Elizabethtown, Ky.; that he was a good honest man; but that he did not know the young man very well, as he was a mere boy at that time. Then Mrs. Stern said to him that she did not have anything against the old man, but that she had a claim against the boy, and it was as to him that she desired information. Appellee was then introduced as a witness, and denied having had any such conversation with Smith, or that she had ever seen Smith. Then her husband, Jacob Stern, her agent and manager, testified with reference to the sale of the clothes, and the institution and prosecution of the action in the magistrate's court as the agent of appellee. To this testimony of Jacob Stern appellant objected and excepted.

The competency of this witness must be governed by the first subdivision of 606 of the Civil Code of Practice, which is as follows: "Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper or a wrongdoer, and in such action either or both of them may testify; and except in action which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. [And except that when a husband or a wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency.]" The words in brackets added by act of February 23, 1898. (Acts 1898, page 1, chapter 1.)

The result of the question under consideration depends on the meaning and construction of this amendment of 1898. Under the common law, as well as under the provision of the Code, husband and wife were and are prohibited from testifying for or against each other. But the Code makes exceptions to this rule. The first exception is as to lost baggage, and permits either or both to testify; second, in actions which might have been brought by or against the wife, if she had been unmarried. In such an action either, but not both, may testify.

The third, and last, exception is this amendment, which permits either to testify as to any matter connected with such an agency, when either has acted as the agent of the other in any transaction. This amendment has never been construed by this court. It is a well-recognized rule in construing a statute that the court should endeavor to ascertain the meaning and intent of the general assembly in enacting the statute, and give it the construction and effect intended. When the general assembly enacted this amendment it had before it the section of the Code referred to, and the prior body in the case of lost baggage had used the words "either or both," and in an action by or against the wife with reference to her individual rights used this language: "Either, but not both, may testify." In this amendment the words "either of them may testify" are used without adding the words "or both," as in the first exception, or adding the words "but not both," as used in the second exception, but did add words significant of the meaning and intent of the legislative will by adding these words, "as to any matter connected with such an agency." It is to be assumed, therefore, that by the use of the words "either may testify" the law intended to restrict the testimony in relation to matters coming within such facts as might be known by one of the parties only. Is it not more reasonable to presume that the legislature intended that, when part of the facts are within the knowledge of one and part within the knowledge of the other exclusively, each may testify to the facts within his or her own knowledge, but that both can not testify with reference to the same facts or matters? To make the matter plain, suppose appellee had sold to appellant many articles of merchandise at different dates. Half of the articles had been sold and delivered by her, and the other half by her husband as her agent. She had no personal knowledge of the sales made by her husband, and he was likewise ignorant of the sales made by her, and she had sued appellant on the account, and he had controverted the claim. To construe this amendment to the Code as contended by appellant she would lose one-half of her claim. Our construction is that she might testify as to the sales made by her and her agent as to the sales made by him, but if both were present at the sale, only one could testify. The act of 1894 (Act 1894, page 176, chapter 76), commonly known as the "Weissinger Act," greatly enlarged the power of married women in respect to making contracts, the bringing of actions, and in the control of their property. The right to make contracts and to bring, prosecute and defend actions in most cases would be a barren one unless accompanied by the right to give testimony in its support. In the case at bar, unless the appellee had been permitted to testify in rebuttal of the testimony of Smith, she would have been helpless to protect herself and property.

The judgment of the lower court is affirmed.

TAYLOR, &c. v. RUSSELL, &c.

(Filed February 5, 1904.)

1. Common schools—Section 4489, Kentucky Statutes, providing that "any city of the first, second, third or fourth class may adopt a provision of this law and establish graded common schools," does not repeal the act of 1891-2-3, relating to cities of the fourth class, which permits them to adopt a system of common schools.

2. Same—Section 4489, Kentucky Statutes, authorizes cities of the fourth class to adopt a system of graded common schools, and as the tax sought to be imposed in this action was the same already adopted, there was no question to submit and the judgment declaring the tax void was proper.

H. C. Hazelwood and R. W. Miller for appellants.

R. H. Crooke and Jackson & Roberts for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge O'Rear.

The city of Richmond, in Madison county, is a city of the fourth class under the statutory classification in this State. In 1894, by ordinance duly passed, its council adopted the graded school system provided in chapter 89, Kentucky Statutes (the statute governing cities of the fourth class), being sections 3588 to 3605, inclusive. (Section 3606 was added in 1894.) Up to that time, so far as we are apprised by this record, that city had not adopted any free graded school system. A board of education, as authorized by section 3588, was regularly installed, who, as a body-corporate, took charge of all the common school interests and property in that city. Bonds were voted and issued to the amount of \$23,000, with which a building for the white school children was built. Other common school funds belonging to the district, and derived from taxation, to the amount of \$8,000, were used in providing a building for the colored school children within the city. Both schools, under the statutes above named, are under the control of the board of education of the city. Besides the per capita derived from the State funds, the city levies and collects and turns over to the board of education a tax of not exceeding 50 cents on the \$100 of all taxable property within the city for school purposes, which is apportioned among the schools as the board deems necessary and just.

In 1902 certain taxpayers within the city petitioned the city council, and it through the mayor duly ordered an election to be held under section 4489, Kentucky Statutes, to determine whether the white citizens and taxpayers would vote an annual tax of 50 cents on the \$100 of taxable property of white persons and corporations in the district to maintain a graded common school in the city for white children. The proposition received a majority of the votes cast, and was duly certified. This suit involves the validity of the last-named vote. Other than the State A. & M. College, the Colored Normal School, the School for Deaf and Dumb Mutes, and similar institutions, the public school system of this State is divided into two classes: First, that of the common school district, which, unless the other class is installed, prevails in every part of the Commonwealth; second, graded common schools. By section 4464, Kentucky Statutes, any rural district, or any city or town of the fifth or sixth class, may adopt the system of graded common schools.

by a vote of the citizens affected. They are not at all required to do so. It is at their option. There is no other provision by general law for graded common schools in towns of the fifth and sixth classes. Nor is there any other provision by general law for rural districts to be provided with graded common schools. But cities of the first, second, third and fourth classes are each provided with a system of education, by which they may adopt the higher or graded common school system. As to cities of the fourth class the sections of the statute providing the system are cited above. It is not mandatory that cities of the fourth class should adopt this system. They are merely permitted to do so. Unless they adopted in some manner a system of graded common schools there would be provided by law only the common district schools for such cities. If, however, they do adopt the graded common school system, that supersedes and absorbs the district common schools within that territory.

Section 4464 of Kentucky Statutes (as was section 4489) was part of an act of the general assembly, approved July 6, 1893. The act for the government of the cities of the fourth class was approved June 23, 1893. They were each passed by the same legislature, and were being considered at the same time. The act of July 6, 1893, now incorporated as chapter 118, Kentucky Statutes, is the general law on the subject of common schools, passed at the first session of the legislature after the adoption of the present Constitution. Section 4464 of Kentucky Statutes, on and including section 4489, are part of article 10 of that chapter, which is devoted to "graded common schools." Sections 4464 to 4488 provides a system of graded common schools not substantially different from sections 8588-8606, *supra*, except that it applies only to rural districts and towns of fifth and sixth classes, and does not allow as expensive buildings as are allowed fourth class and larger towns. Section 4489 reads in part: "The provisions of this article shall not affect, or in any way interfere, with any system of graded common schools established and maintained by any city of the first, second, third or fourth class, by virtue of a general or special act of the general assembly."

If this were all the section, doubtless there would be no dispute that it excluded the cities of the fourth class, or larger, where such cities had adopted a graded school system; but the section continues: "Any city of the first, second, third or fourth class may accept the provisions of this law, and establish graded common schools, subject to all the provisions thereof, except as specially hereinafter provided in this section, by a majority vote, indorsed by the recorded action of the board of trustees, at an election held in the manner prescribed in section 4464," etc.

The exceptions thereafter specially provided, and alluded to in the above quotation, have reference to the manner of holding the election, etc., not involved in nor shedding any light on the point under consideration. It is thought, and appellants have proceeded upon that idea, that this section, the part last quoted, gave to any city in the Commonwealth the right to adopt the graded common school provisions of article 10 of chapter 118 of Kentucky Statutes, by pursuing the method pointed out in section 4489 for ordering and conducting the election, which was done in this instance. It can scarcely be conceived that the legislature in enacting the two statutes here invoked by these respective litigants meant that one should repeal the

other by implication, and without any express allusion to it. Such construction is not to be favored, and will not be adopted when any other consistent construction will allow both to stand. The legislative purpose, if any doubt arises upon the language employed in the acts, will be looked to, rather than the mere dates of enactments, as the guide in construction. The import of the acts in question, viewed in connection with the general state of the law, and the history of the legislation, and previous judicial utterances, if any, upon the subject, are all legitimate and helpful means of arriving at the legislative purpose in the enactment of statutes which may appear to be inconsistent in terms or means provided. The first part of section 4489 shows undoubtedly that the legislature contemplated that by special acts heretofore passed none such could be (under the present Constitution) and by general laws, graded common schools could be, and doubtless had been, established in cities of the fourth class and those larger. In fact the legislature had expressly authorized such cities to adopt such system, formulated especially with reference to their wealth, population and needs. But the respective statutes creating those city governments provided no means of compelling the city councils to adopt a graded school system. Therefore, as the law then stood, the city councils of cities of the fourth class, and larger, could refuse to adopt a graded common school system, leaving the people provided with only the lower order of district common schools. This the legislature knew. It then set to work to provide a method by which the people in those cities could themselves control that question, as other sections of the State were allowed to do, by providing, in the latter part of section 4489 quoted, that the provisions of that chapter should be applicable to such of the larger cities as would adopt it. Read in connection with the first part of this section, this meant such cities as had not already adopted the graded common school system. This compulsory acceptance of this system by their cities could be by vote had upon the initiative of the people by petition. The strict construction contended for by appellants would lead the legislature to say in that section, by the first part of it, that that law did not apply to fourth class and larger cities, and by the last part of it that it did. What the legislature undoubtedly had in mind was to provide a method by which these cities and their inhabitants could avail themselves of the privileges of graded common schools. If they had already done so, then by the first part of section 4489 the provisions of the chapter, of which it was a part, were "not to interfere." But if they had not adopted such system, they were given another way to do it, and to compel it. It is a matter of significant remark that the whole system and scheme of providing higher or graded schools does not once provide a way of doing away with one when once adopted. As the system was the same whether adopted under article 10 of chapter 113 of chapter 89, sections 3588-3606, and as the tax imposed was the same, there was nothing to submit to the voters in this case. The city council had already done precisely what they proposed, and more too. There is no provision, as in the local option statutes, to resubmit that question when once adopted. The effect of the vote, as contended for by appellants, is merely for the white voters to "vote out" the colored graded common school already adopted by the legal authorities, and in the

manner provided by law. That they had no right to do under the law as it now is, for the right has nowhere been given them by any statute.

The judgment of the circuit court declaring the vote and election void is affirmed.

Whole court sitting.

WILSON, ADM'R v. CHESS & WYMOND CO.

(Filed February 5, 1904.)

1. Master and servant—In this action to recover for injuries sustained by falling into a tank of boiling water, a peremptory instruction to find for appellee was proper where in this case there was no assurance by the master of the safety of the place, and no promise to provide other appliances of greater safety.

2. Same—The master is not required to furnish an absolutely safe place in which the laborer may do his work, and if the work is dangerous the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to his work.

Mat O'Doherty, B. H. Young, M. W. Ripy and E. C. Wade for appellant.

Pirtle, Trabue & Cox for appellees.

Appeal from Jefferson Circuit Court, Law and Equity Division.

Opinion of the court by Judge O'Rear.

This appeal is from a judgment rendered upon a verdict returned in favor of appellee under a peremptory instruction.

The action was brought by Wilson, a minor about eighteen years old, by his guardian, for damages sustained by Wilson about November 21, 1898, in falling into a tank of boiling water at appellee's stave factory. In his petition plaintiff complained that alongside of the tank where he was working ice had formed, making it dangerous for him to stand. His duties were to place unfinished kegs in the water in the tank, where they were boiled or soaked so that the staves could be bent into permanent curved shape without breaking them. The negligence alleged against appellee is that it, as master and employer, did not furnish suitable and proper covering or protection for the tank, to guard plaintiff against falling into the water; and in permitting the ice to be and remain where plaintiff had to stand in doing his work. It is claimed that the duty of the master was to furnish the laborer a safe place in which to work. The tank in question was about ten feet long by six feet wide by three and a half feet deep. It was built of wood, and its top was entirely open. The water, which mostly filled it, was heated with steam to about a boiling heat. By nailing wooden slats across the top of the tank, leaving space enough to put in and take out the kegs, it would have made the situation much safer for the workman.

The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work is frequently either misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled

than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has assumed it. There is no feature of the law of negligence better settled than this. The contrivance in use in this case was of the simplest kind. It was merely a large vat or tub, plainly open at the top. The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes, and his most common experience, and his earliest instincts, to fully appreciate the danger of his position. There was no assurance by the master of the safety of the place, even if such assurance under the circumstances could have shifted the liability; there was no promise by the master to provide other appliances of greater safety; no promise to repair. Under these circumstances the servant assumed the dangers of his employment. He can not, therefore, recover from the employer damages growing out of them. (*Kelley v. Barker Asphalt Co.*, 14 Ky. Law Rep., 856; *C. & O. and S. W. R. R. Co. v. McDowell*, 16 Ky. Law Rep., 1; *Mellott v. L. & N. R. R. Co.*, 101 Ky., 212; *McGhee, Rec. v. Bell*, 19 Ky. Law Rep., 267; *McCormick H. M. Co. v. Liter*, 23 Ky. Law Rep., 2154; *Pfisterer v. Peter & Co.*, ante, 605.)

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. LOGSDEN'S ADM'R.

(Filed February 5, 1904—Not to be reported.)

Where a child three years old was run over by appellant's train and killed, a verdict for \$1,200 damages for his death is not excessive, and will not be disturbed where it appears that the place of the accident could be seen from the direction of the approaching train for 450 yards, and where it would seem that those in charge of the train by the exercise of ordinary care could have seen the child in time to have stopped the train and saved his life, and that those in charge of the train were not keeping the required lookout.

B. D. Warfield and Poston & Moorman for appellant.

S. M. Payton for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Settle.

Appellee, S. W. Sanders, as administrator of the estate of Wm. G. Logsdan, deceased, sued the appellant, Louisville & Nashville R. R. Co., in the Hardin Circuit Court for the death of his intestate, an infant less than three years of age, who was run over and killed by appellant's freight train. The appellee's damages were laid at \$10,000, and his right to recover same based upon the alleged negligence of appellant's servants in charge of the train by which the intestate was killed. The trial resulted in a verdict and judgment in appellee's favor for \$1,200, and the lower court having refused

to set aside the verdict and judgment and grant appellant a new trial, it has brought the case to this court by appeal.

The grounds for new trial were numerous, but the point more particularly urged for a reversal of the judgment is that the lower court erred in refusing to grant a peremptory instruction as asked by appellant. The facts, as shown by the evidence, are few and simple. The father of the infant was a section hand in the employ of the appellant. His house stood beside and within thirty feet of the railroad track. Just before the boy's death the father went across and up the railroad about 250 yards to a neighbor's spring for a bucket of water. When he left his home the boy was in the rear or shed room of the house, playing with some bricks, his mother in the yard behind the house at work. While the father was at the spring, or on his return, and the mother at work in the back yard, the boy wandered out of the house and upon the railroad track, where he was soon run over and killed by the train at a point 160 yards from the house. He was probably playing with a hoop at the time of his death, as one with blood on it was found near his body, which was identified as his favorite plaything.

According to the testimony of all the appellee's witnesses, several of whom saw the train just before and at the time of the child's death, but none of whom saw the child struck by the train, no warning from either bell or whistle was given by the train until the stop signal was sounded, presumably when the boy was struck by the train, and this is not denied by those who were in charge of the train. The weight of the evidence conduced to show that the place of the accident could be seen from the direction of the approaching train for a distance of 450 yards, and for this reason it would seem that appellant's servants in charge of the train saw, or by the exercise of ordinary care could have seen, the boy, if he was then on or dangerously near the track, in time to have stopped the train and saved his life.

From the testimony of those in charge of the train the engineer and fireman were in their places in the cab of the locomotive. One of the brakemen in violation of the appellant's rules, and for some reason unexplained, was with them in the cab. Another was seated on top of the car with his feet hanging over the side, apparently not keeping a lookout in any direction. The flagman was in the caboose, where he could not see what was ahead of the train, and the conductor in the cupola on top of the caboose. The conductor, engineer and fireman all testified that the train in approaching the boy was running on a curve. The engineer stated that he was seated on the west side of his department of the cab, which placed him on the outer line of the curve, thereby, as he said, throwing the locomotive in the way of his view of the track ahead of him. The fireman had no obstruction in the way of his seeing the track the usual distance ahead of the locomotive. He claimed, however, to have been firing the locomotive as the curve was rounded, and that when he completed that work he looked ahead and saw the boy, and the train was then in sixty or seventy feet of him; that he (the fireman) at once gave the alarm to the engineer, who immediately reversed the engine, applied the brakes, and stopped the train as soon as it could be done, but too late to save the life of the boy.

The conductor testified that he was sitting on the west side of the cupola,

which position threw him on the outside of the curve, and thereby prevented his seeing far enough ahead of the locomotive to discover the boy before the locomotive struck him, but he admitted that if he had been seated on the east side of the cupola he would have had a much better and further view of the track ahead of the train.

A printed rule of the appellant company was read in evidence, which declares that the proper place for freight train conductors, while the train is in motion, is in the deck (or cupola) of the caboose, and after prescribing the supervision he must exercise over those operating the train, the rule closes with this further declaration: "He must also keep a sharp lookout, especially when rounding curves."

It is singular indeed that each of the persons composing the crew in charge of the train, in testifying in this case, put himself in such a position as that he did not, or could not, see the track ahead of the train at the time the boy was killed. While there was some curve in the track, it was not, according to the weight of the evidence, so pronounced but that the place of the child's death could be seen at a distance of 450 yards by one standing in the middle of the railroad track in the direction from which the train that killed him approached. The speed of the train was from thirty to thirty-five miles an hour. It was stopped, according to the engineer and fireman, within a distance equal to the length of train, which was about three hundred yards. It, therefore, follows that if appellant's servants in charge of the train had seen the boy when 450 yards away, the distance at which, according to the evidence, he might have been seen by them, they could have stopped the train in time to have saved his life.

There could be no recovery for the death of an adult under the circumstances of this case, as he would have been a mere trespasser, to whom the railroad company owed no duty to keep a lookout. But, as said by Mr. Redfield in his work on Negligence, volume 3, section 1809: "It is to the credit of the American jurisprudence that the courts have, as a rule, refused to place the infantile trespasser upon a railway track under the same disadvantages at which they have placed the adult trespasser in the same situation. The general rule is believed to be that children who are sufficiently advanced in years and intelligence to care for their own safety, and to know that they have no right to be upon a railroad track, except where it crosses or is laid upon a public street or highway, occupy in respect to the degree of care which ought to be exercised toward them by the railway company substantially the same position as adults; but that the total or partial inability of a child to appreciate the danger and to understand the wrong of going upon a railway track at an improper place shields it from responsibility for such conduct on the one hand, and imposes a duty of greater care on the part of the railway company on the other hand with reference to it. In the exercise of this care the best judicial opinion is to the effect that the railway company, in running its trains, is bound through its servants to keep a reasonable lookout along its track, to the end of making timely discoveries of any children who may be exposing themselves to danger there, so as by the exercise of like care in giving them audible danger signals, or in arresting the speed of the train, to save them from death or injury."

In section 1818 of the same volume it is further stated: "Where the law obtains, if cattle stray upon a railway track and are run over by a train under such circumstances that the accident might have been avoided by the exercise of reasonable care upon the part of the trainmen, the company will be liable to pay damages to the owner. It is not perceived how helpless children escaping from the custody of their parents are not entitled to the equal protection of the law. * * * If this is a sound rule, children of tender years can not be trespassers within the meaning of the rule of law under consideration in this chapter; but if the children stray upon the railway track, although a place other than a public crossing, the railway company will be liable for running over them, if the catastrophe could have been avoided by the exercise of reasonable care."

The doctrine as announced by Redfield is humane in principle, consonant with reason and justice, and has been repeatedly approved by this court.

Thus in *C., N. O. & T. P. Ry. v. Dickerson's Adm'r*, 19 Ky. Law Rep., 1817, it is said: "It seems to us to be well settled by the decisions of this court that a railroad company is liable for injuries inflicted upon an infant of such tender years that it is incapable of having an intent or comprehending its rights or danger of injury, if such injury was the result of the failure upon the part of those having charge of the train to discover his peril by reason of their failure to use such ordinary care as their duty to the train and passengers require them to exercise in looking along the track of the road." (*South Covington St. Car Co. v. Herplotz*, 20 Ky. Law Rep., 750.)

The child for whose death damages were awarded in this case was of very tender years, which fact, and his consequent want of discretion, must have been realized by appellant's servants in charge of the train which ran over him, if they saw him before he was struck by the train, and it was for the jury to determine from all the evidence whether they saw, or might, by the exercise of ordinary care, have seen, his presence on the track in time to have prevented his death. Though the evidence was conflicting, we are unable to say that it was not sufficient to authorize the verdict of the jury. The instructions given by the court fairly presented all the law of the case. Indeed, in one respect, they were more favorable to the appellant than was authorized by the facts, for they submitted to the jury the question as to whether or not the parents of the deceased infant were guilty of negligence in allowing him to stray upon the track, when there was not, in our opinion, sufficient evidence upon which to base such an instruction. The amount of the verdict is not excessive.

Regarding the record free from prejudicial error, the judgment is affirmed.

DULANEY, &c. v. DULANEY, &c.

SAME v. WILLIS, &c.

(Filed February 5, 1904—Not to be reported.)

1. Will—Construction of.—Where Margaret J. Dulaney provided by will that one-half of her estate should be entailed for the benefit of her children living, or the child or children of any deceased, the children each took an absolute fee-simple estate.

2. Same—Where a bequest providing that one shall receive his part of an estate until he is twenty-five years of age, when if he is capable of managing it it shall be given him, and if he should die one-third to go to his mother, if she remains unmarried, and if she marries, then one-sixth, and the rest to be divided among his heirs, such estate created a defeasible fee only in the event he died under the age of twenty-five and without issue.

C. W. Lindsey, Helm, Bruce & Helm, Joyes & Jarvis and J. S. Clements for appellants.

Peter & Newcomb and Randolph Blaine for appellees.

Appeals from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

These appeals involve the construction of the will of Mrs. Margaret J. Dulaney, with reference to the estates devised to her son, Hector, her three daughters, Mrs. Willis, Mrs. Clements and May Dulaney, and her grandson, Woodford, the only child of a son, Robert, who died before the execution of her will.

The will reads as follows:

"Tullphurst, Pewee Valley, August 6, '97.

"This is my will:

"I desire that all my just debts be paid; that my husband receive his third. If it is the law for him to have his third of my estate before the debts on my property are paid I wish it done.

"I wish my estate to be equally divided. One-half to be entailed, the income to be used for the benefit of my children living, or the child or children of any deceased before or after this is written. I wish out of the income of the half set apart \$300 to be given to my brother, Ben Cawthon, if he be living each year as long as he lives. I wish \$200 to be given to my daughter Josey's namesake, Josey Barclay. My grandson, Woodford H. Dulaney, son of Robert Lee Dulaney, to receive the income of his part of the estate until he is twenty-five years old; if he is then capable of managing his part of the estate, it is to be given him; if not, it is to be put in the hands of trustees for his sole benefit. If he should die before he is twenty-five, one-third of his income is to go to his mother, Annie McAfee Dulaney, if she remains unmarried. If she marries, one-sixth is to be given her. The rest to be divided between the heirs living and the heirs of any deceased. I wish my property to be entirely exempt from any debts contracted by my heirs prior to my death. If any one of my children should die and leave property belonging to me, one-half they can will to whom they please, if they have no legal heirs; the other half is to go to my living heirs. It is to be used for the sole benefit of my sons and daughters. My daughters, Florence Willis and Lizzie Clements, May Dulaney, are to have my personal property to divide as they see fit, giving to my brothers, Hector and Ben, mementoes of me. My namesake, Margaret Dulaney Clements, is to have my small ring. Lizzie Clements to have my largest diamond, a pin. Mrs. Willis, the large diamond ring. I have given May the other. My daughter, May, to have my engagement ring. My husband, my wedding ring. After the \$200 for Josey Barclay, my husband's one-thirds, my debts paid. I wish the residue to be equally divided, share and share alike, to my living children, the one-half to be given them for their sole use and benefit, not for-

getting my son Robert's son, Woodford H., to have only the income of his until he is twenty-five years. The other half in trust, the income to be used for their benefit, with the \$300 taken out for my brother each year that he lives.

"MARGARET J. DULANEY."

The judgment entered, and from which these appeals are prosecuted, was, in effect, that the four children of the testatrix took each one-fifth of her estate in fee simple, and that her grandson, Woodford, took the other one-fifth in fee, but subject to be defeated if he died under twenty-five years of age, without issue. It was also held to be subject to certain trusts. The personal property disposed of by the will is not considerable, indeed is only the jewelry mentioned. The net value of the real estate disposed of is something like \$300,000.

One son named in the will, Ben, died before the testatrix, as did her brother, Ben Cawthon. Her husband and her son, Hector, have died since the will was probated. This is a holographic will. Although the testatrix is said to have been an educated woman, it must be admitted that her notions of law, and her use of technical legal terms, are much confused. Barring the disposal of her jewelry, and the bequests to Ben Cawthon and Josey Barclay, the instrument is so involved as to leave the mind in doubt as to what was her real purpose and desires; and to reconcile them, when ascertained as can best be gathered from the paper, with lawful allowance, is even more difficult.

The learned chancellor, whose painstaking investigation has lightened the labors of this court in an understanding of the case, in his opinion thus arranges the clauses of the will with reference to the subject-matter:

"1st. I wish my estate to be equally divided. One-half is to be entailed, the income to be used for the benefit of my children living, or the child or children of any deceased before or after this is written. I wish out of the income of the half set apart \$300 to be given my brother, Ben Cawthon, if he be living, each year as long as he lives.

"2d. If any of my children should die and leave property belonging to me, one-half they can will to whom they please, if they have no legal heirs; the other one-half is to go to my living heirs. It is to be used for the sole benefit of my sons and daughters.

"3d. After the \$200 for Josey Barclay, my husband's one-third, my debts paid, I wish the residue to be equally divided, share and share alike, to my living children, the one-half to be given them for their sole use and benefit, not forgetting my son Robert's son, Woodford, to have only the income of his till he is twenty-five years. The other half, in trust, the income to be used for their benefit, with the \$300 taken out for my brother each year that he lives."

The children of the testatrix contend that they each take in fee an undivided one-fifth of the testatrix's estate. The grandchildren contend that each child takes in fee only one-tenth of such estate, and that the other one-tenth is limited either to the children for life, with remainder to their descendants, or in fee defeasible as to each child at its death without issue. It is certain that under any construction of the will one-half of the testator's estate passed in fee simple to her children, her grandson, Woodford

H., the sole issue of a deceased son of testator, taking his father's place in her estate. However, Woodford's share was subject to the conditions and trust hereinafter treated of. We incline to the opinion that the testatrix intended to limit the use and enjoyment of the other half of her estate to the same persons, with remainder to such heirs as were heirs of her body, creating in them a fee-tail estate. Such an estate, by section 2348, Kentucky Statutes, converted into a fee simple, becoming a pure and absolute fee in the taker first named, and not a defeasible fee. (*Breckinridge v. Denny*, 8 Bush, 523.)

It will be noted that the testatrix gave the full, unrestricted beneficial use of the entire estate (subject to the annuity to her brother) to her children, and the grandson, Woodford. Her children were not prohibited from selling and conveying any part of it, either of the one-half devised to them in fee simple, or the other half, spoken of variously in the will as "the half set apart," "the other one-half," "the other one-half in trust." An unlimited devise of the income of property is equivalent to a devise of the fee in the property itself. Although it is called "trust estate," and even if a trustee had been named, nothing else appearing, it at most would have been a dry trust, which would not have affected the real interest of the devisee. Such limitations over the "trust estate," as the testatrix is supposed to have attempted to create, are to take effect only if any of her children die leaving property "belonging to her" (i. e., derived from her). "But," as the chancellor remarked, "if any of the property is devised otherwise than absolutely to her children, it is impossible that any child should die without leaving such part." The testatrix evidently had in mind that her children might die without having consumed or disposed of all the estate she gave them by her will. She attempted to tie up such part remaining, as she says, "entail" it, so that it would pass to her heirs, or in any event (if her children left living issue), to such as would be heirs of her body. This court has, in a number of cases, held that an attempted limitation made upon a fee, that is, a devise over of what may not have been disposed of by the first taker, is void, as being incompatible with the fee. (*Ball v. Hancock*, 82 Ky., 107; *McAllister v. Bethel*, 97 Ky., 1; *Barth v. Barth*, 18 Ky. Law Rep., 840; *Clay v. Chenault*, 21 Ky. Law Rep., 1485.)

As showing the nature of the estate created by this will, the chancellor very pertinently said: "The testatrix may have known little about the technical meaning of many of the words she used, but she certainly knew the word 'if' imported contingency, and nothing else. She must have had in mind the idea that her children might die, either without having disposed of what she gave them or having disposed of all of it; but the implication that the children might dispose of all their estate negatives the idea that any part of it was given to them otherwise than absolutely."

We are of the opinion that the children each took an absolute estate, the fee simple to an undivided one-fifth of the property devised to them by the will.

2d. The next question is as to the interest of Woodford H. Dulaney, and the contingent interest of the children of the testatrix in the property devised to Woodford.

The language of the will making this devise is as follows: "My grandson,

Woodford H. Dulaney, son of R. Lee Dulaney, to receive the income of his part of the estate until he is twenty-five years of age. If he is then capable of managing his part of the estate, it is to be given to him. If not, it is to be put in the hands of trustees for his sole benefit. If he should die before twenty-five years, one-third of his income is to go to his mother, Annie McAfee Dulaney, if she remains unmarried. If she marries, one-sixth is to be given her. The rest to be divided between the heirs living and the heirs of any deceased."

We have no doubt that the word "heirs," as first employed in the last sentence but one, means the children of the testatrix, and as second employed the children or descendants of such of her children as may be dead. A literal construction of the clause would read that if Woodford, who is clearly shown to have been substituted in every particular to his deceased father's place in testatrix's contemplation, should die before he is twenty-five years old, although he may have then living children, his children would not take, but his interest would go to his aunts and to his cousins. It can not be supposed, no reason whatever appearing therefor, that testatrix intended to cut off Woodford's line as long as there were representatives of that line. On the other hand, if Woodford should die after he is twenty-five, leaving children, or issue, they would take, subject to the portion then given his mother for her life or widowhood. There can be no reason for supposing that the testatrix ever had such an absurd purpose as to disinherit Woodford's children if he died before he was twenty-five years old, but if he managed to live till after he was twenty-five they were to have his property upon his dying intestate.

In the case of none of the children did the testatrix make an attempt to make such discrimination. On the contrary, her purpose is clear at least as wishing to continue the property in any event to her children's line of descendants. This general purpose, nothing to the contrary appearing, must be presumed to have existed also with respect to Woodford's children. Therefore, to carry out testatrix's intention, there should be read into this clause the words "without issue," so that the sentence would read: "If he should die before he is twenty-five without issue, one third of his income is to go to his mother," etc.

There is ample authority for this construction. In Jarmon on Wills, volume 2, page 60, it is said: "It is established that where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words he has omitted, those words may be supplied, in order to effectuate the intention, as collected from the context. Of this we have a very simple example in an early case, where a devise to A. and the heirs of his body, and if he should die, then over, was read, 'and if he should die without issue.'" (Hunt v. Johnson, 10 Ben. Mon., 344; Aulick v. Wallace, 12 Bush, 531; Abbott v. Middleton, 21 Beavan, 143, 7 H. L. Cas., 84.)

We are of opinion that as to this interest the chancellor correctly decided that in case of Woodford H. Dulaney's death before he arrives at the age of twenty-five years, leaving issue, such issue will inherit from him, and that his said estate is defeasible only upon the event of Woodford's dying under the age of twenty-five years and without issue. In the meantime his estate

will be held for him by a trustee until he shall have become twenty-five years of age, receiving the income during said period, and the principal at the end of that period, if he should then be capable of managing it. Under the above construction of the will, if Woodford should die before he becomes twenty-five years of age, his mother, Annie McAfee Dulaney, takes the income of one-third of his entire estate during her widowhood, and one-sixth thereof if she should marry again.

3d. Under the construction herein given the will the son, Hector Dulaney, took a fee-simple interest in his mother's estate; and having survived her and died intestate, his interest passed in fee simple to his infant daughter and only child, Henrietta Dulaney, subject to the dower right of his widow, Carrie F. Dulaney.

The judgment is affirmed in each appeal.

The whole court sitting.

REAGAN v. DUDDY.

(Filed February 5, 1904—Not to be reported.)

Official newspaper—The statute in this State requiring publication of notice of sale of lands in daily paper requires that the notice shall not only be published in a daily paper, but in one of general circulation, and a paper which appears to be a small publication and contains no news of a general nature, but only advertisements and notices of conveyances of real estate, building permits, court docket and commissioner's sales, is not such a paper in which the notice contemplated by the statutes should be published.

Johnson & Hieatt for appellant.

Leopold & Pennebaker, Lane & Harrison and G. L. Everbach for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

On the 29th day of June, 1903, R. W. Herr, commissioner of the first division of the chancery branch of the Jefferson Circuit Court, sold under a judgment rendered in favor of the Fidelity Trust and Safety Vault Co., in the action of Margaret Duddy v. Benjamin Harrigan, &c., the following described lot, located in Louisville, Ky.: "Commencing at the northwest corner of the intersection of Slevin and Twenty-fifth streets; thence west along and having a front on the north side of Slevin street forty feet, and extending back northwardly the same width between lines parallel with the direction of Twenty-fifth street, 180 feet to an alley."

The appellant, James J. Reagan, became the purchaser of the property at the price of \$1,055, and complied with the terms of the sale. The judgment directed the commissioner to advertise this sale by printed hand bills posted for ten days prior to the day of sale, one at the courthouse door in the city of Louisville, and by three insertions in the "Official Record," a newspaper printed and published in the city of Louisville, giving notice of the time, place and terms of sale. The sale was duly reported by the commissioner, and appellant, as purchaser, filed exceptions to its confirmation on the ground that the "Official Record" was not a daily newspaper, published and having a general circulation in the city of Louisville and county of

Jefferson. In support of this exception the affidavit of C. C. Heatt was filed, in which he states that the Official Record is not a daily newspaper, published or in general circulation in Jefferson county. The appellee filed a counter affidavit of J. B. Lewman, who says that he is president of the Record Printing and Publishing Co.; and that this company is a Kentucky corporation, and the owner of the newspaper called the "Official Record;" it is issued and published every day in the week except Sunday, and has a general circulation among the legal profession, court officials financial institutions, real estate agents, and public generally, in the city of Louisville, and is devoted to all news pertaining to matters of public interest connected with the courts, real estate and financial matters, and is used as an advertising medium by the Louisville real estate agents, and is recognized as an efficient medium for reaching the general public interested in real estate matters; and he filed copies of the Official Record with his affidavit. The exceptions having been submitted upon this evidence, the chancellor overruled them, and the report of sale was confirmed, to which the appellant, Reagan, excepted, and has appealed to this court.

It is conceded that the property was duly advertised for sale, as required by the judgment by three insertions in the Official Record, on the 25th, 26th and 27th day of June. It was held in *Wilson v. Petzel*, decided at the present term of this court, that the Louisville Times was a daily newspaper, although not published on Sunday, within the meaning of the statute. The only question, therefore, to be decided upon this appeal is whether the Official Record is a newspaper of general circulation within the spirit of the statute.

There is no definite information contained in the affidavit of the president of the corporation which publishes the Official Record as to the number of copies of the paper stricken off each day, and the copies filed with his affidavit show it to be a very small publication in point of size; and that it contains no news of a political, religious, commercial or social nature. But it does contain a few advertisements and notices of conveyances of real estate, building permits, court docket and commissioner's sales. Our attention has been called to a number of decisions from the courts of other States in which it has been held that a paper which makes a specialty of legal notices and information regarding courts and legal matters generally, is none the less a newspaper when it contains other matters of a general interest. But numerous authorities to the contrary are also cited in the note on page 533 of 21 A. & E. Ency. of Law. Our statute seems somewhat more comprehensive than any of those in which the validity of advertisements in similar sheets in other States have been upheld, in that it requires the publication, not only to be in a daily paper, but also in one of general circulation. It seems to us that the purpose of the general assembly in this addition to the statute was to require that the publication of judicial sales should be made in newspapers which reach all classes of the general public, to give it the widest circulation. The copies of the Official Record filed in this case do not appear to us to meet the requirements of the statute either as to a newspaper or as to its general circulation. The only evidence in the case is the two affidavits, one of which states that it does not have a general circulation, and the other that it does. We are, therefore, of the opinion that

the chancellor erred in overruling the exceptions to the confirmation of the sale filed by appellant. It is proper, however, for us to say that the sales of property which have been confirmed without objection on account of the insertion in the Official Record of the notice would not be invalidated. (Greer v. Wintersmith, 85 Ky., 516; Henderson v. Bristow, 12 Bush, 844; Lawrence v. Speed, 2 Bibb, 401.)

But for reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

VAUGHN, &c. v. JUSTICE, &c.

(Filed January 21, 1904—Not to be reported.)

1. Grounds for new trial—Where a trial was begun on the 23d of April, but court adjourned until the next day when a verdict was returned, and grounds were filed on the 26th for a new trial, the time had not elapsed when a motion for a new trial could be made.

2. Instructions—In an action against a sheriff for damages for seizure of telephone poles, it was error for the court to instruct the jury that it could allow as part of the damages the fee which appellee contracted in defending his right to the poles.

Alex. Lackey and A. J. Garred for appellants.

J. A. Scott, H. C. Sullivan and M. S. Burns for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Paynter.

This action grew out of this state of facts: Garred & Bartram sued Ben Wilson for a lot of telephone poles. The appellant, Vaughn, sheriff, supposing that the poles for which the writ was issued were in the possession of the appellees, who were then floating telephone poles down the Big Sandy river in rafts, seized them under the writ against Wilson and held them for about twenty-four hours. They were being floated on a falling tide, as claimed by appellees, and that the delay caused them to incur certain expenses, attorney's fee, and that part of the poles were lost by an unexpected freshet in the river. This action was, therefore, brought to recover damages for the unlawful seizure of the poles, and a trial resulted in a verdict for appellees for \$327.

We will first consider some questions raised as to the right of the appellants to have the rulings of the lower court reviewed on this appeal. In one of the briefs for the appellees it is stated that the verdict was rendered on the 23d day of April, and the grounds for a new trial were filed on the 26th of the same month, therefore, more than three days had elapsed from the return of the verdict until the motion for a new trial was made. In the same brief it is stated that there was no exception saved to the giving of instructions. The first question may be disposed of by the statement that the trial began on the 23d day of April and was adjourned until the next day, when the verdict was returned. The other contention may be disposed of by calling attention to the fact that in the closing paragraph of the bill of excep-

tions it is stated the defendants objected to the instructions given, and excepted to the action of the court in giving them.

Counsel urges that before appellees could have had a cause of action against the sheriff they should have filed the affidavit provided for by section 191, Civil Code of Practice, which reads as follows: "If another person than the defendant or his agent claim the property taken by the sheriff, and delivered to the sheriff his affidavit that he is entitled to the possession thereof (a), the sheriff shall not be bound to keep it, or deliver it to the plaintiff unless he shall, within two days after the delivery to him, or to his agent or attorney, by the sheriff, of a copy of the affidavit, indemnify the sheriff against the claim, by a bond executed by one or more sufficient sureties, in double the value of the property. No claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made. He shall return the affidavit of the claimant, with his proceedings thereon, to the clerk's office."

This section attempts to give the cause of action on the bond provided for in that section against the plaintiff and his sureties. No such bond was given, nor was there any occasion for giving it, because the sheriff surrendered the property to appellees. The mere fact the affidavit was not made, and the bond not given, did not relieve the sheriff of the consequences of the wrongful act in seizing the property of appellees. The poles were seized in the Big Sandy river a short distance above the lock and dam at Louisa. After they were taken through the lock they were lodged on a sand bar, together with some other rafts of telephone poles. The poles in all the rafts were cut apart, and an attempt was made to drift them down the river, and while so doing some of the poles were lost. The inference to be drawn from the evidence is that there was a commingling of the poles of the rafts which had been seized by the sheriff and those which had not been so seized. The evidence does not show how many of each were lost, and there is neither a plea nor proof showing any liability on the sheriff for the loss of any poles except those which he seized. For that reason instruction No. 1 is misleading. It reads as follows: "If the jury believe from the evidence that plaintiffs, B. H. Justice and S. B. Blackwell, were the owners of the poles in controversy, and that while they were such owners the defendant, J. L. Vaughn, levied the order of delivery referred to in the evidence upon said poles and took them into his possession; and shall further believe from the evidence that by reason of said levy and seizure the plaintiff was compelled to employ counsel to gain possession of said poles, they were to find for them such reasonable sum, not exceeding \$50, as they may believe from the evidence will compensate them therefore. And if the jury believe from the evidence that by reason of said levy and seizure the plaintiffs were put to greater expense in separating said poles to get them off of the sand, they were to find for plaintiffs such reasonable sum, not exceeding \$30, as they may believe from the evidence will compensate them for such extra expense. And if the jury shall believe from the evidence that by reason of such levy and seizure the poles were, while separated, swept by a sudden freshet or rise into the Ohio river, and thereby they, or some of them, were lost, and the plaintiffs were compelled to expend money in gathering up said poles, they will find for plaintiffs such reasonable sum, not exceeding \$500, as they

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may believe from the evidence will compensate them for such loss and expenses, but the finding for plaintiffs can not exceed in the aggregate the sum of \$580."

The jury may have allowed damages for the loss of the poles which had not been seized by the sheriff. The court erred in instructing the jury it could allow as part of the damages attorney's fee which appellee contracted with a view of asserting and defending his right to the poles. (*Worthington, &c. v. Norris' Ex'ors*, 98 Ky., 54; *Farmers and Shippers Tobacco Warehouse Co. v. Gibbons*, 91 Ky. Law Rep., 1348; *Bogard v. Tyler's Adm'r*, ante, 1416.)

Judgment is reversed for proceedings consistent with this opinion.

LYON'S EX'TX, &c. v. LOGAN COUNTY BANK'S ASS'EE.

(Filed February 5, 1904—Not to be reported.)

1. Witnesses—Decedent's estate—In an action by a bank's assignee against the estate of its deceased debtor, the cashier of the bank is a competent witness against the decedent's estate, he being merely the bank's agent.

2. Waiver—Where issue was formed as to the merits of defense upon a claim against decedent's estate without objection because affidavit and demand had not been made, failure to make such objection before answer was a waiver of demand and affidavit.

3. Practice—Section 763, Civil Code of Practice, provides that void judgments shall not be reversed on appeal until motion to set aside or modify is made in the inferior court and overruled, and the failure of the circuit court to act on such motion deprives this court of jurisdiction to reverse judgment.

E. B. Drake for appellants.

J. C. Browder, W. P. Sandidge and W. F. Browder for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

In this suit by the bank's assignee against the estate of its deceased debtor the cashier of the bank is a competent witness against the decedent's estate. It was not shown that the cashier had any personal interest in the bank. He was merely its agent. Although a party, subject to certain exceptions, can not testify for himself concerning transactions had by him with one who is dead when the testimony is offered to be used, the agent of such party is under no such disability. (Section 606, subsection 6, Civil Code of Practice; *Cobb's Adm'r v. Wolfe*, 96 Ky., 418.)

In addition, the testimony of the cashier, so far as it was material, related to original book entries made by him contemporaneously with the transactions about which he was testifying.

2d. There does not appear in the record the statutory affidavit purging the claim. (Sections 3870-3872, Kentucky Statutes.)

An issue was formed as to the merits of the defense, without objection having been made because the affidavit and demand had not been made. No objection seems to have been made on this account till after the judgment. That was too late. The failure to make the objection before answer filed was a waiver of the demand and affidavit required by those sections.

(Usher v. Flood, 12 Ky. Law Rep., 721; Tipton v. Richardson, 21 Ky. Law Rep., 1195; Lytle v. Davidson, 28 Ky. Law Rep., 2262; Stix v. Eversole, 106 Ky., 516; Thomas v. Thomas, 15 Ben Mon., 178.)

3d. A nonresident infant defendant does not appear to have been brought before the court. If the allegations of the petition are true (and they are not denied by the appellants, whom they directly affect on this point), she has no interest in the case. But of course without her presence her interest could not be conclusively adjudged. The judgment was rendered notwithstanding. While there was a motion to set aside the judgment, the record does not show that the motion has been acted upon. The judgment in so far as it affects the interests of the nonresident infant is probably void. Section 763, Civil Code of Practice, provides that such void judgment shall not be reversed on appeal until a motion to set aside or modify it should have been made in the inferior court and overruled. The failure of the circuit court to act on the motion deprives this court of any jurisdiction to reverse the judgment for the reason stated.

4th. There were two infant defendants before the court, for whom no defense was made. The rendering of the judgment against them before defense was a clerical misprision. (Section 517, Civil Code.) But by section 516, Civil Code, it is provided: "A misprision of the clerk shall not be a ground for an appeal until the same shall have been presented and acted upon in the circuit court."

5th. The suit upon the note was begun several years after the death of the maker and of the qualification of his personal representative. Section 3884, Kentucky Statutes, prohibits the recovery of any interest accruing after the death of the debtor, unless the claim be verified and demanded of his personal representative within one year after his appointment. If the personal representative is the only person to be affected by it, he may waive such demand. (Croninger v. Marthen, 83 Ky., 662.) However, in this case there is neither pleading nor proof that the verified demand was not made as required by the statute. Merely failing to find evidence in the record that it was made is not sufficient to condemn the claim for interest. Usually evidences of demand of payment, with the statutory affidavit, are not pleaded, for they form no part of the original cause of action; nor for that reason, unless the answer made such defense, are they pertinent, or necessary to be filed. It is too late to make that question for the first time in this court upon a record which simply fails to show affirmatively, without plea calling it out, that a demand was made within the year.

Finding no reversible error in the record the judgment is affirmed.

FELLOWS, &c. v. KING.

(Filed February 5, 1904—Not to be reported)

Lands—Cloud upon title—Where Richard and Godfrey Fellows owned a tract of land jointly, and Richard signed a paper addressed to C. L. King, saying, "you buy Godfrey out, and I will pay the two Trigg notes given for the land," and appellee, acting on this direction, sold the one-half interest acquired for \$2,500, evidenced by five notes for \$500 each, without any allusion to the Trigg notes, and after these five notes, with their interest,

were paid appellee set up claim on the Trigg notes, which then amounted to \$1,800. Held—When appellee sold the one-half interest for \$2,500 he did so at a handsome profit, and the interest sold was clear of previous debt, and there was no reason shown in the deed why the true consideration was not recited if the Trigg notes were part of it, and it is concluded that they were not, and appellant is entitled to have his title cleared of the cloud cast upon it in an action to recover for the Trigg notes.

R. H. Cunningham and W. P. McClain for appellants.

Brown & Vance for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge O'Rear.

Richard and Godfrey Fellows owned jointly a tract of 100 acres of land in Henderson county upon which they owed \$1,900, represented by four notes, of \$800 each, bearing 8 per cent. per annum interest. The notes were assigned to appellee. Appellant, Richard Fellows, had paid all of the original purchase money (some \$1,400), leaving the amount of these notes as the balance. He continued to pay on the notes for several years, till two of them, with accruing interest at 8 per cent., had been discharged. He then proposed to appellee, who was a merchant and trader, to buy out his brother, Godfrey Fellows', interest in the land, and he, appellant, would buy it from appellee. Appellant is an illiterate man, unable to read or to write his name. The reason he proposed to appellee to buy the land and sell it to him was that he was unable to buy and pay cash for it, he says. At any rate, appellee prepared and appellant signed this paper:

"C. L. King:

"You buy Godfrey out and sell to me, and I will pay the two Trigg lien notes given for the land. February 1, 1889.

his
"RICHARD x FELLOWS.
mark.

"Attest: J. D. DICKEY."

Appellant was then owing as joint maker with Godfrey Fellows the two Trigg notes referred to, being the last two of the \$300 notes above alluded to. It is not clear just what consideration appellee really paid to Godfrey Fellows for his interest in the land. But all that is accounted for with any satisfaction is not exceeding \$2,000, if the two Trigg notes just mentioned are included. Appellant and Godfrey Fellows claim they were included. Appellee denies that they were. Then appellee sold the same one-half interest to appellant, and made him a general warranty deed for it, for the recited consideration of \$2,500, evidenced by five notes of \$500 each, bearing interest from date. No allusion was made in the deed to the two Trigg notes. The one-half interest in the land is shown to have been worth then, probably not exceeding \$3,000, certainly not as much as \$2,500. Appellant continued to make payments on this purchase price till he had paid enough to extinguish it, with its interest in 1899. Then appellee asserted that appellant owed him the two Trigg notes, and interest, which then amounted, according to the judgment of the circuit court, to something over \$1,300; that these two notes were a balance of the consideration for the Godfrey

Fellows' half of the land, making it cost, not counting the interest, over \$3,100, instead of \$3,500.

We construe the written memorandum copied above as a direction to appellee to buy the land, and as an agreement by appellant to repurchase it from him, paying the Trigg notes as part of the consideration. Godfrey Fellows had no interest in the land to sell, as he had paid none of the consideration, unless the Trigg notes were cancelled or paid off by Godfrey. It, therefore, must have been that it was the intention of the parties that that debt was to be extinguished in that way. Then when appellee resold to appellant for \$2,500, that paid to appellee a handsome profit for his part in the transaction. The interest sold was thus clear of previous debt. There was no reason shown why the deed from appellee to appellant did not show the true consideration, if the Trigg notes were part of it. We conclude that they were not. And as appellant has paid appellee's debt in full, he was entitled to have the liens cancelled of record, and his title cleared of that cloud.

Judgment reversed and remanded, with directions that a judgment be entered in accordance herewith.

Judge Nunn not sitting.

SHEMWELL v. OWENSBORO & NASHVILLE R. R. CO.

(Filed February 5, 1904.)

Railroads—Master and servant—Where appellant, the keeper of the water tank and pumping house of appellee, was injured by the giving way of a roof where he had gone to put out a fire, the employer was not the insurer of the safe condition of the premises, and where there was no notice that the condition of the roof was such as to be unsafe there was no promise or undertaking on the part of the superior to repair it, or to take the consequences, and in an action for damages for injuries sustained by reason of the defective character of the roof the action of the trial court in sustaining a demurrer to the petition and amended petition was not erroneous.

E. B. Drake for appellant.

Browder & Browder and B. D. Warfield for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was the keeper of a water tank and pumping house on appellee's railway. He was the sole agent or servant in charge or connected with that place. His principal duty was to operate the engine that pumped water into a large tank, from which the locomotives were supplied. He alleges that on an occasion the smokestack of the boiler connected with his engine became so out of repair that it deflected sparks onto the roof of the little building in which the engine was situated setting fire to the roof; that he went upon the roof to put out the fire, when it, by reason of its rotten condition, gave way, letting him fall to the ground and injuring him. He sued the railway company for the damages which he alleges he sustained by reason of this injury. The negligence of the railway company of which he complains is that it had negligently permitted the covering of the roof,

which was made of boards or plank, to be and become rotten; negligently permitted a cap or covering of the smokestack to be and remain so that sparks were thrown directly upon the roof, and negligently refused to furnish proper fire horse "to be there in case of fire," and negligently refused to repair or remedy the same "after notice repeatedly," though it had promised to do so; that the roof caught fire because of the negligence above set out, and that because of the absence of proper fire hose he was compelled to and did go upon the roof to put it out, as above stated. His petition sets out that while he was "putting the last water upon said burning house top, and while he had his feet securely put in an opening in said roof, and which he thought was sound enough to hold his weight and keep him from falling, said foothold gave way," etc. A demurrer was sustained to the petition. An amended petition was filed reiterating many of the averments of the original petition, but amplifying them in some particulars.

He says that he was employed to look after and protect the buildings at that pumping station; that he believed the building was sufficiently strong to support his weight, and while upon the building attempting to put out the fire "he placed his foot upon a cross-piece or beam of said building, which appeared to be sound so far as he could observe or had any way of knowing, and which he alleges that defendant had permitted to remain there so long that it had become rotten and unsafe" (he don't allege that defendant was negligent in failing to learn earlier of the actual condition of this cross-beam), all of which was produced by the said act of the defendant in failing to have a proper and sound roof when they had agreed to do so, and when they had been informed of its rotten condition and knew of same, and knew of its increased danger from fire." He alleges "that defendant did know that all these things existed and promised to repair same only a few days, or within a week, of said fire and he did rely upon said promise and continued to work there," etc. In alleging more specifically the knowledge of the railway company and its promise to repair, he further says in the amendment: "The said covering of said engine house caught fire not more than a week prior to his injury, but he was enabled to put it out by the use of a hose; that he then went to the supervisor of bridges or water stations, or at least to the defendant's agent and employe who was his superior and in control of said water station, and who had supervision of all water stations, and informed him that same had been afire, and also informed him of the dangerous condition of the building, and also informed him that he had been able to put same out, and also informed him of the great danger of a recurring fire and the possible destruction of said building and said machinery, which was worth \$500 or \$1,000, and it was then that the said defendant, by its superior officer and supervisor of water stations, then and there agreed and promised to and with this plaintiff to repair and fix same, and instructed him that if said fire occurred again, and he could not reach same with the hose, that he must go upon said building and put same out."

These are the strongest allegations of the pleadings for and against appellant upon the point upon which the case was made to turn. The circuit court sustained a demurrer to this amendment also. Appellant declining to plead further, his suit was dismissed, and he has appealed. Under our Code system of practice the object of all pleadings is to set forth the facts

upon which the parties rely in seeking relief, or making defense, and to join an issue thereon. Legal conclusions and circumlocutory statements will be ignored in favor of facts explicitly stated in testing the sufficiency of the pleading. The court looks alone to the well pleaded facts, and applies the law thereto.

Negligence is the failure to do something that the doer, in the exercise of ordinary care, should have done. The employer's duty in this case, it is claimed for appellant, was primarily to furnish him a safe, or at least a reasonably safe, place in which to do his work. With certain recognized limitations this will be accepted. The two latest cases from this court in which that matter is discussed are *Pfisterer v. Peter & Co.*, ante, 1605, and *Wilson's Adm'r v. Chess & Wymond Co.*, ante, —.

Among these limitations are these: If the laborer knows of the defective condition of the premises, or if their condition is so obvious that he could have known of it by the exercise of ordinary care on his part, he assumes the risk of injury arising from such defect. The promise of the employer to repair will be noticed further along. But in no state of case is the employer an insurer of the safe condition of his premises. His undertaking is only an implied one. The defective condition must be such that the employer actually knew of it, or by the exercise of ordinary care on his part, or on the part of his servants in authority and in charge, could have known of it before he is liable therefor to a servant. The law imposes neither an impossible nor an unreasonable duty upon either the employer or the employee. Applying these principles to the facts of this case as the pleadings stand, the employer did know actually of the defects complained of, because its superintendent of bridges and water stations had been told of it. So the petition alleges. It further shows by whom and when he was told, to wit, about a week before the accident, and by the plaintiff himself.

As the petition as amended does not show that appellee had any other knowledge or means of knowledge as to conditions at this pump station than it acquired through appellant, the case is considered alone in that aspect. Plaintiff was the only person there, or required to be there, so far as the pleadings show, representing appellee. The eyes, ears, judgment, opinion and experience of its employe in charge is its way of learning such things. The law, therefore, imputes to the corporation just what these representatives see, hear and know in the course of their respective duties, as affecting the condition of its property and appliances. Appellant being the sole person present at the water station representing appellee, his knowledge would be its knowledge, and, therefore, his negligence would be its negligence as between it and third persons. When appellant reported the conditions to his superior, with a view of shifting his responsibility to his employer as between themselves on account of conditions there, his recital of the conditions to his superior became the knowledge of the employer as affecting its duty to appellant. Consequently appellee knew just what appellant told his superior about these conditions. Besides the defective smokestack and insufficient fire hose, he says he told his superior that the roof was rotten. He don't say that he told him just how rotten it was. But presumably he told him that it was so rotten that it was inadequate for the purposes, for which it was intended, namely, to turn sunshine and rain, and

was more liable by reason of its condition to ignition from the sparks falling from the smokestack. The language of the petition indicates that this was the probable extent of appellant's information to the superintendent. But if he in fact told the superintendent that it was so rotten as not to bear the weight of a man, appellant had just the same information on that subject that the superintendent had, viz., what appellant had seen, and his opinion and judgment based thereon. Then if appellant, with as much actual knowledge of the condition of the roof as his employer had, went upon the roof, and was injured by reason of its defects, the employer is not liable to him. If, on the other hand, neither of them actually knew of the real condition of the roof, the appellant because he had not sufficiently inspected it and the employer because its agent in charge, appellant himself, had failed to notify it of the condition, the employer is not liable, because ordinary care on its part was to require an inspection and report on the conditions by its only servant in charge. Its failure consequently to exercise that care was because appellant had himself failed to exercise ordinary care in acquainting himself of the conditions and reporting it. The employer's knowledge is theoretical, in fact an imputed knowledge. It was bound to come through the head of some employee; the petition don't show that it was the duty of any other employee than plaintiff himself to even examine that building. In fact he say he was employed "to look after it," which means to care for it as the person in charge. The knowledge of the owner can not rise above his source of information. As between the employer and third persons, it is true there will be imputed to the former all that his servant in authority knew, or by the exercise of ordinary care could have known, about it. But as between the employer and the very servant who was solely in the custody, and whose duty it was to know and report the exact conditions to the master, their knowledge as to conditions arising while the premises are in the custody of that servant must of necessity be the same, particularly in the absence of any showing that the master had otherwise acquired knowledge on the subject.

It is insisted, however, as the master had promised to repair the defect, and had requested the servant to in the meantime continue in the use of the premises, that the risk then and thereby became the master's for a reasonable length of time. One week after such promise is not unreasonable length of time within which the servant might properly have relied on the master to make the repairs required in this case. But the rule is not, as seems to be assumed, that the master in the meantime becomes an insurer to the servant of the safety of the premises. He don't. It relieves the servant of the charge of contributory negligence in the matter of continuing at his work with knowledge of the defective conditions, unless such defects are so obviously dangerous as that none but a reckless person would venture upon them. In the latter case the servant, notwithstanding the master's promise to repair, himself takes the hazard of his folly. (*Mellott v. L. & N. R. R. Co.*, 101 Ky., 212; *Wood on Master and Servant*, section 326; *Shearman & Redfield on Negligence*, section 214; *G., C. & S. F. R. R. Co. v. Brentford*, 23 Am. St. Rep., 3-5; *Missouri Furnace Co. v. Abend*, 107 Ill., 44; *Eureka Co. v. Bass*, 81 Ala., 260.)

In the instant case appellant, as has been suggested, probably notified his

superior of the defects in the roof only as affecting its purpose as a roof. If appellant had been injured by the roof falling in upon him (and that danger had not been a patent one), or by reason of its leaky condition, he would have been protected against the damages. But it is not shown nor claimed that he notified his superior that the roof was so rotten as to be unsafe to get upon; and, therefore, there was no promise or undertaking by the superintendent to repair such a defect, or to take the consequences upon the employer meantime. The promise to repair, and the assumption of consequences during repairs for a reasonable time, necessarily are referred to the particular defects which the parties were discussing. On the other hand, if the notification by appellant was that the roof was unsafe to go upon, knowledge of that fact was with appellant, and no promise to repair could relieve him of the contributory negligence of going upon it while it was in that condition. For if it was that unsafe, it meant it would give way under the weight of a man, and if it gave way it was almost inevitable that he would be hurt by the fall. Nor does the direction of a master to the servant to place himself in an obviously dangerous situation, one that none but a reckless person would assume, relieve the servant of his own negligence in acting.

The judgment is affirmed.

The whole court sitting.

STALLCUP, &c. v. CRONLEY'S TRUSTEE, &c.

(Filed February 5, 1904.)

Wills—Trusts—In a devise to three daughters, and after the death of either, to her surviving children in fee simple, but with the provision that if any daughter died without issue her portion should go to her surviving sisters, if living, but if dead to their issue, one of them dying without issue, but before her death appellant, a daughter of her sister conveyed in trust to her all of her interest in the trust estate of this daughter under the will, a judgment of the circuit court denying to appellant her interest in the personal estate owned by the decedent and held in trust, which was derived from the will, was erroneous.

J. D. & G. R. Hunt for appellants.

Morton, Webb & Wilson for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

The will of Joseph Bruen, probated in Fayette county, this State, in 1848, gave his estate to his three daughters (after provision for his wife). He gave to each daughter her portion to her sole and separate use during her life, and after her death to her surviving children in fee simple; but that if any daughter died without issue her portion was then to go to her surviving sisters, if living; but if dead, to their issue. The children of his children were expressly made the representatives per stirpes of their parents in taking the estate in the contingencies mentioned.

The testator had three daughters: Mrs. Ingles, Mrs. Sarah B. Cronley and Mrs. Shelby. Mrs. Cronley was the last of the three to die, and she had

no children. Mrs. Ingles had several children. Mrs. Shelby, one. Mrs. Shelby's child is appellant, Mary B. Stallcup. At her death Mrs. Cronley owned, in her own right, a considerable estate, derived from her deceased husband. Besides, she owned, in the hands of a trustee, from \$30,000 to \$35,000 of estate derived under the will of her father, Joseph Bruen. Of this, it is claimed, \$26,850 is personalty.

In 1870, directly after appellant had left school and returned to the home of her aunt, Mrs. Cronley, with whom it seems she had been making her home for some years, appellant, at the instance of Edward Cronley, Mrs. Cronley's husband, executed to him a conveyance, in the form of a deed of trust, conveying to him in trust for his wife all of said Mary P. Shelby's interest (she was then unmarried) in the trust estate of Mrs. Cronley under her father's will. The deed was in consideration of natural love and affection, and \$1. and contained no warranty. At that time the great bulk of the estate so attempted to be conveyed was personal property, though some part of it was real estate.

Mrs. Cronley died a year or so ago, leaving a will, the principal, if not the sole, effect of which was to dispose of her estate derived from her husband, Edward Cronley. In this suit to settle and partition Mrs. Cronley's estate, brought by her executor, the executor and the heirs of the Ingles branch claim that by her deed made in 1870 appellant conveyed to Mrs. Cronley the remainder interest owned by her in the Bruen trust estate, being one-half thereof; and that as to that half Mrs. Cronley died intestate; as to the other half the Ingles family took as remaindermen under Bruen's will. Appellant contends that her attempted conveyance of her contingent interest in the trust estate held by Mrs. Cronley for life was void, especially as to the personalty. The effect of the difference is to give appellant, as heir-at-law of Mrs. Cronley, of the personal estate say \$6,712.50 less than she would take otherwise.

Appellant contends that the deed of 1870 is invalid as an executed conveyance, because her interest then was only that of an executory limitation, or devise, which was not the subject of a conveyance at law. While the common law originally admitted of no estate in personal property, regarding its title as its possession, as inseparable, yet that distinction has long been obsolete, and now life estates and remainders may be created in personal property. Language which would create a life estate and a reversion or remainder in lands, may, with equal assurance, sever the title to personal property, giving it for a term of life to one, with the remainder to others, upon the same contingencies as land is devised, guarding always against perpetuities. How far certain remote and contingent interests thus created in personal estate are the subject of conveyance by deed or executed contract is, and from the beginning has been, a troublesome question. The same difficulty naturally existed concerning the conveyance of similar interests in real estate. And they would arise more frequently, and were far more important then, because generally it was the title to real estate only that was subjected to such limitations. Not for a long while afterward were they allowed as to personalty. The early cases, and indeed nearly all the cases and texts, hold that such interests as executory devises or limitations are not alienable at common law.

To obviate the difficulty of this rule, and to facilitate the transfer of titles to land, legislative enactments have been resorted to. In this State a statute of that nature has been in effect for many years. It is now section 2431, which reads: "Any interest in or claim to real estate may be disposed of by deed or will in writing." * * *

This language is so comprehensive as to include an executory devise. It is conceded by appellant, and we think it is clear that it is so, that the deed was effectual to convey appellant's interest in the real estate then held in trust for Mrs. Cronley. An executory devise is such a limitation of a future interest in lands or personal chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. (Freame, Rem., §36, 7th edition; 2 Bl. Com., 172.) It was defined in *Patterson v. Ellis*, 11 Wen. (N. Y.), 278, as being "a devise of a future interest in lands or chattels, not to take effect at the testator's death, but limited to arise upon some future contingency."

Unlike a remainder, it requires no particular estate to support it (*Burleigh v. Clough*, 52 N. H., 273), and may be limited upon a fee. It is not called an estate. In truth it is not. It is an interest, dependent upon the happening of one or more contingencies to ripen it into an estate. It is an expectancy, something more than an heir presumptive has. The interest of the remaindermen is more tangible. It is certain and fixed, resting upon a particular estate, and to become dominant upon the happening of a contingent event. In this case the interest of Mrs. Stallcup, when first created, was thus: First, if Mrs. Cronley should die without issue; second, if Mrs. Shelby should die leaving no issue save appellant; third, if appellant should survive Mrs. Cronley. So long as either Mrs. Cronley or Mrs. Shelby lived there was the legal possibility of appellant's having absolutely no interest in the estate, or by the birth of other children to Mrs. Shelby to have a different and varying interest. It is not so strange that such indefinite interests of such uncertain beneficiaries were not assignable at the common law. The statute quoted has made them assignable as to lands, but as to lands only. This indicates a legislative purpose to leave the common law in force as to personal estates so conditioned. The common law did not allow the conveyance or creation of such interest except by will, and the statute has not authorized it.

But equity did for many purposes treat such conveyances or contracts as equitable assignments, and as such enforced them. In *Grayson v. Tyler's Adm'x*, 80 Ky., 362, it was said: "The doctrine of the common law is that a contingent remainder can not be passed or transferred by a conveyance at law before the contingency happens, otherwise than by way of estoppel by fine, or by a common recovery; but contingent estates were assignable in equity." (Freame on Remainders, page 366.)

That was a case where a contingent remainderman, having such an interest in personal estate under a will, had for value assigned it, and the assignment was upheld and enforced.

Chancellor Kent in his Commentaries, volume 4, 262, says: "All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration."

Speaking of the contract to sell an executory devise, Story's Equity Juris-

prudence, volume 2, section 1040b, says: "Until the event has happened the party contracting to buy has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. * * * It is not an interest in the property, but a mere right under the contract. Indeed the same effect takes place in such case if there be an actual assignment, for in the contemplation of equity it amounts, not to an assignment of a present interest, but only to a contract to assign when the interest becomes vested. Therefore, a contingent legacy, which is to rest upon some future event, such as the legatee's coming of age, may become the subject of an assignment, or a contract of sale."

When the enforcement of the contract is sought, the chancellor will look to the contract and the circumstances under which it was executed, and the consideration, and will decree an enforcement, or withhold it, as is the habit of equity. For it is not every valid contract that equity will enforce. So if there be wanting a consideration, it seems that the contract should not be enforced against the will of the grantor. A "good consideration" will not suffice.

"But although such assignments are valid in equity, yet they will not generally be carried into effect in favor of mere volunteers; nay, not in favor of persons claiming under the consideration of love and affection (such, for instance, as a wife or children) against the heir and personal representative of the assignee, but only in favor of persons claiming for a valuable consideration." (2 Story's Equity, section 1040, Civil Code.)

We do not regard the fact that the deed was made to a trustee affects the question at all. The sole purpose of making the conveyance to a trustee, instead of to Mrs. Cronley direct, was to create a separate estate in her; that fact manifestly could not have any bearing upon the transmissibility of the interest attempted to be assigned. The case of *Williamson v. Yager*, 91 Ky., 283, is relied upon by appellee as holding a contrary doctrine. But in that case the question was not as to the effect of placing the title in a trustee as bearing upon the assignability of the subject-matter of the trust. There the owner of certain notes by a signed endorsement upon them created herself a trustee of the assignees, continuing to hold the notes. The court held that by making herself the trustee of a trust by an executed instrument, no other delivery of the notes assigned was either possible or necessary, and that as the gift was executed, the matter of consideration was immaterial. But in that case the subject-matter of the assignment was a thing and estate in esse. The difficulty here is that the thing attempted to be assigned, the estate in the trust fund, was not in being, or vested in the assignor, and consequently the utmost effect that could be given to the attempted assignment was that of an equitable assignment, or an agreement to assign, to take effect in the future when and if the estate to be assigned came into existence. When that event occurred a court of equity will not enforce the assignment, because of a lack of equity in the claimant under the instrument.

The judgment of the circuit court denying to appellant the whole of the one-half of the personal estate owned by decedent and held by her trustee, derived under Joseph Bruen's will, is reversed and cause remanded for proceedings not inconsistent herewith.

COE v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 5, 1904—Not to be reported.)

Railroads—Duty of conductor—In an action by a passenger for injuries sustained in alighting from a train, where the petition alleges that as the train was slowing up at the station and the conductor announced three times the name of the station, and that the train stopped, the night was dark, the passenger attempted to get off the train and was injured because it had not yet reached the station, but had stopped at a dangerous point for a passenger to get off, the petition stated a cause of action, and it was error for the trial court to sustain a demurrer to it.

N. J. Weller for appellant.

B. D. Warfield and J. W. Alcorn for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge O'Rear.

Section 784 of Kentucky Statutes, which requires that a common carrier "shall cause to be announced twice within each passenger car of every passenger train, within a reasonable time before its arrival at a station at which, from notice given, it is to stop, the name of the station," is for the purpose of apprising passengers of the fact that the train is approaching that station, so that those who are to disembark there may be prepared to leave the train. Consequently when the train stops after such an announcement, or when such announcement is made merely calling the name of the station after the train has stopped, passengers destined for the station have a right to assume, without notice or knowledge to the contrary, that the train has arrived at such station. If for any reason after the announcement has been made, the train is compelled to stop before arriving at the station where the passengers are to leave the train, it is the duty of the carrier to warn or caution passengers to that effect, that they may govern their movements accordingly.

In this case the petition substantially alleges that as the train was slowing up to stop at the station where appellant was a passenger, the conductor announced three times distinctly the name of the station. The train stopped directly. It was night and dark. The passenger attempting to leave the train was injured because it had stopped before it had reached the station, and at a point dangerous for disembarking passengers. We are of opinion that the petition stated a cause of action. If the passenger was negligent in leaving the train under the circumstances that is a matter of defense.

The judgment of the circuit court sustaining the demurrer is reversed and cause remanded for proceedings not inconsistent herewith.

DIXON, &c. v. LABRY, &c.

(Filed February 5, 1904—Not to be reported.)

Ditch—Lien for digging—Limitation—In an action to enforce a lien for the digging of a ditch under section 2400, Kentucky Statutes, where it appears that the surveyor of the county accepted the ditch as completed according to the specifications and that the action was instituted within five

years after the recording of the certificate as required by law, it was not barred by the statute of limitations.

R. D. Vance and M. C. & G. D. Givens for appellants.

Thos. E. Ward for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellees to enforce a lien for the sum of \$113 65 incurred in digging a ditch on appellant's land under an act of the Kentucky Statutes, section 2400, entitled "An act for the drainage of land." This action has been appealed to this court once before, the opinion being in 24 Ky. Law Rep., 697. After the return of the cause to the lower court appellees filled the blanks in their petition as authorized by this court. The appellants filed an amended answer, in which they denied that the survey of Henderson county issued or delivered to the appellees or to the clerk of the Henderson County Court a certificate showing the amount due them, or either of them, for the construction of the ditch, and alleged that the contract of Labry, made with the clerk for the performance of this labor in digging the ditch, was made on the 17th of May, 1894; that he should have completed his work under the contract in ten days thereafter, and did complete the labor in digging this ditch prior to October, 1894, and that his cause of action, if any he had, accrued more than five years before the commencement of their action, and they pleaded the statutes of limitations. Under the former opinion in this case all the questions have been settled except the one last mentioned.

It appears from the record herein that the surveyor of the county did accept as completed, according to the specifications, the ditch passing through the lands of the appellants and made his report to that effect, which was recorded in the Ditch Book for that county on the 28th of September, 1896. And it appears that this action was brought on the 3d of August, 1901, less than five years after the recording of the certificate. Appellees had no right to bring an action on this claim except as authorized by the statutes. They could not legally have instituted this action before this acceptance by the surveyor and his certificate made with reference thereto as required by section 2400 of the Kentucky Statutes. Their claim was not due until that time, their cause being wholly statutory, and having been brought within five years from the date of the acceptance and certificate by the surveyor, their action is not barred by the statute of limitation.

Wherefore, the judgment of the lower court is affirmed.

BARLOW'S ADM'R, &c. v. COMSTOCK'S ADM'R.

(Filed February 9, 1904.)

Marriage—Antenuptial contract—Where in an antenuptial contract in consideration of the marriage the wife was to receive \$500 at the husband's death, she waiving her right to claim homestead or dower, or to other distributable shares in his property, Held—That the death of the wife does not defeat the claim of her estate to the \$500, because that was an antenuptial

contract and contained no provision that it should be paid only in the event she survived him, and was in no wise dependent upon any such contingency.

John W. Lewis for appellants.

J. H. Thurman and J. W. S. Clements for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the — of July, 1881, Peter G. Barlow and Lucinda Comstock executed the following antenuptial contract with each other:

"Whereas, marriage is about to take place between Peter G. Barlow and Mrs. Lucinda Comstock, all of Washington county, State of Kentucky: This marriage contract between the parties whose names are hereunto subscribed, Witnesseth: The said Peter G. Barlow agrees to give to said Mrs. Comstock \$500, to be paid at his death, and to the payment of the same hereby binds himself, his administrators, executors, heirs and assigns as stipulated. The said Lucinda Comstock agrees and binds herself to make no claim to dower or homestead or other distributable right, interest or share in the real or personal property of said Barlow, and hereby releases, relinquishes and waives all claim to dower, homestead or to other distributable right or share in the property, real or personal, of said Barlow. Said Barlow agrees that said Mrs. Lucinda Comstock shall have the exclusive right to the use and control and dispose of what personal effect she has before, during or after the marriage, free from all claim of said Barlow, his heirs, administrators, executors and assigns. The said Barlow is to furnish a decent support during his natural life. Witness our hand this — of July, 1881.

"PETER G. BARLOW,

her
"LUCINDA x COMSTOCK.
mark

"Attest: PALMER GRUNDY,

"ISAAC L. JONES."

Shortly after the execution of this written agreement the marriage between the parties was legally solemnized, and the parties lived together as husband and wife until the death of Mrs. Barlow on the — day of —. Peter Barlow survived his wife, and died intestate on the 19th of April, 1900, leaving surviving him as heirs at law a number of children by a previous marriage. Suit was instituted in the Washington Circuit Court for a settlement of his estate, and W. T. Comstock, as administrator of the estate of Lucinda Barlow, was made a party defendant. He filed his answer, which he made a cross petition against the administrator and heirs of Peter G. Barlow, setting up the antenuptial contract of July, 1881, and prayed judgment against the administrators for \$500, with interest. The administrator of Peter G. Barlow filed a general demurrer to the answer and cross petition of Mrs. Barlow, which was overruled, and declining to plead further, judgment was awarded to appellee for \$500, with interest, from the 1st day of June, 1900, until paid, and the administrator of Peter G. Barlow has appealed, and insists that the sole consideration for the payment of the \$500 provided for in the antenuptial contract between the parties was the release by Mrs. Comstock of all claim to dower, homestead or other distributable

right in the estate of her prospective husband in the event she should survive him. Or, in other words, that it was a stipulated sum to be paid to her in lieu of all rights which she might have growing out of the marriage in her prospective husband's estate as surviving widow; and that as she died several years prior to her husband, she never became invested with any estate of the character sought to be released, and in consequence the written obligation sued on was not enforceable.

We can not concur in this contention. There were two considerations which entered into the execution of the antenuptial contract by Mrs. Comstock, one the prospective marriage, which was alone an adequate consideration therefor; the other, the release of all claim by her of her inchoate rights as surviving widow. The obligation assumed by Peter Barlow in the contract of July, 1881, to pay Mrs. Comstock \$500 at his death is unconditional. It contains no such qualification as appellant seeks to inject into it. Nothing is said about her death, or that the contract sued on was to be enforceable only in case she survived her prospective husband, and we think is in nowise dependent upon such a contingency. In an unbroken line the authorities favor a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust and settle the question of marital rights in property.

For reasons indicated the judgment is affirmed.
Whole court sitting.

MONTGOMERY v. MONTGOMERY.

(Filed February 9, 1904—Not to be reported.)

1. Appeals—By the provisions of section 950, Kentucky Statutes, in order to give this court jurisdiction of appeal the amount in controversy must be \$200, exclusive of interest and costs.

2. Set-off—Practice—In an action of assumpsit to recover \$170, an answer pleading a set-off that certain taxes had been paid where the legal title was in appellant and the equitable title in appellee, the action of the lower court in striking out the claim for taxes was proper, because it could not be properly pleaded as a set-off.

James Bradley and B. M. Lee for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee sued appellant in an action in the nature of express assumpsit to recover \$170. The answer denied the alleged agreement, and pleaded as a set-off that appellant had paid for appellee certain taxes on lands owned by them jointly, in a given proportion, when the legal title was in appellant to the whole tract, while appellee owned the equitable title to the proportion named. The sum claimed by appellant on this account was \$95.24. The circuit court struck out so much of his pleading as claimed the taxes. The verdict and judgment on appellee's claim was in her favor. The first question is, has this court jurisdiction of the appeal? To give this court jurisdiction of an appeal the amount in controversy must be \$200, exclusive of

Interest and costs. (Section 950, Kentucky Statutes.) As to the defendant it is said that the amount in controversy is the amount of the judgment, from which he appeals. (*L. & N. R. R. Co. v. Wade*, 89 Ky., 285; *American Accident Co. v. Slaughter*, 101 Ky., 28.) But when the defendant has presented a counterclaim or set-off against the plaintiff which is germane to the original cause of action, and which is denied entirely, then the amount in controversy will be the sum recovered against him by the plaintiff on the original action, plus the amount claimed by the defendant, and which he was denied. (*Walter A. Wood Co. v. Taylor*, 104 Ky., 217.) This brings us to consider appellant's claim as a set-off. A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff. (Subsection 2 of section 96, Civil Code.) It is a suit within a suit.

Defendant alleged by way of set-off, and, therefore, as constituting a cause of action against the plaintiff, that he and the plaintiff owned jointly in unequal proportions a farm in Scott county; that he held the legal title to the whole of it, but that for certain years the plaintiff was the owner by title bond from appellant of the equitable title to the portion named, being something less than one-half; that the tax had been assessed against him, and that he had paid all of it, and that plaintiff's proportion was \$95.24 in the aggregate, which she had not paid.

Section 4023, Kentucky Statutes, makes the holder of the legal title to land and the holder of the equitable title also liable for the taxes thereon; "but as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

Section 4038 provides that "whenever the occupant of any land * * * shall pay the tax thereon which the owner ought to pay, the person paying the taxes shall be entitled to recover of the owner the amount of the tax so paid and interest."

Section 4035 gives a right of action to a joint owner who pays all the tax where the property has been "assessed conjointly."

These sections were intended to fix the liability for the tax as between the persons prima facie liable therefor, and from any of whom the State may have exacted its payment. The payment of taxes is generally involuntary; its assessment and the means of collection are necessarily more or less summary; that a mere volunteer, who pays the taxes of the owner of property, will not be given either a lien on the property or a right of action to recover the amount paid from the owner is well settled, but where one who can be made to pay it does so, the statutes fix the ultimate liability as between the persons liable, and give a right of action against such one in favor of the other who pays. We are of opinion that the answer presented a good cause of action in favor of defendant against plaintiff. But a set-off must be based upon a contract, judgment or award. There is no claim that defendant paid the tax for plaintiff under a contract, or under a request that would imply a promise to repay. No statute would be needed to allow a recovery in such state of case. This is purely and simply a statutory liability. Penalties or forfeitures fixed or allowed by statute and torts and unliquidated demands have not been allowed as matters of set-off. The language of the Code, no less than the practice before, exclude such as matters of set-off.

We think to this class belong pure statutory liabilities—involuntary liabilities. The action of the circuit court was, therefore, proper in striking out that matter as a set-off, although it may have constituted a good cause of action by defendant against plaintiff. This leaves the amount in controversy less than \$200. (C. & O. Ry. Co. v. Roe, 21 Ky. Law Rep., 1145; *Arthurs v. Thompson*, 97 Ky., 218.)

Appeal dismissed.

THOMPSON, &c. v. RAGAN.

(Filed February 9, 1904.)

1. Bankruptcy—Attachment—Where a debtor whose property had been attached filed his petition in bankruptcy within four months thereafter, and was adjudged a bankrupt, and the trustee in bankruptcy sought to have the proceeds of the attached property turned over to him, the prayer of his petition should have been sustained except as to the extent of costs incurred and expenses to the sheriff for keeping attached property prior to its sale under the attachment.

2. Same—The question as to whether the property of the debtor was exempt under the laws of another State was properly a question to be considered by the Federal court in the bankruptcy proceeding.

John F. Lockett, A. W. & A. D. Funkhouser for appellants.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, G. W. Ragan, brought this action against the appellant, Charles Thompson, in the Henderson Circuit Court to enforce the payment of a note for \$224.25, executed to him by appellant on the 20th of January, 1898, and at the same time sued out a general attachment upon the ground that both he and the defendant were residents of the State of Indiana, which was levied by the sheriff upon an undivided one-third interest owned by him in sixteen head of cattle, twelve head of hogs, which were subsequently sold under an order of the judge of the Henderson Circuit Court for the sum of \$215. On the 9th of May following, the appellant, Jefferson D. Smith, of Evansville, Ind., filed his petition to be made a party to the proceeding, and alleged in substance that immediately after the levy of the attachment Charles Thompson filed his voluntary petition in bankruptcy in the district court of the United States for the District of Indiana; and on the 7th day of March, 1900, he had been adjudged a bankrupt within the meaning of the acts of congress relating to bankruptcy; that he had been duly appointed trustee of the estate of the bankrupt and had executed bond and accepted the trust. Copies of the adjudication in bankruptcy and of the order appointing the petitioner trustee were filed with and as a part of his petition. He alleged that appellee's attachment was procured to be issued and levied at a time when defendant was insolvent; that the enforcement thereof would work a preference in favor of the plaintiff as one of the creditors of Thompson, and asked that the lien created by the levy of the attachment be dissolved, and the attached property be turned over to him as trustee of the

estate of the bankrupt, or that the proceeds thereof should be paid over to him. Plaintiff, by way of reply, alleged that under the provisions of the Revised Statutes of the State of Indiana, where Thompson resided, money or property of the value of \$600 was exempt to a man of family from the payment of debts; that Thompson was at the time of the filing of his petition in bankruptcy entitled to these exemptions; that in the schedule of assets filed by Thompson with his petition in bankruptcy the entire amount, including the property involved in this suit, was of less value than \$600; that no assets of any kind came into the hands of his trustee or could be made available for the payment of his debts; and that the fund in controversy in this case, if turned over to the trustee, would not be used for the payment of his debts." The trustee demurred generally to the reply, which was overruled, and declining to plead further, the trial court adjudged that the attachment should be sustained; that the sheriff be allowed \$12.90 for his services, and the further sum of \$42.50 to be paid by him to J. W. Todd for taking care of the cattle; and that the remainder of the \$215 be paid to the plaintiff, Ragan, and the plaintiff, Smith, as trustee, has appealed.

Subsection 2 of section 8 of the Constitution of the United States provides "that congress shall have the power to establish uniform laws on the subject of bankruptcy throughout the United States." Pursuant to this provision of the Federal Constitution the congress of the United States, on July 1, 1893, passed an act to establish a uniform system of bankruptcy throughout the United States. Subsection C of section 67 of this act provides: "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mense process or a judgment by confession, which was begun against the person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if it appears that the said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the provisions of the act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

In the Bank of Columbia v. Overstreet, 71 Ky., 151, it was decided by this court that all laws of congress enacted pursuant to the powers delegated to it by the Federal Constitution were binding upon the State as well as the Federal courts, and that they were bound to respect the rights acquired under them. This decision was approved in Wood v. Carr, 21 Ky. Law Rep., 2146. As the petition in bankruptcy of appellee was filed within four months after the levy of the attachment, and the trustee intervened in this proceeding and sought to have the proceeds of the attached property turned over to him under the provisions of section 67 of the Federal Bankrupt Law, we are of

the opinion that his prayer should have been sustained to this extent, viz., the attachment should have been sustained, and the cost incurred, including the allowance to the sheriff and to Todd for keeping the live stock prior to its sale, paid out of the proceeds of the attached property, and the balance of the attached fund adjudged to the trustee in bankruptcy. The question whether this property was exempt under the laws of Indiana is properly a question for the determination of the Federal court in the bankrupt proceedings.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

SOUTHERN RY. CO. IN KENTUCKY V. OTIS' ADM'R.

(Filed February 9, 1904.)

1. Railroads—Damages—Where a brakeman was killed while attempting to connect some cars at the direction of the conductor, no signal or other warning having been given by the backing train which struck him, and he was between the cars where he could not see the train backing, it was not erroneous for the trial court to refuse a peremptory instruction to find for defendant, and the verdict and judgment awarding damages were authorized upon the facts as they appear from the record.

2. Same—Instructions—The use of the word "skillful" in defining the character of care which should be exercised by those in charge of persons engaged in occupations such as the operation of trains, did not add a new and distinct meaning, but only required such care as is exercised by ordinary men in the business in which they are engaged, and an instruction containing it can not be said to be erroneous, although it would have been better to have conformed to the ordinary definition.

3. Same—In an action against a railroad company for damages alleged to have been sustained by the action of a superior, where death does not ensue, there can be a recovery for only gross negligence of superior who was engaged with employe in the same service, but when death results and the action is under the statutes, there may be a recovery for ordinary negligence of the superior servants engaged in the same employment.

L. C. Willis, Willis & Todd and Humphrey, Burnett & Humphrey for appellant.

Gordon & Gordon for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from the judgment of the Anderson Circuit Court in favor of appellee against appellant for damages in the sum of \$5,000 for the death of appellee's intestate as a result of the alleged negligence of appellant's employes. The deceased, E. V. Otis, was a brakeman or flagman on one of appellant's freight trains in charge of Conductor Clifford. Clifford's train had recently been in a wreck and the cars of his train were on the sidings at Lawrenceburg, and they were preparing to get them together to start on the trip to Louisville. About this time another train of appellant, known as the local freight, in charge of Conductor Hampton, came in from

Louisville on its way to Lexington. There were some dead cars, on what is known as the long siding, coupled together, but the air connections had not been made. Conductor Clifford directed Otis to make these connections, and while Otis was performing this work those in charge of the Hampton train had uncoupled it and backed a portion of that train in on this long siding and struck these dead cars, between which Otis was situated, knocked him down, and the wheels passed over his head, killing him instantly.

The proof shows that those in charge of the Hampton train did not give any warning signal, either by blowing the whistle or ringing the bell, of the intention of backing the train. The deceased was in a position between the cars where he could not see the train backing. The two conductors, Clifford and Hampton, were in a position to see the train backing, and were within, according to proof, a half or two car lengths of the place where deceased was killed, and where they could have seen him.

The appellant contends that the court should have given a peremptory instruction to find for it. We are of the opinion that the court was right in refusing such instruction. Appellant also complains that the court erred in submitting to the jury the question of negligence of those in charge of Hampton's train, which was the train that killed the deceased. Under the proof in this case, it was negligence on the part of those in charge of the Hampton train to back in on this siding without giving any warning thereof, by blowing the whistle or ringing the bell. It was also negligence on the part of Clifford in permitting this train to be backed in on this siding without making some effort to prevent it, or without giving Otis some warning of its approach. The appellant contends that the noise the train made in moving ought to have been sufficient warning to him. It is possibly true that he could have heard the movement of the train, but it was not notice to him that it was moving on the long siding, as there were several other tracks at that point, and he might have heard it and thought it was moving on some other track, and he could not have told from the noise whether it was backing or going forward.

The appellant contends that the court erred in instructing the jury that appellee could recover upon proof of ordinary negligence upon the part of those in charge of the train, and cites as authority for its position several decisions of this court, all of them, however, decided prior to the adoption of the new Constitution and the enactment of section 6 of the Kentucky Statutes. By these sections it is provided, whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence gross, punitive damages may be recovered. (21 Ky. Law Rep., 1097; 22 Ky. Law Rep., 878; 23 Ky. Law Rep., 2410.) In this last case the court said: "Where death does not result, there can be a recovery for only the gross negligence of his superior who was engaged with him in the same service, but where death results, and the action is under the statutes, it controls, and there may be a recovery for ordinary negligence of the superior servants engaged in the same employment."

The appellant contends that the court erred to its prejudice in its instruc-

tion defining ordinary negligence. The instruction is as follows: "Ordinary care, as used in these instructions, is that degree of care which ordinarily prudent and skillful men usually exercise under circumstances and in occupations similar to those proven in this case, and the failure to exercise such care is negligence."

It will be noticed that if this instruction was not proper, it was as hurtful to appellee as it was to appellant, because the court in its instructions required ordinary care of appellee's intestate before he could be allowed to recover anything. The objection of the appellant is to the word "skillful" in this instruction. This word is not commonly used by the courts in the definition of ordinary care, but it is hard to distinguish the difference between the instruction as given by the court and the meaning of the ordinary definition. By this instruction no especial skill was required. Ordinary skill is supposed to be possessed by ordinary men in conducting the business in which they are engaged. The word skillful, as used, did not add a new, distinct or different standard, but only required what should be required of ordinary men in the business in which they are engaged. It would have been better if the court had conformed to the ordinary definition, but we are not prepared to say that the instruction, as given, was erroneous; but if erroneous, it was only technically so, and not prejudicial. It appears from the record that the appellee offered an instruction defining ordinary care in proper form, which was objected to by appellant, and the court sustained its objection; and it also appears that appellant did not offer any instruction on this point. It appears to us that where, upon its objection, a proper instruction defining ordinary care was refused, and where it offered no instruction on the subject, it can not be allowed to complain that no proper instruction was given. (24 Ky. Law Rep., 789; 23 Ky. Law Rep., 2071.)

Wherefore, the judgment of the lower court is affirmed.

MUIR v. THIXTON, MILLETT & CO.

(Filed February 9, 1904.)

1. Damages—Stock running at large—In an action to recover for the killing of a horse where it fell into a cistern upon the premises of another, a peremptory instruction to find for defendant was proper where the cistern was not necessarily dangerous, or per se a nuisance, nor where there was at the time of the death of the horse anything about the premises that could have been called an "attractive nuisance" by which it was invited to go upon appellant's premises.

2. Same—Where a distillery was "closed down" June 22, and a horse not killed until June 27, five days thereafter, and where hogs were frequently upon the premises, it is to be presumed that in that length of time whatever grain may have been left on the ground would have been eaten by them, and that the horse was not lured to the place because of it.

3. Same—Where a cistern was in the rear of a distillery, and from eighty to one hundred feet from the public highway, it was not dangerous per se in the sense that animals may have been attracted to it.

4. Same—The owner or occupant of land is under no obligation to make it safe for the benefit of the owners of domestic animals which are permitted to run at large.

C. T. Atkinson and J. Smith Barlow for appellant.

John S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by the appellant against the appellees to recover damages for the death of a horse which, in straying upon the distillery premises of the appellee, fell into a cistern and was drowned.

The distillery grounds front on the Bardstown and Loretto turnpike in Nelson county, and are uninclosed. The cistern in which appellant's horse was drowned is situated in the rear of the distillery buildings and near one hundred feet from the pike, and is used for supplying the distillery with water when in operation. The water with which the cistern is filled is conducted into it by a pipe connecting with a nearby spring. According to the evidence the appellant's horse escaped from his lot or field on the night of June 27, 1908, and went upon the appellee's premises, where it was found on the following morning in the cistern, dead. Whether the animal fell into the cistern while grazing near it, or in trying to drink therefrom, does not appear. It is, however, averred in the petition that it was induced to enter the premises of appellees, as was common with other stock in the neighborhood, to eat corn or malt which appellee's servants negligently permitted to fall and remain upon the ground in and about the premises, and that by reason thereof, and appellee's further negligence in permitting the cistern to remain uncovered, the horse met its death.

The answer denied the alleged acts of negligence set forth in the petition, or that the horse was thereby led to enter the distillery premises, and averred that at the time of its death the horse was trespassing upon appellee's lands, and had been either driven thereon by its owner, or by the negligence of the latter had been turned out upon the highway and allowed to stray wheresoever it would. The affirmative matter of the answer was controverted by reply, and upon the trial which followed the making up of the issues the lower court, at the conclusion of all the evidence, peremptorily instructed the jury to find for the appellees, and they thereupon returned a verdict as instructed, upon which judgment was entered dismissing the petition and allowing appellees their costs. Of the action of the trial court in giving the peremptory instruction and in overruling his motion for a new trial the appellant complains. The question presented by the appeal is interesting because of its novelty and the zeal with which counsel have urged their respective contention.

We find in Thompson's Negligence, volume 1, section 988, this statement of the law on this subject: "In most of the States of the American Union, with the exception of some of the Eastern States, the common law of England, which requires the owner of cattle to restrain them, is not in force; but they may lawfully run at large upon the public highway and upon uninclosed lands without regard to the ownership of such lands. The difference is that by the common law of England the owner of cattle must fence them in; whereas, by the general law of America the owner of the land must fence them out." * * *

In section 989 we are also told by the learned author that "where domestic

animals are allowed to run at large, and they stray upon uninclosed lands and are injured, the owner of the lands can not be held liable therefor. A land owner is no more obliged to prepare his land in any particular way for the protection of his neighbor's cattle, not invited or tempted to come upon it, than for the protection of his neighbor himself. For example, a land owner is under no obligation to fence his land bordering on the highway, or to keep such fences or the gates in them, so as to prevent the animals of another, which are allowed to run at large upon the highway, from getting through the land upon a railroad track and there being killed."

The English law rests the rule upon the proposition that the owner of domestic animals has no right to allow them to stray upon open grounds, and if he does so it is at his peril. Upon the other hand, the doctrine in most of the American States is that cattle may run at large upon the highway and upon uninclosed lands without regard to the ownership of such lands. Under the doctrine last stated the owner or occupant of land, as we have already observed, is under no obligation to make it safe for the benefit of the owners of domestic animals which are permitted to run at large. But while this is true, an exception to the rule exists, as we are told, by Mr. Thompson in what are sometimes called "attractive nuisances," so that if the owner or occupant of real property erects and leaves upon his premises anything which is especially attractive to young children, or to domestic animals, and children or animals are attracted to it to their hurt, he must pay damages. (*Bransom's Adm'r v. Labrot, & Co.*, 81 Ky., 642; *Jones v. Nicholls*, 46 Ark., 207; *Haughey v. Hart*, 62 Iowa, 96; *Young v. Harvey*, 16 Ind., 314.)

We regard the rule *supra* as the law in this State, and though some of the authorities relied on by counsel for the appellees seem to support the contrary view, upon examination it will be found that they apply to those States wherein the common law is in force, or statutes have been enacted, which requires the owners of stock to keep them within their own inclosures.

The case of *L. & F. R. R. Co. v. Ballard*, 2 Met., 180, cited for appellees, is not in point. It only holds that a railroad company is not bound to fence its track, and that as its trains have the right of way on and over the track, owners of cattle are under peculiar obligations to keep them off the track. This rule does not, however, apply to other owners of uninclosed lands.

We have in Kentucky no statute preventing the running at large of stock, though there is what may be called a "local option" stock statute, which may be put in force in a given territory by a majority vote of the citizens thereof, in which event the owners of stock in such territory will be required to keep them upon their own lands. But applying the law as we have announced it to the facts of this case, we are, nevertheless, of opinion that appellant was not entitled to recover. Several of the witnesses testified that in unloading grain at the distillery it was often the case that some of it was spilled on the ground, and that stock were frequently attracted by the grain thus left upon the ground, and at such times would go upon the premises and eat it. But no witness testified that there was any grain or other provender attractive to stock on the distillery grounds at or just before the time the appellant's horse was killed. Upon the contrary, the evidence showed that the distillery was "closed down;" that it ceased to be operated

June 23, and the horse was not killed until June 27, five days thereafter. And if, as stated by some of the witnesses, hogs and other stock were so frequently lured to the premises by the spilled corn, it is to be presumed that they would in five days have eaten and removed what grain was left on the ground, if any, at the time the distillery ceased to be operated.

Some of the witnesses also testified that appellees' servants sometimes threw malt on the ground from the distillery, but the proof is silent as to there being any malt on the ground at the time the appellant's horse was killed, and one witness, an employe of the appellees, testified that he had never seen stock eat the malt that was thrown on the ground, which statement was not contradicted by any other witness.

In our opinion the cistern was not dangerous per se. It was in the rear of the distillery building, from eighty to one hundred feet from the pike. It will be found that only one witness said the water in the cistern could be seen from the pike; others said it was not visible from the pike. Several witnesses testified that planks were kept upon the cistern; one witness, N. R. Boon, says it was covered with not less than nine pieces of timber.

J. C. McKelvey was the revenue officer in charge of the distillery at the time appellant's horse was killed. He first discovered it in the cistern, and from his testimony it is evident that the timber or covering of the cistern was displaced by the horse when he fell into it, for he stated that some of the pieces had fallen into the cistern and others were projecting over it, and others still were lying by it on the ground. It is manifest, therefore, that some precautions had been taken by appellees or their employes in covering the cistern.

It should be borne in mind that if appellees can be held liable at all, it must be upon the ground that they maintained upon the premises an "attractive nuisance," by which the horse of appellant was invited thereon. As to the care required of them in such a state of case, we find the rule thus stated in section 595 of Thompson's Negligence: "The same rule, subject to qualifications, applies to the case of injuries to domestic animals through pitfalls or other dangers upon uninclosed grounds. That rule is, that the owner or occupier of land is under no legal obligation to take special care or pains to the end of keeping it safe for the protection of the animals of others which may be allowed to run at large, and this without reference to the question whether the rule of the English common law prevails, which requires the owners of domestic animals to restrain them at their peril, or whether the rule of most of the American States prevails which allows domestic animals to run at large, and requires the owners of cultivated fields to fence them." As the appellee's liability, if any, must rest upon the ground that they maintained upon the distillery premises an "attractive nuisance," whereby appellant's horse was induced to enter the same, it necessarily follows that if no such attraction existed no cause of action arose against appellees in appellant's behalf for the death of the horse, though caused by its fall into the cistern. Under the facts of this case the cistern was not necessarily dangerous, or per se a nuisance, nor was there at the time of the death of the appellant's horse anything on or about the distillery premises that could have been called an attractive nuisance by which it was invited to go upon appellant's land.

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We are, therefore, of opinion that the trial court did not err in granting the peremptory instruction.

Wherefore, the judgment is affirmed.

LOUISVILLE RAILWAY CO. v. TEEKIN.

(Filed February 9, 1904—Not to be reported.)

Instructions—Evidence—Where appellee was driving his delivery wagon on the street after dark, and the street was so narrow that appellant's double track took up the most of it, and being warned by a car, moved off on the other track, when his horse was struck and killed by a car coming from the opposite direction, and his wagon demolished and himself injured, the evidence was sufficient to base an instruction for punitive damages.

Fairleigh, Straus & Fairleigh for appellant.

Chatterson & Blitz for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge O'Rear.

The decisive question in this case is whether an instruction allowing punitive damages should have been given.

Appellee was driving his delivery wagon over one of the streets of Louisville after dark, about 8 o'clock at night. The street was so narrow that appellant's double track street railway took up the most of it. Appellee's wagon was being driven on one of the tracks, when being warned by a car coming up in his rear, he drew off to the other track, there being not enough room to the side of the track next to the curbing, when another car, coming in the opposite direction struck his horse, killing it, demolishing the wagon and injuring appellee. This last named car, according to the evidence for appellee, was being run at a high rate of speed, from twelve to twenty miles an hour; it failed to sound its gong at the street crossing near which the accident occurred; the motorman was looking back, and not ahead. We are of opinion that this evidence was enough to base an instruction on for punitive damages, allowable for gross neglect.

Judgment affirmed, with damages.

UNITED STATES CAST IRON PIPE AND FOUNDRY CO. v. GABLE.

(Filed February 9, 1904—Not to be reported.)

Verdict—Sufficiency of pleading—Where there is no bill of evidence in the record and the pleadings are sufficient to support the verdict and the instructions conform to the pleadings, the verdict will not be disturbed.

O'Neal & O'Neal for appellant.

Gardner & Moxley for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

There is no bill of evidence in this record, consequently the only thing we can consider is whether the pleadings support the verdict. The petition alleges in substance that appellant, the employer, negligently suffered a walk way on its premises used by its workmen, including appellee, to get out of repair, so that the covering to a waste pool of hot water was allowed to become rotten and unsafe, which fact was known to the employer, and could have been known to its superior agents in authority by the exercise of ordinary care, but was unknown to the plaintiff, and which he could not have discovered by ordinary diligence; that the plaintiff fell onto this covering without fault on his part, when it gave way, letting him into the boiling water, whereby he was injured. The instructions seem to conform substantially to the pleadings. The pleadings are sufficient to support the verdict.

Judgment affirmed, with damages.

KNUCKLES v. COMMONWEALTH.

(Filed February 9, 1904—Not to be reported.)

Criminal law—Evidence—Where the facts and circumstances testified to by witnesses tend to connect appellant with the crime, and that he stated the morning after the shooting that he shot Helton and was promised \$25 to do it, and had only received \$5, and made other statements which tended to incriminate him, a verdict fixing his punishment at confinement for two years in the penitentiary will not be disturbed.

Lewis & Hansford and H. F. Farmer, Jr., for appellant.

N. B. Hays and Loraline Mix for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was indicted by the grand jury of Leslie county at the March term of the Leslie Circuit Court, 1903, charged with the statutory offense of willfully and maliciously shooting at and wounding one John Helton with an intention of killing him. At the June term of the court he was tried and convicted and sentenced to serve a two-year term in the penitentiary. He appealed to this court for a reversal, and the case was submitted on the 2d of this month, without a brief being filed by either the Commonwealth or the appellant.

We have examined the record carefully and find in substance the following facts: Helton, the person wounded, after supper one evening visited a widow lady, Mrs. Bailey, at the instance of her son, Lee Bailey. On starting to leave for his home, about 200 yards distant, and just as he was about to step out of the door, he was fired upon by some one and shot through the breast and lung. On the next day, when he thought he would not live, he made a statement that he thought he recognized, from the flash or light made by the firing of the gun, Jonah Helton, a cousin of his, as the person who fired the shot. It appears that very soon thereafter he became convinced that he was mistaken in this. Early the next morning after the shooting persons visited the house where the shooting occurred and followed some tracks of persons who were in their sock feet. These persons were tracked across the

valley and up Pine mountain, and there it appears that they put on their shoes. They were then tracked a part of the way down the other side of the mountain, going in the direction of Ann Howard's store and Berry Howard's home. This was about ten or twelve miles from the place of the shooting. The appellant was seen passing a house on this route about daylight the next morning carrying a gun. There he related the fact of Helton's being shot, and made some statements which tended to incriminate him. He arrived at Ann Howard's store at about 8 or 9 o'clock in the morning, and there related the circumstances of the shooting of Helton.

One witness, Jeff Saylor, stated that appellant told him that he had shot Helton; that he had been promised \$25 to kill him and had only been paid \$5, and he was afraid he was not going to get the balance.

Many witnesses were introduced and many facts and circumstances were presented which tended to connect appellant with the crime. The court gave to the jury proper, and the usual, instructions in such cases, and we are of the opinion that the appellant had a fair and impartial trial, and that the jury was very lenient with him.

Wherefore, the judgment of the lower court is affirmed.

BARBOUR v. HUBER'S EX'OR, &c.

(Filed February 10, 1904—Not to be reported.)

Lien—Payment—In an action to obtain a release of lien in a deed where the defense is that the purchase money had not been paid, where the evidence is conflicting, but the circumstances point to the payment of the notes for which the lien is retained, a judgment enforcing the lien for their payment can not be upheld.

Fairleigh, Straus & Fairleigh for appellant.

J. F. Combs for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Paynter.

The relief sought by this action is to obtain a release of the lien retained in the deed which appellee's intestate, Henrietta D. Huber, executed and delivered to the appellant for ten and one-half acres of land. The appellee resisted the relief sought upon the ground that the purchase money had not been paid. There was a sharp conflict in the testimony of Mary J. Hagan, a devisee under the will of testatrix, and John R. T. Barbour. Much of this conflict relates to issues between these witnesses, not the issue here for consideration. The deed was acknowledged in the city of Louisville. Mrs. Hagan claims that her mother did not start to the city with the deed which she made to appellant for the land or the notes which the appellant and her husband executed for the balance of the purchase money. John R. T. Barbour testifies that the notes had been delivered through Mrs. Hagan to the testatrix before the deed was acknowledged; this Mrs. Hagan denies. The notary who took the acknowledgment to the deed testified that the testatrix produced to him at the depot in Louisville (Barbour not being present), the deed to the appellant and acknowledged it, and that she left it with him for the appellant. He also testifies that she had the two notes executed by appellant and her husband for the purchase money, endorsed them on the back

and left them with him to be delivered to John R. T. Barbour. Mrs. Huber's name is endorsed on the back of the notes. The notes were for \$155 each. The weight of the testimony establishes the fact that the notes had been actually received by Mrs. Huber, and after endorsement by her were returned to appellant's husband. This statement becomes important in view of the fact that the notes were delivered to Mrs. B. M. Tucker for value. John R. T. Barbour testifies that the reason the notes were returned to him was, that Mrs. Huber was starting to Texas and she wanted him to use the proceeds to pay several debts for which she was liable. In this he is sustained by Mrs. Hagan, because she said the notes were to be discounted. So far as this record shows there could be no purpose in discounting the notes unless it was for that stated by Barbour, because it is not claimed that the proceeds of the notes were to be sent to Mrs. Huber. She certainly did not want to discount them and thus deprive herself of the interest simply to turn over the proceeds to the husband of appellant without any purpose. John R. T. Barbour and Mrs. Hagan lived near each other. In June following the execution of the notes Barbour sent Mrs. Huber a statement, and the records shows that she never made any complaint to him that he had applied the proceeds of the notes to the payment of any debts or to any purpose not intended by her. We think the circumstances sustain the claim of Barbour. It is admitted that the notes were paid to Mrs. Tucker either by the appellant or her husband. It is immaterial which paid them, as the proceeds were applied as directed by the testatrix.

It is claimed that the contract price of the land was \$635. There were ten and one-quarter acres in the boundary, and the plaintiff claims that it was sold to her at \$40 an acre, and the amount recited in the deed in excess of that (except \$30) was so stated to apparently keep up the price of land in the neighborhood. It was shown that Mrs. Huber did the same thing in a deed to other lands which she sold a short time before. It is recited in the deed that \$325 is cash in hand paid, and for the balance of the purchase money the two notes for \$155 were executed. The evidence shows that the land was not worth \$40 an acre. Mrs. Hagan testifies that the contract price was \$40 an acre, but that the improvements on the place were estimated at \$235. Mrs. Hagan and Barbour contradict each other on this issue, but there is another witness whose testimony tends to support Barbour. In view of the recitation in the deed, and the statement in the notes that they are for the balance of the purchase money, and the other evidence in the record, we conclude that all the purchase money, except that evidenced by the notes, had been paid before the delivery of the deed and the execution of the notes.

The judgment is reversed for proceedings consistent with this opinion.

KINCAID v. COMMONWEALTH.

(Filed February 12, 1904—Not to be reported.)

Robbery—Evidence—A verdict and judgment against appellant will not be disturbed where he was convicted of robbery and sentenced to two years in the penitentiary, the proof showing that while employed in a bar room and eating house he and another gave one Curtis beer, when he became uncon-

scious and was taken upstairs by appellant and another, appellant saying when he came down that he (meaning Curtis) "was a good one for us," it being shown that Curtis had more than \$20 when he went to the place.

F. M. Dailey for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant was indicted by the grand jury of Fayette county of the offense of robbing Joseph Curtis of more than \$20 in United States money, and being put upon his trial before a petit jury was convicted and sentenced to the penitentiary for a term of two years. A reversal is asked upon the sole ground that there was no evidence to support the verdict. Curtis testified that on the 6th of December he went into the bar room and eating house in which appellant was employed; that he had in his possession \$45 or more of United States currency, which was pinned under the sweatband on the inside of his derby hat, and some other moneys in his pocketbook; that while he was eating his dinner with Lula Winkler they drank a bottle of beer; that after he had finished this one Dow Green brought him a glass of beer, and insisted that he should drink it; that he did so, and immediately lost consciousness; that he awoke some time afterwards in a room over the saloon; that he found he had been robbed, and the door locked; that he rang the bell and was let out by a colored boy; that he was sore upon regaining consciousness, and could scarcely walk; that he found a \$10 bill and about \$5 in change scattered on the mattress in the room. Lula Winkler testified that when Curtis came into the saloon he invited Dow Green, appellant, and herself to drink beer; that they drank two glasses each; that Dow Green remarked to her, "Here is a live one, old man; you had just as well spend your money, for I am going to have some any way;" that Curtis was deaf, and did not hear this remark; that she and Curtis then went into the wine room and sat down at a table and began to eat dinner; that Green brought him a glass of beer, and insisted that he drink it; and that the bar-keeper also brought another bottle of beer; that Curtis took a few swallows of this beer and immediately lost consciousness; that thereupon Dow Green and the appellant, Kincaid, each took hold of Curtis, one under each arm, and carried him up stairs; that when they came back Green remarked, "that was a live one, sure," and Kincaid said, "that was a good one for us;" that she remained until the old man came down, and said that he had been robbed. It was also shown by other witnesses that Curtis had the money.

While this evidence of appellant's guilt is not as satisfactory as it might be, we can not say that there is no evidence to support the verdict, and, as frequently decided by this court, we have no power to reverse a criminal case upon the sole ground of insufficient evidence to support the verdict.

For reasons indicated the judgment is affirmed.

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KENTUCKY COURT OF APPEALS.

GERMAN WASHINGTON MUTUAL FIRE INSURANCE CO. v. CITY OF LOUISVILLE.

(Filed February 10, 1904.)

Insurance—Where an assessment insurance company failed to list its property for taxation as required by law, an action for the enforcement of such payment was proper under sections 171, 173 and 174 of the Constitution, and the fact that it was required by ordinance to pay a license tax to a city to carry on its business, makes the collection of taxes double taxation.

G. S. Everbach, I. T. Woodson and Lane & Harrison for appellant.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The appellant is an assessment or co-operative fire insurance company, organized under subdivision 5, chapter 32, Kentucky Statutes, having its chief office and principal place of business in Louisville, Ky. The corporation having refused to list its personal property for taxation, as by law required, the city of Louisville arbitrarily assessed it with the sum of \$50,000 for the years 1899, 1900, 1901 and 1902. Appellant having refused to pay the tax so assessed, this action was instituted for the purpose of enforcing payment.

No claim is made by appellant that it did not own the personalty with which it was assessed. It claims, however, that, being a co-operative insurance company, without stock, inasmuch as its various members pay taxes upon the property insured, therefore, to tax the personalty of the corporation would be double taxation. It is difficult to understand the reasoning upon which this claim is predicated. Section 171 of the Constitution provides that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

"Section 172. All property not exempt from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it

"would bring at a fair voluntary sale." * * * And section 174: "All property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempt by this Constitution, and all corporation property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."

Section 181 provides that the legislature "may, by general laws, delegate the power to county, town, city and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

It will thus be seen that the Constitution provides a general system for the taxation of all real and personal property by an ad valorem tax, and also delegates power to the legislature to authorize the various municipalities to collect franchise and occupation taxes. Because the members pay an ad valorem tax upon the property insured, it does not follow that the imposition of an ad valorem tax on the personalty of the corporation is double taxation. If the personalty of the corporation was in the hands of the individual members it would still be taxable in addition to their other property.

The money sought to be taxed in this case is contributed by the various members, for the purpose of indemnifying any member for the loss of his property by fire. This money, as well as the insured property, is subject to taxation. The money in the hands of the corporation being taxed once and the property in the hands of the individual members being taxed once, this is not double taxation. It is simply the enforcement of the constitutional rule that all property, whether real or personal, shall pay a uniform rate of ad valorem taxation.

It is further contended by appellant that, inasmuch as it was required by an ordinance of the city of Louisville to pay a license for carrying on the business of a fire insurance company for the years wherein the ad valorem tax is sought to be collected, that fact makes the collection of the ad valorem tax double taxation. After the passage of the act for the government of cities of the first class in 1893 the municipality sought to tax certain business by means of a license, which was to be in lieu of the ad valorem tax prescribed by the Constitution. In the case of *Levi v. City of Louisville*, 97 Ky., 394, it was held that this could not be done; that the ad valorem tax must be enforced uniformly, and that the license or occupation tax must be in addition to the ad valorem tax. The court, in thus overturning the system by which the municipality sought to substitute a system of licenses in lieu of the ad valorem tax, after directing that the ad valorem tax should be retrospectively imposed, said: That inasmuch as the license fees as indicated by their amount approximated the value of the ad valorem tax, the former might be deducted from or credited on the latter for the given years. But this was done only because the licenses had been imposed as a substitute for the ad valorem system, and the language of the court has no application where the license is an occupation tax, and is imposed in addition to the ad valorem system.

Section 3011, Kentucky Statutes, provides: "The general council (of cities

of the first class) may, by ordinance, provide for the following licenses to be paid into the sinking fund, with added penalties for doing business, for following the calling, occupation, profession or the using or holding or exhibiting of the articles herein named, without the required license;" then follows the general list, including, specifically, the name of every business which the legislature could call to mind, among which were the following:

"Every life, fire or accident, casualty and indemnity insurance company * * * doing business in this city, shall, on or before the first day of February of each year, pay to the sinking fund not less than two nor more than three dollars on every one hundred dollars of premiums received on business done in the city during the previous year."

In pursuance of this authority the general council, on April 1, 1896, enacted an ordinance, entitled "An ordinance providing for certain licenses for the sinking fund of the city of Louisville," which is as follows:

"Be it ordered by the general council of the city of Louisville:

"Section 1. That hereafter the following licenses shall be paid into the sinking fund of the city of Louisville, for the purpose of the sinking fund, for doing the business, following the calling, occupation and profession, or using or holding or exhibiting the articles hereinafter named in the city of Louisville, in addition to the ad valorem tax heretofore levied, or hereafter to be levied, on any species of property in the city of Louisville." * * *

Among the occupations required to be taxed by the provisions of this ordinance were the following: "Every life, fire, accident, casualty and indemnity insurance company doing business in this city shall, on or before the 1st day of February of each year, pay to the sinking fund the sum of two dollars and fifty cents on every one hundred dollars of premiums on business done in the city during the previous year." * * *

It will be observed that this ordinance specifically provides that the license shall be in addition to the ad valorem tax required by the Constitution and the charter to be paid on all property within the city limits; that the general council had the right thus to require the payment of the occupation tax in question, in addition to the ad valorem tax, was clearly settled in the cases of *Levi v. City of Louisville*; *Commonwealth v. Pearl Laundry Co., &c.*, 105 Ky., 259, and *Fidelity Casualty Co. v. City of Louisville*, 20 Ky. Law Rep., 1785. The opinions in these three cases are conclusive of the right of the municipality to levy the occupation tax provided for by the ordinance, in addition to the ad valorem tax required by the Constitution and the charter. They are so exhaustive of the subject and so plain in their meaning that it is unnecessary to further attempt to elucidate the proposition.

It follows that appellant is not entitled to a credit of the amount of the license tax paid under the ordinance on the ad valorem bills sued on.

The judgment of the chancellor is affirmed.

NUTTER v. SOUTHERN RAILWAY IN KENTUCKY.

(Filed February 10, 1904—Not to be reported.)

Railroads—Where appellant was compelled by the conductor to leave the train because she had neither ticket nor money, the fact that she had purchased a ticket which she had given a friend to keep for her who failed to get on the train with it does not render the company liable, and an instruction of the trial court to the jury to find for defendant was proper in an action against it for damages.

L. F. Sinclair and V. F. Bradley for appellant.

Humphrey, Burnett & Humphrey and R. E. Roberts for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

Appellant and a friend, Mrs. Logan, boarded appellee's train at its Seventh Street Station in Louisville, Ky., for the purpose of going to their home, Georgetown, Ky. Before entering the train appellant handed her ticket to her companion, Mrs. Logan, for safe keeping. The latter not being able to secure a seat in the car with appellant, left it for the purpose of going into another car; and, by accident, was left at the station, keeping with her appellant's ticket. When the conductor made his rounds to collect fares from the passengers appellant had neither ticket nor money, whereupon, at the Fourth Street Station, in Louisville, she was required to, and did, leave the train. She took a street car, rode down to the Seventh Street Station, found her friend and ticket, and that afternoon they went to Georgetown.

To recover damages of appellant for being required to leave the train, under these circumstances, this action was instituted.

It was decided in the case of *Brown's Adm'r v. L. & N. R. R. Co.*, 108 Ky., 211, that a common carrier of passengers had the right to eject a passenger who refused, upon demand, either to produce a ticket or pay fare. To the same effect is the opinion of the Superior Court in the case of *C. & N. O. & T. P. R. R. Co. v. Barkley*, 18 Ky. Law Rep., 381; *Commonwealth v. Power*, 41 Am. Dec., 465, and the note thereto, in which it is said: "It is a universal rule among railway companies to eject passengers who refuse, upon proper demand, to show or surrender their tickets or pay fare, and its reasonableness is beyond question, for, by such refusal, a passenger becomes a mere trespasser. (*Ohio, &c., R. R. Co. v. Muhling*, 30 Ill., 9; *Chicago, &c., R. R. Co. v. Roberts*, 40 Ill., 503; *State v. Overton*, 24 N. J. L., 425.)"

In 6 Ency., 551, the rule is thus stated: "For refusing to pay the required fare for transportation, the reasonable and usual remedy is expulsion."

In the *Amr. & Eng. Ency. of Law*, 1st edition, 1076, it is said: "It may be stated as a general rule that the ticket is the only evidence, as between the conductor and passenger, of the latter's right to transportation, and he must exhibit it when demanded. If he fails to do this and refuses to pay fare, he may be expelled from the train, and the rule is not altered by the fact that the passenger had a ticket but lost it."

In the case of *Downs v. New York and New Haven R. R. Co.*, 4 Am. Rep. 77, a passenger was the owner of a commutation ticket, which he was required, under the rules of the company, to exhibit whenever he rode on

its train. On the particular day in question he forgot his ticket, and, refusing to pay fare, was ejected. The court held that this was a proper exercise of a reasonable regulation. To the same effect is the opinion in the case of McClure v. Philadelphia, Wilmington and Baltimore R. R. Co., 6 Am. Rep., 845.

There was no evidence to uphold the allegation of appellant's petition that the conductor knew she had a ticket, but this would have made no difference, as the fact that she once had a ticket would not have been evidence that she had not sold it or given it away. The evidence developed the facts as herein stated, and the trial court, upon motion at the conclusion of appellant's testimony, instructed the jury to find for the defendant, which was done. This ruling was a correct exposition of the law applicable to the case.

Judgment affirmed.

GUTHRIE v. GUTHRIE.

(Filed February 10, 1904—Not to be reported.)

Wills—In a devise to the wife of all testator's estate, with direction to assist one son in such way as may be deemed proper and right, charging him with such sums as she may advance him, and in another clause it was directed that after the death of the mother all of the property should go to the children, which were appellant and four brothers and sisters, equally, where the mother built a small house on fifteen acres of ground, allowing appellant to live upon it although he lived upon it for twenty years, in an action against the son by the mother for the possession of the property, it appearing that she had merely allowed him the use of the property, he could not, against his co-tenants, acquire title by lapse of time, and the judgment against him will not be disturbed, the issues having been fairly submitted under proper instructions.

W. Scott Morrison for appellant.

Miller & Todd and R. G. Hill for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

G. C. Guthrie, Sr., died, domiciled in Daviess county, Ky., in 1881, leaving a last will and testament, which was duly admitted to probate. By the third clause of his will he provides as follows: "I give to my beloved wife, Bettie L. Guthrie, during her life or widowhood, all my real and personal estate, of every kind, to have, hold and manage for her own use and support, and for the use and support and education of my four children until they are grown; also my wife will, in her discretion upon her judgment, assist my son, Granville C. Guthrie, now of age, in such way as may be deemed proper and right, charging him with such sums as she may advance to him. My wife is directed especially to properly educate the four young children, making no charge therefor. She will also, when they are of proper age, or married, make to them such advances as may by her be deemed proper."

The property left by the decedent in the main consisted of a farm of one

hundred and eighty acres of land, situated near the city of Owensboro, Daviess county, Ky.

By another clause of the will it was provided that after the death of the mother all of the property of the decedent should go to appellant and his four brothers and sisters equally.

After the death of his father G. C. Guthrie lived in the mansion house with his mother for several years. About 1888 appellee built a small house on fifteen acres of the farm left by her husband, which she permitted appellant to occupy and use, together with the land upon which it was situated. Appellant took possession of the property, planted some fruit trees, fenced it, added an addition to the dwelling house, and resided thereon for twenty years, when his mother demanded of him possession, and upon his refusing instituted this action to recover it, alleging in her petition that she was the owner and entitled to the possession of the land, and that appellant had possession without right, and wrongfully withheld it from her.

Appellant's answer denied the title of appellee, and pleaded the fact that his mother had given him the use of the property as an advance, under the third clause of his father's will, and pleaded title by adverse possession for more than fifteen years. The issues were made up on these lines, and a trial resulted in judgment in favor of appellee.

As said before, appellant claimed that his mother had given him the property under the third clause of his father's will to possess as his own. This she denied, claiming that she had simply given him the right to the use of the land during her will, and that he was, therefore, a tenant at will, and, after proper notice to surrender, was wrongfully in possession.

Appellant could only plead the statute of limitation as against his mother; he could not acquire, by lapse of time, a title as against his co-tenants in remainder. They have no cause of action against him until after the termination of the life estate, and, having no cause of action, time does not run against them.

The questions as to whether or not appellee gave appellant the use of the land during her life estate, or whether or not she gave him the use during her pleasure, and whether or not he had acquired title against her by adverse possession, were fairly submitted to the jury under the instructions of the court, and these issues were found against him. We think, upon the whole, the court gave the law as favorably to appellant as he was entitled.

It having been determined by the jury that appellant was only a tenant at will by the verbal contract between him and his mother, he was not entitled to recover the value of the improvements placed upon the property by him, in the absence of a contract on that subject. In the Am & Eng. Ency. of Law, volume 16, 2d edition, page 110, it is said: "It is well settled that one who has occupied land merely as the tenant or lessee of another is not entitled as against his lessor to any compensation for improvements which he may have placed on the demised premises, in the absence of some express or implied covenant or agreement on the part of the lessor to pay therefor."

In the case of Gray v. Oyler, 2 Bush, 256, on a question similar to the one at bar, this court said: "If one without claim or contract voluntarily erects a building on another's land, the law would doubtless withhold compensation, and also prevent his removal of the fixtures. And so with the lessee

who shall, without contract, express or implied, voluntarily erect fixtures, as contradistinguished from chattels, on the lessee's premises."

In *Gudgell v. Duvall*, 4 J. J. M., 239, the court held where one took possession of land under a verbal lease and made improvements he was not entitled to compensation for the value of the improvements, in the absence of a contract to that effect. The court, in denying the right to recovery for the improvements, said: "No express contract to pay for the improvements has been proved, and no fact from which a contract to pay for them can be implied."

The court did not err in rejecting the amended rejoinder of appellant. We do not think the facts set up therein had any tendency to elucidate the issues involved in this case, and, even had it been material, it would have been within the discretion of the trial judge to admit it or not.

Perceiving no error in the record, the judgment is affirmed.

LEAK'S HEIRS v. LEAK'S EX'OR.

(Filed February 10, 1904—Not to be reported.)

Wills—Charitable bequests—The general doctrine as to charitable bequests is that the beneficiaries may be designated as a class only, leaving the particular object of the testator's benefaction to be determined by the trustee appointed to administer it, and where the will indicates with reasonable certainty the purposes in the mind of the testatrix as to the disposition of her estate, and the classes to which she desired her property to be appropriated, the selection of the special beneficiaries is left to her executor.

O. H. Waddle and T. B. Stinchomb for appellants.

Virgil P. Smith for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellants, heirs at law of Victoria Ann Leak, seek on this appeal to have her will declared invalid because it does not point out with reasonable certainty the purposes of the charity and the beneficiaries thereof as required by section 317 of the Kentucky Statutes. The clauses of the will which are assailed in this action are as follows:

"Second. I authorize and empower my executor hereinafter named to sell and dispose of my estate, real and personal, * * * for the following purposes in the order enumerated, and in such proportions and manner as may be deemed wise and best by my executor.

"1st. For the aid of a Bible training and missionary school for Christian workers.

"2d. For the support of a missionary or missionaries in the foreign field.

"3d. To aid in carrying on the cause of Bible holiness, including fire baptized holiness work and evangelism.

"4th. To aid in the support of needed and destitute ministers of the Gospel."

H. D. Scudday, the testamentary executor of the will of decedent, testifies to the existence of a number of Bible training and missionary schools for

Christian workers in the United States, the purpose of such schools being to specially fit persons for missionary and church work, and that Mrs. Leak, during her lifetime paid the expenses of a missionary engaged in church work in a foreign field, and was greatly interested in the success of these schools. He also testifies to the existence of a national association for the promotion of Bible holiness, of which the Rev. C. J. Fowler is the president and to another distinct association known as the Fire Baptized Holiness Association, in which decedent was an active evangelist, commissioned by the chief officers of the association during her lifetime. When asked the difference between Bible holiness and fire baptized holiness the witness answered: "Ordinary Bible holiness means the second blessing, and fire baptized holiness the third blessing, which gives the Christian greater unction and enthusiasm;" that these distinctive associations find authority for their existence in the eleventh and twelfth verses of the third chapter of St. Matthew, which read as follows:

"11. I indeed baptize you with water unto repentance, but he that cometh after me is mightier than I, whose shoes I am not worthy to bear. He shall baptize you with the Holy Ghost and with fire.

"12. Whose fan is in His hand, and He will thoroughly purge His floor and gather His wheat into the garner, but He will burn up the chaff with unquenchable fire."

He also testifies to the existence of large numbers of needed and destitute ministers of the Gospel in all denominations.

The general doctrine as to charitable bequests, as announced in a large number of adjudicated cases by this court, is that the beneficiaries may be designated as a class only, leaving the particular object of the testator's benefaction to be determined by the trustee appointed to administer it.

In the light of the testimony of the executor, we are of the opinion that the will in this case indicates with reasonable certainty the purposes in the mind of testatrix in the disposition of her estate, and the classes to which she desired her benefactions to be appropriated, the selection of the special beneficiaries being left to the discretion of her executor. The amendment to section 317 of the Kentucky Statutes, enacted by the general assembly in 1893, has been so thoroughly considered in a number of very recent cases that we deem it unnecessary to again enter into an elaborate argument to sustain our conclusion that the trial court did not err in the judgment appealed from. (*Crawford's Heirs v. Thomas Ex'or*, 21 Ky. Law Rep., 1100; *Thompson's Ex'or v. Brown*, 25 Ky. Law Rep., 371.)

Judgment affirmed.

CARPENTER, &c v. RICE'S ADM'R.

(Filed February 11, 1904—Not to be reported.)

Decedent's estate—Evidence—Under section 606 of the Code of Practice one may testify for himself concerning a transaction with a decedent where one interested in the estate has testified as to the same transaction.

Hall & McLean, W. M. Fenley and W. C. Hall for appellants.

B. F. Meniffee and J. G. Tomlin for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought by appellee to recover a judgment and to enforce a mortgage lien on real estate upon a note, dated March 7, 1878, for the sum of \$1,450. The note bore 8 per cent. interest from date until paid, and was executed at the time when 8 per cent. was legal when provided for in the contract. Several credits were endorsed on the note and the appellant answered, claiming additional credits, one of \$175, another of about \$300. These two credits he claimed were the first credits to which he was entitled. On the note was endorsed a credit of \$497 as of date April 27, 1893. He claimed in his answer that at that date he paid in a check on the note the sum of \$997 and \$3 in silver, and that he was entitled by reason thereof to an additional credit as of that date, \$503. He also claimed that, by an arrangement between himself and the appellee's intestate, he was to only pay 6 per cent. interest after the maturity of the note; that decedent had agreed if he would keep the money that he would exact of him only 6 per cent. interest after that date. Appellee controverted this answer.

On the trial of the case the appellant produced the check for \$997, showing the endorsement of Lewis Rice, and that he had received the money thereon. The appellee introduced a daughter and heir of the decedent, who testified at the time of this payment, April 27th, 1893, decedent held two notes of appellant, creating the impression that a part of this payment went to the credit of this second note. Appellant was then introduced as a witness and was properly permitted to testify as to this particular transaction, and he denied that at that time the decedent held two notes against him, or any other note than the one sued on in this action. Then appellant's counsel offered to prove by him the payment of the \$3 in connection with this check, and the other two credits claimed by him of \$175 and \$300. Upon objection the court refused to permit him to testify about these other transactions. The appellant complains of this. The court was correct in its ruling. Under section 606 of the Code a person may testify for himself concerning a transaction with a decedent where one interested in the estate of the decedent has testified as to the same transaction.

The court properly allowed him the additional credit of \$500 of date April 27, 1903, and refused the other claimed credits of \$175, \$300 and the \$3, as there was failure of proof on the part of appellant concerning them. The court also properly refused to reduce the interest on the note from 8 per cent. to 6 per cent. from the maturity of the note, for a like reason. We are of the opinion that the court erred in its judgment in the manner in which the interest on the note should be calculated against the appellant. The court misconstrued the effect and intent of these words contained in the note, to wit, "and to pay the interest annually for value received of him." The court adjudged not only that the appellant should pay 8 per cent. interest per annum from the date of the note until paid and interest upon interest at 6 per cent. until the maturity of the note, but also adjudged that appellant should pay interest upon interest as it accrued annually after the maturity of the note at the rate of 6 per cent. per annum until the note was paid. The court erred in allowing this interest upon interest after the maturity of the note. The proper judgment should have

been for 8 per cent. interest from date until paid and interest upon interest at 6 per cent. per annum until maturity, and after maturity the interest should have been calculated in the ordinary way. (*Hall v. Scott's Adm'r*, 90 Ky., 340; *Magruder v. DeHaven*, 21 Ky. Law Rep., 580.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HODGES V. METCALFE COUNTY COURT.

(Filed February 11, 1904.)

J. W. Kinnaird and M. O. Scott for appellant.

Appeal from Metcalfe Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

Upon a re-examination of this case, upon a petition for rehearing, the court adheres to the original opinion.

The petition assumes that this decision is in conflict with *Hodges v. Metcalfe County Court*, decided October 22, 1903, 25 Ky. Law Rep., 772. The result may be, but the opinions are not inconsistent. In the last-named case the only questions passed upon were, first, where an applicant to retail liquors has made out a prima facie case under the statute, and there is no remonstrance from the neighborhood affected, it is the duty of the county court to grant the license; second, where an appeal is taken to the circuit court from the action of the county court, it must be tried on a bill of exceptions; and, third, upon a reversal of the judgment of the county court to the circuit court, the latter is not authorized to enter a judgment granting or refusing license, but must remand the application to the county court, where the judgment must be entered as directed. We adhere to what was there said.

In that case it was assumed, and so far as the opinion shows, it was a fact, that the applicant had made out his prima facie case in every particular. Our attention was not then directed to sections 4205 to 4214, Kentucky Statutes, nor were those sections, or the facts of that case calling them into consideration, passed upon or considered at all. If these sections had been relied on, and the facts appearing the same as in this record, our conclusions would have been as in the original opinion in this case. The opinions are in no sense conflicting.

In the original opinion a part only of section 4205, Kentucky Statutes, is quoted. The next sentence after the quoted part reads: "And such license shall only authorize the person to sell the liquor named in the license in quantities not less than a quart." (Druggists who sell for medicinal purposes on the prescription of a physician are excepted.)

Appellant contends that section 424 applies only to licenses for selling in quantities less than a quart. That is true. But the whole chapter together shows that liquor sellers who may be licensed are thus classified: First, distillers; second, wholesalers, which two include rectifiers (as a branch of these classes); third, retailers. This class is particularized by section 4205, as shown in the quotation in the original opinion; it includes druggists. Fourth, tavernkeepers. Appellant does not show himself to belong to any

of the classes above named. Consequently he did not show himself entitled to a license to sell liquor in any quantity, or for any purpose.

Appellant cites section 4224, Kentucky Statutes, as conferring authority to grant the license. It does not. It merely fixes the tax to be collected of those to whom licenses may be granted according to law. The license tax imposed for retailing spirituous and vinous liquors is \$100, whether conducted in a city or elsewhere. Only if conducted not in a city the license will not authorize any person except a druggist or licensed tavernkeeper to sell in quantities less than a quart. Nor can the license be granted to any person to sell by retail not in an incorporated town or city, unless such person is a distiller, druggist, merchant or licensed tavernkeeper. All licenses are granted by the county court clerk, except to retail liquor dealers and tavernkeepers. These are granted by the county court. (Section 4203.) Section 4224 must be read and applied in connection with the preceding sections on the subject.

The petition is overruled.

CHAMBERS, &c. v. HASKELL, &c.

(Filed February 11, 1904—Not to be reported.)

Lands—Trespass—Injunction—In an action to enjoin the commission of trespass to lands, where the legal title is held by plaintiff, where the petition sets out such facts as show the peaceable possession is interfered with, such acts being committed as tearing down fences, threatening tenants and so on, an injunction was authorized restraining the commission of such acts, and it was error in the chancellor to sustain a demurrer to the petition.

D. K. Weis for appellants.

D. W. Steele, Jr., for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellants brought this action against the appellees asking that they be enjoined and restrained from trespassing upon certain lots owned by them in the town of Ashland, or interfering with their erection of a screen or fence thereon. They allege that the appellant, Susan E. Chambers, is the owner and in possession of lots numbers 11 and 12 on the north side of Winchester avenue, between Fifteenth and Sixteenth streets, in Ashland, Kentucky, and that Otis J. Chambers is her husband; that the defendants have frequently, unlawfully and without right, entered upon these lots and interfered with the peaceable enjoyment by their tenants thereon; that on the — day of July, while the plaintiff, O. J. Chambers, was at work erecting a screen on lot No. 11, which was necessary for the comfortable enjoyment of the residence thereon, the defendant, Haskell, entered upon the lot, abused, insulted and threatened to inflict upon him personal violence, and to tear down the screen he was then erecting; that subsequently, in the night time, the defendants, in connection with others unknown to plaintiffs, entered upon lot No. 11 and forcibly took down the screen and carried away the lumber used in its construction; and threatened that they would continue to enter upon the plaintiffs' premises and interfere with them,

and their tenants in the peaceable enjoyment of their property; that both of the defendants are insolvent, and that they have no adequate remedy at law for the protection of their property or its comfortable use and enjoyment, and ask that an injunction should issue restraining the defendants from trespassing upon the premises or tearing away the screens or fences, or from inflicting further injury thereon. The defendants filed a general demurrer to the plaintiffs' petition, which was sustained, and plaintiffs refusing to plead further, their petition was dismissed, and they have appealed.

Section 2361 of the Kentucky Statutes provides that "the owner of any land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain injury committed thereon, or to prevent or restrain any trespass or other injury thereto, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass."

Section 272 of the Civil Code provides that "If it appear from the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of an act which would produce great or irreparable injury to plaintiff, * * * a temporary injunction may be granted to restrain such act."

The law is well settled that an injunction will lie to restrain a trespass to real estate if the threatened trespass is so vexatiously persisted in that a multiplicity of suits must result, or is made by one who is insolvent and against whom a verdict would be valueless. (*Hillman v. Hurley*, 82 Ky., 626; *Preston v. Preston*, 85 Ky., 12; *Ellis v. Wren*, 84 Ky., 254.) The demurrer in this case admits that the defendants have repeatedly, without right, trespassed upon the plaintiffs' property and interfered with the peaceable enjoyment thereof; that they have unlawfully torn down and carried away a screen erected thereon by plaintiffs for their comfort and convenience, and threatened that they will continue to do so in future, if plaintiffs, against their objection, should erect structures of similar character. It also admits that the defendants are insolvent, and that a judgment against them for damages would be valueless. The mere fact that the criminal law provides adequate punishment for the offense committed by defendant against the plaintiffs afford no compensation to them for past or future trespasses upon their property. We are of the opinion that the averments of the petition set out a case which authorized at the hands of the chancellor the injunction restraining trespass to the real estate.

The judgment is, therefore, reversed and cause remanded for proceedings consistent herewith.

RHODES, &c. v. LOWRY & GOEBEL.

(Filed February 11, 1904—Not to be reported.)

Sales of goods—Partnership—In an action against a firm for goods sold, where the record shows that Rosalie Rhodes wrote a letter to the firm stating that she was a partner in response to a letter from the seller asking if she was a partner, and that if she was not the goods would not be sold the firm, and where the evidence was sufficient to show that she was a member of the firm, or had an interest in it, a judgment against her will not be disturbed.

Thos. E. Ward for appellants.

R. H. Cunningham for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought on two promissory notes, amounting to something over the sum of \$500, in favor of appellees against Moses Rhodes, James. Kitchens and Rosalie Rhodes, partners, doing business under the firm name of Kitchens & Rhodes. Rosalie Rhodes denied that she was a partner, or that she had any interest in the firm. The issues were completed on this question, and the lower court on the evidence decided that she was a member of the firm, and rendered judgment for the appellees against all the defendants.

The only question on this appeal is one of fact, and is whether or not appellant, Rosalie Rhodes, was a member of the firm of Kitchens & Rhodes at the time the indebtedness was incurred. The record in substance shows that some years prior to the formation of the firm of Kitchens & Rhodes that Moses Rhodes became involved and transferred considerable real estate in Henderson county to his wife, the appellant herein; that some time prior to the creation of the indebtedness sued on he went to East St. Louis and purchased from one Dates his one-half interest in a furniture store owned by Kitchens & Dates; that Dates made a bill of sale of his interest to one R. L. Rhodes, and from that time the firm was known as Kitchens & Rhodes; that Dates was given a sight draft for \$100, drawn on one R. L. Rhodes, of Henderson, Ky., and the balance of the purchase price was a note signed by "R. L. Rhodes per Moses Rhodes." At that time appellant resided in Henderson, Ky. It also appears that appellees, before making a sale of the goods to the firm, wrote the appellant a letter in effect stating that if appellant was a member of the firm of Kitchens & Rhodes they would sell them the goods, but if she was not a member of the firm they would not. In reply they received a letter signed with appellant's name, stating that she was a member of the firm. It also appeared that after Dates' interest in the stock was purchased the firm had letter and bill-heads printed and used them in their business, showing that James Kitchens and R. L. Rhodes were the members composing the firm. A witness by the name of John L. Jones testified that while this firm was in business in East St. Louis he had a conversation, at her house in the city of Henderson, with her, in which she asked him how the firm of Kitchens & Rhodes were getting along with their business (the witness having recently been in East St. Louis), and he told her that he did not think the firm would make money, and then she said that she was going to have the management of the firm taken away from Kitchens. It was also shown that in the year 1900, but after the execution of the notes to the appellees, the appellant executed a bill of sale selling her interest to the Rhodes Furniture Co. for the price of \$1,200, which bill of sale was acknowledged and recorded in the office of the county clerk of St. Clair county, Illinois.

Appellant denied that she ever was a member of the firm, or that she wrote the letter to appellees stating that she was a member of the firm, and also stated that she supposed she did execute the bill of sale to the Rhodes Furni-

ture Co., but stated that if she did, she did not know what she was signing or acknowledging. Kitchens stated that he did not know whether or not she was a partner, and stated that he did not know who R. L. Rhodes was. There was proof showing what Kitchens and Moses Rhodes said about the interest of appellant in the concern, which was incompetent. Many things might be said with reference to the conduct of Moses Rhodes and his wife, Rosalie Rhodes, concerning this transaction, but it is sufficient to say that there was sufficient, competent and relevant testimony to show that appellant had an interest in the firm of Kitchens & Rhodes, and that the judgment of the lower court was proper.

Wherefore, the judgment is affirmed.

BOHANNON, TRUSTEE v. CLARK, &c.

(Filed February 11, 1904—Not to be reported.)

1. Bankruptcy—Liens—In an action by appellant, a trustee in bankruptcy of appellee, against him and his wife to set aside a conveyance to the wife by the husband, which had been made shortly before the filing of his petition in bankruptcy, the conveyance was properly set aside, but it appearing that the wife had paid part of the purchase price for the land, she was properly adjudged a lien to the extent of the purchase money paid by her.

2. Same—Where an action has been tried and judgment entered fixing the rights of the parties, it is too late to file an amended petition, it presenting new issues, which, if proper at all, should have been presented with the other issues involved.

C. H. Hackett and Luther James for appellant.

Baird & Richardson for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Settle.

W. H. Clark, of Barren county, upon his own petition was declared a bankrupt in the year 1903, and the appellant, G. M. Bohannon, was elected trustee of his estate. Thereafter this action was instituted by the appellant as such trustee in, the Barren Circuit Court to discover and subject to the payment of the debts of the bankrupt certain personal property alleged to have been transferred by him to his wife, the appellee, Lillian Clark, and to set aside a deed which he made to her shortly before the filing of his petition in bankruptcy, whereby he conveyed to her his undivided interest of one-half in a certain tract of land. The wife was made a defendant in the action, and she and her husband filed separate answers. The answer of the latter contained specific denial of the averments of the petition and answers to certain questions annexed to the petition; that of the wife in addition to a traverse of the averments of the petition alleged that the land sought to be subjected to the payment of the debts of the bankrupt was purchased by her alone, but that by mistake of the vendor the same had been conveyed to her and her husband jointly; that she had furnished all of the purchase money that had been paid thereon with the proceeds of a farm in Green county, which she sold before the purchase of the Barren county land. Both answers were controverted by reply, and after the taking of depositions by

the parties the case was submitted for trial, and the chancellor rendered a judgment setting aside the deed made to the appellee, Lillian Clark, by her husband, and vesting in the appellant, trustee, the title to the land thereby conveyed for the benefit of the husband's creditors, but as it appeared that Lillian Clark had paid of the purchase money due the vendor of herself and her husband \$1,100, one-half of which should have been paid by her husband, the judgment gave her a lien on that part of the land adjudged the latter's trustee for \$550, one-half of the sum so paid by her.

It further appearing from the answer and cross petition of Lizzie Anderson that she was the owner by assignment of two of the notes, aggregating \$680, executed by Lillian and W. H. Clark in part payment of the purchase money on the land as a whole, a supplemental judgment was rendered by the chancellor, directing a sale of all the land, or enough thereof to pay the two notes mentioned. After the entering of the original and supplemental judgments the appellant filed an amended petition, seeking to recover of the appellee, Lillian Clark, rents for certain years upon the half of the land attempted to be conveyed her by her husband, but the deed to which was set aside by the judgment of the lower court, it being claimed that she had had possession of and cultivation of the same during these years. But the claim to such rents was disallowed by the court. From this judgment, and so much of the first judgment as allowed the appellee a lien upon the half of the land attempted to be conveyed her by her husband, the trustee has appealed, and from so much of the first judgment as set aside the deed to her from her husband the appellee, Lillian Clark, prosecutes a cross appeal. The evidence found in the record discloses the following facts: The appellee, Lillian Clark, first married one Sims in Tennessee, who died leaving some landed and personal estate and two children. Appellee, after the death of Sims, bought of one of his children his interest in the land left by the father; the other child died after becoming of age, and under the laws of Tennessee appellee inherited his interest in the land. Thereafter she sold the land, and after her marriage to her present husband they removed from Tennessee to Green county, Ky., where they purchased a small farm, the title of which was conveyed the husband. Whether or not the conveyance of the Green county land to the husband was made with the wife's consent we are unable to determine from the evidence, nor is it material in this case, for the title was acquired by the husband long before the creation of any of the debts, from which he seeks a discharge in bankruptcy. The Green county land was sold in 1893 for \$1,050, and notes for the purchase money were made payable to the appellee, Lillian Clark. In 1894, and subsequent to the creation of the bankrupt's debts mentioned in the petition, she and her husband bought the land in Barren county, which was conveyed to them jointly. She and the husband claim that this was a mistake; that she alone was the purchaser. We are of opinion, however, that the proof does not sustain the claim, but, upon the contrary, tends to show that her claim of sole ownership is untrue. But it is satisfactorily established by the evidence that she furnished all the money that was paid on the land that was conveyed them jointly. She secured the \$1,100, which she paid on the Barren county land, by a sale to her brother of the notes received by her for the Green county land.

As already stated, it does not matter that her husband owned the Green county land. As he acquired it before any of the debts that have been filed against his estate as a bankrupt were created, as against those debts he was entitled to a homestead in the land, therefore, \$1,000 of the proceeds of the land, after its sale, were exempt from his debts. He had the right to give the proceeds of the land to the amount of \$1,000 to his wife, and she had the right to invest that sum in other land and take the title to herself, so in applying the proceeds of the Green county farm to the purchase of the Barren county land no wrong was done the husband's creditors, as has been repeatedly held by this court. (*Lee v. Campbell*, 8 Ky. Law Rep., 421; *Cravens v. Shippen*.)

As she sold the Green county land notes to her brother for \$1,100, and paid that amount on her husband's half of the land as well as her own, and his half must, under the judgment of the chancellor, go into the hands of his trustee, to be sold and applied to the payment of his debts, it is but just that its proceeds should first be used to pay its ratable part of the \$680 of unpaid purchase money going to Mrs. Anderson, holder of two of the original lien notes, then to reimburse the appellee, Lillian Clark, for the \$550 paid by her thereon for her husband, the remainder, if any, to be distributed among his general creditors, and as the judgment of the chancellor seems to have determined the rights of the parties upon this basis, it should not be disturbed. We do not think it was error for the chancellor to refuse appellant the rents claimed in the last amended petition. If for no other reason, it was right to reject the claim because the amendment came too late. The case had been tried and judgment entered fixing the rights of the parties before the amendment was filed. It would have been improper to reopen the case to litigate new issues which, if proper at all, should have been presented with the other issues involved. The only error committed by the chancellor was in permitting the amendment in question to be filed. Finding no error in the record prejudicial to the rights of the parties the judgment is affirmed on both the original and cross appeal.

LOUISVILLE & NASHVILLE R. R. CO. v. EWING'S ADM'X.

(Filed February 11, 1904.)

1. Railroads—Damages—Negligence—Where a brakeman on one of appellant's freight trains was uncoupling cars by the direction of the conductor and was run over by other cars which were not set so as to prevent them from moving, and received injuries from which he died, it was such negligence of the conductor in not seeing that the brakes were set so as to keep the cars stationary that the railroad company is liable for the damages resulting from the brakeman's death.

2. Same—Proximate cause—Where a brakeman was killed by being run over by dead cars, the brakes not being set, it being the duty of the conductor to see that such brakes were set, the conduct of the conductor in not setting the dead cars so as to keep them stationary was the proximate cause of the death of the brakeman.

Benj. D. Warfield, Edward W. Hines, Helm, Bruce & Helm and D. H. French for appellant.

B. F. Procter, Morris & Morris, G. H. Herdman and Robt. L. Greene for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge O'Rear.

John A. Ewing, a brakeman on one of appellant's freight trains, was fatally injured in the following manner: A previous train had some fifteen hours before cut off and left ten or twelve cars on a siding at Lagrange. Of these three were to be taken out by Ewing's train and put into it, to be carried on. Ewing, as was his duty as brakeman, shifted the switch for the siding and preceded the engine, which was pushing three cars ahead of it, to the string of cars first mentioned, where he uncoupled the two to be taken out, coupled them to the front of the cars attached to his engine and gave the signal to back out, which was obeyed. He rode the cars out to the switch, where he dismounted, and threw the switch so as to run the engine and cars forward on the right track. As the cars came forward, being pushed by the engine, he mounted the side ladder on the corner of the front car, signaling to the fireman to "come ahead." It was then dark. As these cars were being pushed forward they were met before they had cleared the siding by the other cars which had been left there, the remaining of the ten or twelve first mentioned. In the collision Ewing was crushed, from which he died. The tracks all had a down grade from the point where the dead cars had been left toward the point where the collision occurred.

The negligence complained of, and because of which it is charged that Ewing was injured, was in leaving the cars on the siding without their brakes being set so as to prevent their rolling out by gravity and of their own momentum. It is charged, first, that this negligence occurred when the conductor and crew of the train who set those cars in there failed to properly set the brakes on them so as to prevent their rolling out; and, second, that Ewing's conductor was negligent in not seeing personally that the brakes were set on the remaining cars so as to keep them stationary. The defenses are that the injury was caused by Ewing's contributory negligence, and by the negligence of a fellow servant, another brakeman of his crew named Sexton, who it was charged should have set the brakes, but failed to do it.

The court's instructions clearly and in unobjectionable terms submitted to the jury those defenses. It is furthermore contended, and this is the main point made on this appeal, that the negligence, if any, of the crew or conductor who set the cars on the siding, without putting on sufficient brakes, was not the proximate and efficient cause of the injury. Whether Ewing's conductor was negligent in failing to see that the other cars were properly braked was submitted to the jury, as was the negligence of any other servant of the company in that matter other than the brakeman, Sexton. (It was not claimed that any other fellow brakeman had omitted to do anything which in duty he should have done.)

But the court told the jury in addition: "It was the duty of the conductor who left cars on the side track in the yards to see that sufficient brakes were set to hold such cars. He is not required to personally set or test the brakes, but must use ordinary care in supervising the performance of such duty."

This instruction was based upon a certain rule of the company's shown in evidence. The form of this instruction is not questioned in the briefs. It is urged by appellant that no instruction should have been given submitting, the question of the first conductor's negligence. This contention is based solely upon the ground that that negligence, even if found to exist, was not the proximate cause of the injury. So the question is at last, was the negligence of the conductor of the other train so remote as that, as a matter of law, the court should have instructed the jury that they could not consider it? If there be doubt as to whether the injury was the result of a particular act, or of another closer connected; or, if there be doubt whether there was or was not an intervening and independent agency between the original act and the injury, that is, where different minds may draw different conclusions from the fact the question whether the injury is the proximate result of the causes complained of, we say unhesitatingly should be submitted to the jury for determination. On the other hand, if the facts be admitted, or not in dispute, and if they show so clearly that reasonable minds could not well disagree about it, that but for the intervening independent agency the injury would not have happened, the question is one of law. That there must be a casual connection between the negligence complained of and the injury, a natural and continuous sequence, not dependent upon any new and independent cause before a recovery could be allowed, is too well settled to admit of discussion. For appellant it is claimed that although appellant's conductor in charge of the first train who set in the dead cars was guilty of negligence in not sufficiently scotching them to prevent their subsequent escape, yet that negligence alone did not, and could not, have hurt Ewing; that something else was necessary to, and which in fact did, occur, but for which the injury could not have happened. This new agency is said to have been the act of letting off the brakes on the two cars taken out by Ewing, which had doubtless been the sole stay of the whole lot, and of the jar or jolt given the remaining cars by the engine in coupling onto the two, thus disturbing their poise and giving them a momentum. Sometimes it is a very difficult thing to say just what was the proximate cause of a result. It is, therefore, the rule, in determining such fact, to leave it to the jury, who from experience and observation in such matters are thought to be best able to satisfactorily solve it. As to whether the injury to Ewing was the result proximately of the acts of negligence sued for was expressly submitted to the jury in this case. But it is insisted that, on this particular issue, there is no dispute as to the facts; that, taking appellee's theory of the cause of the injury so far as the acts of the first train's crew are concerned, it is a demonstrable proposition, to which the conclusion is irresistible drawn, that but for the intervening and independent agency of the action of the engine in jolting the cars (which is not claimed to have been negligent) and of Ewing's loosening the brakes on the two front ones, the original act of negligence in not braking all the cars would have been barren. Aside from Ewing's letting off the brakes, we are not at all satisfied that the above proposition of fact is made out. It was not made to appear that the disturbing of the cars by the act of coupling the engine to the front two either did in fact, or necessarily would, put the others in motion when the engine detached and took away the two cars. That may or may

not have been so. We are satisfied from the facts shown that none of the remaining cars were braked, or at least not sufficiently, and that it was the removal of the restraint imposed by the two cars that caused the others to start. Was the act of Ewing a new and independent cause in the sequence of events from the original negligence of leaving the cars unbraked to the injury? The negligence was in leaving the cars in that unsafe condition. It was continuous. When Ewing came to handle them, their condition, the passive negligence, became active, and proximately and inevitably produced the result, Ewing being situated as he was at the precise moment of collision. If the brakes on the dead cars had been negligently not set, that fact would not, and could not, of itself have injured the brakeman. But when he, in ignorance of their condition, but relying upon its being all right, came to handle them, his handling, while in one sense a new agency, was nevertheless a natural sequence in the probable order of events, and such as should have been anticipated by the person guilty of the original omission. This necessarily must be true in all passive negligence, where the party in the wrong has omitted to do something that he ought to have done. Generally his omission alone will be harmless. It is only when others come in contact with the event, relying upon the existence of the thing omitted, that injury will result. To hold that for such acts the negligent person is not responsible, because of the intervention of another agency, but for which the injury would not have happened, would be to strip the law governing negligence of half its application and value.

Whether Ewing should have examined the remaining cars before leaving them, so as to know whether they were safely secured, or whether he had the right to rely upon the presumption that those who placed them there had discharged that duty, was involved necessarily in the question of his contributory negligence submitted to the jury whether he had acted with that caution which an ordinarily prudent person similarly situated would have observed for his own safety. We can not say as a matter of law that he had not the right to assume that the other servants who had gone before him had done their duties. If every operative in railroad service should be compelled to personally verify the proper discharge of all duties of all other servants and officers who had acted before him, it would be impossible to continue the business with any degree of dispatch. While he must use ordinary care and observation and judgment in keeping himself informed as to conditions of his train and service, he has the right to assume that things not obviously insecure have been properly arranged by those whose duty it was to put them in proper condition. We see no error in the record.

Judgment affirmed, with damages.

PULLINS, &c. v. BOARD OF EDUCATION OF METHODIST CHURCH,
&c.

(Filed February 11, 1904—Not to be reported.)

Wills—In a devise where the title to property passes to a board of education to be held, invested and managed as other funds held by the board are invested and managed, the restriction that only the interest should be used, and the principal kept and invested, does not show any purpose or in-

tention that the identical property should be preserved, and such bequest is not void as a perpetuity under section 2360, Kentucky Statutes.

D. W. Steele, Jr., for appellant.

Proctor K. Malin for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Burnam.

We are asked by the appellants, heirs at law of R. D. Callihan; deceased, to hold the bequest made by him to appellee, the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, in codicil No. 1 of his will, void as a perpetuity under section 2360 of the Kentucky Statutes. The codicil is as follows: "I, R. D. Callihan, being of sound and disposing mind, do hereby ratify and confirm the above will, executed by me on the 8d day of July, 1894, excepting the third item thereto, which I do hereby revoke and cancel, and substitute this codicil, No. 1, in place of said third item, viz.: After the payment of all my just debts and all the costs of executing this will, it is my will and desire, and I do hereby give, devise and bequeath all the residue of my estate, both real and personal, unto the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, the same to be held, invested and managed by said board as other funds constituting the educational fund of said conference are held, invested and managed, except that the principal sum derived by said board under the provisions of this will shall be kept invested, and the interest used from year to year only to help pay the current expenses of the Ashland Collegiate Institute, now owned and managed by said board at Ashland, Ky., or to help pay the current expenses of some school established by said board at Ashland, Ky., or Louisa, Ky., or at some point intermediate between Ashland and Louisa, Ky., instead of the Ashland Collegiate Institute, but in no event shall either the principal sum or the interest thereof be invested or used to pay the expenses of any school established by said board at any other point than those named in the codicil, and in case said board fails, neglects, or refuses to maintain said Ashland Collegiate Institute, or some like school in its stead at the points named in this codicil after a period of ten consecutive years, then said trust shall be declared void and the principal sum and interest legally distributed as provided by law."

The will of which this codicil forms a part was duly probated by the Boyd County Court in July, 1902. There is, therefore, no question of a failure by appellees to maintain the school provided for by testator. The sole basis for the relief prayed is that the bequest is prohibited by section 2360 of the Kentucky Statutes, because the power to alienate the bequest is suspended beyond the period limited by the statute if not denied altogether. We are unable to discover any suspension of the power of alienation in the codicil quoted supra. The title to the property devised, both real and personal, passes to the board of education, to be held, invested and managed by said board as other funds constituting the educational fund of said conference are held, invested and managed. The restriction that only the interest should be used and the principal kept invested, does not show any purpose or intention of testator that the identical property should be preserved by the board. And even if the will were susceptible of the construction con-

tended for it would not be invalid, as the first section of the chapter on charitable uses and religious societies, page 279 of the Kentucky Statutes, expressly provide that "all grants, conveyances, devises and gifts for the benefit of schools of learning, seminaries, colleges, universities, etc., shall be valid if the grant, conveyance, devise, gift, * * * pointed out with reasonable certainty the purpose of the charity and the beneficiaries thereof, except as hereinafter restricted." Under this provision of the statute a trust for educational purposes is not void as being a perpetuity. (*Glass v. Wilhite*, 32 Ky., 170.)

For reasons indicated the judgment appealed from is affirmed.

STRATER BROS. TOBACCO CO. v. COMMONWEALTH.

(Filed February 10, 1904.)

Constitutional law—Section 32, subdivision 3, article 10, chapter 128 of the Acts of 1902, providing for the payment of a license tax for the conversion by corporations of the natural tobacco leaf into manufactured product is not in violation of section 171 of the Constitution, the tax imposed being simply a license tax as declared in the act.

O'Neal & O'Neal, D. W. Sanders and Grubbs & Grubbs for appellant.

C. J. Whittemore and Hazelrigg & Chenault for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

This action arises from an effort to enforce section 32, subdivision 3, article 10, chapter 128 of the acts of 1902, which reads as follows: "That all corporations, associations, copartnerships or other persons, owning or operating a tobacco factory in this State, whereby the natural leaf is converted by process of manufacture into manufactured product, including cigars and cigarettes, shall pay a license tax therefor. On the manufactured product (except cigarettes) for each factory, \$1 on the marketable value of each \$1,000 of such product, up to \$100,000 of such product; and 50 cents on each \$1,000 of the marketable value on all in excess of the first \$100,000."

The appellant owns and operates a tobacco factory wherein the natural leaf is converted by process of manufacture into a manufactured product. For the appellant it is insisted: First, that it is a tax upon the manufactured product of the tobacco factory, not on the manufacturer's right or privilege to conduct a tobacco manufacturing business; second, that it is a tax imposed under section 171 of the Constitution, and is in violation thereof, because it is not uniform. For the Commonwealth it is insisted that it is a license or occupation tax, and is not a tax upon the product of the tobacco manufacturer.

Section 171 of the Constitution provides that taxes shall be levied and collected for public purposes only; and that they shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. Section 174 provides that all property shall be taxed in proportion to its value, unless exempted by the Constitution, and it contains the further provision which reads as follows: * * * "Nothing in this Con-

stitution shall be construed to prevent the general assembly from providing for taxation based on income, license or franchises."

The taxes provided for by the sections of the Constitution to which we have referred are ad valorem taxes.

Section 181 of the Constitution reads as follows: * * * "The general assembly may, by general law only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax." * * *

The tax imposed is not levied upon property. It is simply a license tax as declared by the general assembly in the act. The Constitution not only does not prohibit the imposition of such a tax, but it expressly recognizes the right of the legislature to impose it. It not only does so, but authorizes it to be done in addition to an ad valorem tax. If the Constitution had been silent upon the question, it would have been competent for the legislature to have enacted the law.

It is said in Cooley on Taxation, 2d edition, page 570: "It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax upon every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if, in the opinion of the legislature, that course will be wiser. And what is true of property is true of privileges and occupations also; the State may tax all, or it may select for taxation certain classes and leaves the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by the Constitution. * * * Constitutional provision requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the taxation now under consideration."

Again it is said by the same author, page 580: "This is a class of dealers commonly selected for exceptional taxation. Their occupation is sometimes taxed for Federal, State and municipal purposes, though their stocks are taxed as property, and whatever has been imported has paid a heavy duty. The right to levy these several taxes has almost ceased to be contested."

We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufactures the same quantity of tobacco. The legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured. If all manufacturers of tobacco, regardless of the manufactured product produced by each, had been made to pay the same license tax, then a more potential argument could be made against the validity of the law for lack of uniformity and inequality of burden than has been made against the law here sought to be enforced. While this is true, we would not hold it sound. If we did, then it would logically follow that a license tax on retail liquor dealers would be invalid, because the one who sold small quantity of liquor paid the same as the one who sold many times as much. This court has upheld ordinances imposing a license or occupation tax on liverymen, based upon the number of vehicles employed in their business. Such taxes are not based upon the value of the vehicles or the profit derived from their use, but upon the number employed.

The judgment is affirmed.

McADAMS & MORFORD v. NORTON'S ASS'EE.

(Filed February 12, 1904—Not to be reported.)

1. Construction of statutes—Section 2342, providing that unless a different purpose is expressed every estate in land created by deed or will without words of inheritance shall be deemed a fee-simple estate; and where in a devise it was provided that where a child left issue such children should receive their parents' portion of an estate, a defeasible fee was created contingent upon the devisee dying without issue.

2. Same—Defeasible fee—Where a defeasible fee was taken predicated upon a condition that did not happen within the period named, this fee ripened into a fee-simple estate by the nonhappening of the contingency.

H. E. Ross and Breckinridge & Shelby for appellants.

Morton, Webb & Wilson, Forman & Forman and Robt. L. Greene for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

This action involves the title of F. H. Norton to a storehouse and lot in Lexington, Ky. He having made a general assignment for the benefit of all his creditors, in an action in the Fayette Circuit Court, for the purpose of selling his real property to pay his debts, the storehouse and lot in question were sold at judicial sale, and purchased by appellants. The purchasers, being apprehensive that the title of the assignor was not indefeasible, filed exceptions to the sale, which, being overruled by the court, they have appealed.

The property was devised to F. H. Norton by his father, George W. Norton. So much of the will as we deem pertinent to the issues involved is as follows: "I desire, first, that all my debts be paid off as rapidly as possible from rents not otherwise provided for. * * * To my son, Frank, the storehouse, No. 39, southwest corner of Main and Upper, includes half the wall next to No. 37, running back to No. 39 Upper street, including the whole wall (property in question)." In addition to the devise to his son, Frank, herein set out, the testator devised quite a large estate to his wife and daughter. "I direct my executors to keep under rent all the above storehouse bequeathed to my children, together with Nos. 9 and 11 on the north side of Upper street, also Nos. 6, 8, 10 and 12 on the south side of Upper street, until all my debts are fully paid. My children are then to have full control of the property bequeathed to them, unless the remainder of the property and stock will not produce enough income to carry out my bequests; then it must be deducted pro rata from their income. * * * In the case of the death of any of my children leaving issue, such children shall receive their parents' portion of my estate. * * * I appoint my beloved wife and my son-in-law, John R. Sharp, the executors of this, my last will."

The question raised by the exception is the title which Frank Norton took under the will of his father to the property in question. The purchasers are willing to comply with the terms of sale, provided they obtain a fee-simple title by their purchase.

Section 2342 of the Kentucky Statutes provides as follows: "Unless a different purpose appear from the express words or necessary inference,

every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such estate as the grantor or testator has power to dispose of." This section of the statute is declaratory of that rule of testamentary construction in favor of absolute estates, which is thus stated in the Am. & Eng. Ency. of Law, 1st edition, volume 29, page 468: "In doubtful cases an interest, whether vested or contingent, ought, if possible, to be construed as absolute or indefeasible, in the first instance, rather than as defeasible; but if it can not be construed to be an absolute interest in the first instance, at all events such a construction ought to be put upon the conditions expressed, which render it defeasible, as to confine their operation to as short a period as possible, so that it may become an absolute interest as soon as it can fairly be so considered." And in the note in support of the text: "The law favors the free, uncontrolled use and enjoyment of property, and the power of alienation, where as defeasible qualification of an interest tends most materially to abridge both."

Bearing this principle in mind, from an examination of the will constituting the muniment of title in question, it appears reasonably certain that the father of the assignor intended that his son should take a defeasible fee in the property, contingent upon his dying without issue, either before the death of the testator, or, at all events, before the time when the debts of the testator had been fully paid. It will be observed that the will required the executors to keep under rent all the storehouses bequeathed by the testator to his children (which included the property under discussion) until all of his debts were fully paid, at which time they were to have full control of the property bequeathed to them, "unless the remainder of the property and stock will not produce enough income to carry out my bequests," a contingency which seems not to have arisen. The assignor survived his father, and also the time when all his debts were fully paid; so that if the construction be admissible, that he took a defeasible fee, predicated upon the contingency of his death without issue before the happening of either of these events, then his defeasible title has ripened into a fee-simple estate by the nonhappening of the contingency within the periods named.

There is nothing in the testator's will, taking a survey of the whole, which militates against this construction, or which would indicate an intention on his part to postpone indefinitely the time upon which his son's title would become indefeasible. This case seems to come within the letter and the reasoning of the opinion in the case of *Wilson v. Bryan*, 90 Ky., 482. In that case the will provided as follows: "It is my will that my estate be kept together, and jointly used and enjoyed by my children until the youngest comes of age, and then the land to be equally divided in value amongst my sons that may then be living. If any of my sons should die without any bodily heirs, his portion of my estate to be divided amongst his brother and sister that then may be living." * * *

In construing this provision the court said: "It seems to us if each portion of the claim quoted be considered in relation to and dependence upon all other parts, as manifestly should and was intended by the testator to be done, there is not much difficulty in determining the nature and object of the scheme devised for disposal of his real estate among his five sons. That scheme was, we think, to have his estate, in his own language, 'kept to-

gether and jointly used and enjoyed by all his children' until the arrival of his youngest son to the age of twenty-one, and then for a division to take place among those of his sons living, which, according to the natural import of the language used, involved an absolute title of each of the sons to the particular tract of land falling to him in that division. As we think it is equally clear the event, and the only one contemplated by the testator, or correct grammatical construction permits, upon which that scheme was to be modified or altered, was to be the death of a son or sons before the time arrived for the division to take place. The close connection of the sentence in which the condition or contingency is mentioned with that providing for division, for one immediately follows the other, shows that the condition, and only one, intended upon which the devise of an absolute estate should be defeated was concurrence of the death of one or more of his sons before his youngest became of age."

In the case of *Duncan v. Kennedy*, 9 Bush, 580, a testator provided that his estate should be kept intact until the 1st day of January, 1872, when it was to be divided among his five devisees, with the provision that should any of the five die without issue, then, in that case, the estate was to be divided among the survivors. The court held that the conditional devise over to the survivors of the devisee in the contingency of the dying of any of them without issue, had reference to the 1st of January, 1872, the time contemplated by the testator for a division of the real estate, and could not thereafter take effect. (*Hughes v. Hughes*, 12 B. Mon., 115; *Wren v. Hynes'* Adm'r, 2 Met., 129.)

In the will under discussion it is provided that the estate of the testator should be kept under rent by the executors until all of his debts were fully paid, at which time his children were to have full control of the property bequeathed to them. We are of opinion that the contingency under which the defeasance of the assignor's title to the property in question depended was his dying childless before the debts of the testator were paid; that event happening in his lifetime, his title became absolute.

There is nothing in the case of *Trimble v. Shawhan*, 101 Ky., 408, or *Varble, Jr. v. Phillips*, 14 Ky. Law Rep., 868, which militates against this view. The first involved the construction of a deed, and it is specifically stated in the opinion that it has no application to a will, and was not opposed to the rule of construction laid down in the case of *Wills v. Wills*, 9 Ky. Law Rep., 77, which is in harmony with the opinions in the cases of *Wilson v. Bryan* and *Duncan v. Kennedy*. In the second it is declared that the intention of the testator was gathered from the entire will, and the opinion was not predicated upon any specific rule of construction other than the cardinal rule of enforcing the intention of the testator, as gathered from the whole instrument.

The assignor has one child, an infant daughter, who was sought to be made a party defendant by the purchasers, in what was called an amended and supplemental answer or cross petition, in order to bind her by the judgment rendered on the exceptions to the sale. This, we think, could not be done, for the court having properly reached the conclusion that her father owned the absolute title, she had no interest, and was not either a necessary or proper party. The demurrer to the pleading was properly sustained.

Judgment affirmed.

SCOTTISH SECURITY CO.'S REC'R v. STARKS.

(Filed February 11, 1904.)

1. Corporations—Stockholders—Where appellee was never in fact a subscriber to the capital stock of appellant company, it being distinctly understood between himself and the incorporators that his signature to its articles of incorporation was only for the purpose of enabling the company to become incorporated under the laws of West Virginia, and that no stock was ever to be issued to or paid for by him, and that he had no connection with the officers or business of the company after its organization, and was by the consent of all of the stockholders released from his subscription to the capital stock of the company, a verdict for him in an action by the company's receiver to recover upon his alleged unpaid subscription will not be disturbed.

2. Same—Cancellation of stock—Where appellee's subscription to the capital stock of a corporation was at its chief office in this State, a cancellation of his stock by the stockholders was legal, although the corporation was organized in another State which had a different mode of cancellation.

Bingham & Daviess and W. W. Thum for appellant.

A. J. Carroll for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle.

The appellant, W. T. Newman, Jr., as receiver of the Scottish Security Co., sued the appellee, John P. Starks, in the lower court upon an alleged unpaid subscription for twenty shares of the capital stock of the company named, the amount claimed being \$1,800.

The trial was by jury, and a verdict was found for the defendant, upon which judgment was entered dismissing the petition and allowing appellee his costs. The appellant's motion for a new trial was overruled, and the case is here by appeal. The defense interposed by the answer was in substance that the appellee was never in fact a subscriber to the capital stock of the Scottish Security Co., although his signature appeared to its articles of incorporation as a holder of twenty shares of its stock, but that the only purpose of his so appearing, as distinctly understood between himself and the incorporators, who were then the only stockholders, was to enable the company to become incorporated under the laws of West Virginia, and to effect an organization; and further, that no stock was ever issued to or paid for by him, nor was it so intended, and that he had no connection with the officers or business of the company after its organization, and was by consent of all the stockholders released from his subscription to the capital stock of the company. The matters of defense averred in the answer were denied by reply.

The facts presented by the record appear to be as follows: D. H. Wilson, W. C. Cowper, Alex. Stewart and Nathan Wolf, desiring to organize the Scottish Security Co., requested the appellee to join with them in the enterprise, which he at first seemed willing to do, but later he attended a meeting held by them at which he informed them that upon full consideration of the matter he had made up his mind not to take stock in the company, or part

in its organization, but in view of the representations of the persons named, that the articles of incorporation had been already prepared containing his name as one of the incorporators, appellee was induced to sign the paper that it might be forwarded to West Virginia, and the incorporation effected under the laws of that State without delay; but this act upon his part was with the distinct understanding and agreement that he did not thereby become a stockholder in the company or liable for the stock, or any part thereof, set opposite his name, and in fact that he was then released from its payment.

As stated, the real parties in interest were D. H. Wilson, W. C. Cowper, Alex. Stewart and Nathan Wolf. The names of Stewart and Wolf do not, however, appear in the articles of incorporation for the reason that under the laws of West Virginia it was necessary that two of the incorporators be residents of that State; therefore, the names of Edward Carder and D. S. Guthrie, residents of that State, and clerks in the office of its secretary of state, were put in the articles of incorporation with those of Wilson, Cowper and Starks, in the place of Alex. Stewart and Nathan Wolf, each of the incorporators being represented in the articles of incorporation as having taken 20 shares of stock.

Upon being incorporated, the company was organized at a meeting held in Charleston, West Virginia, at which meeting appellee, to effect the organization of the company, was elected a member of its board of directors. He was not at that meeting, but gave his proxy to another to represent him. The chief office of the company was to be and was kept in Louisville, Ky., and at the first meeting there held the appellee was present and tendered his written resignation as a director of the company, according to the previous understanding and agreement, though the resignation does not seem to have been formally acted on until the following meeting, when it was duly accepted.

In the meantime Carder and Guthrie had at the meeting in West Virginia transferred to Stewart and Wolf the stock set opposite their names in the articles of incorporation, and the stock over against the name of appellee in that instrument was never issued to him, but was divided among and issued to Wilson, Cowper, Stewart and Wolf, as they had agreed with appellee should be done, and they paid to the company ten per cent. of the face value thereof, viz. \$200. Later one share each was issued to Stewart's wife and a relative of Wolf. But at the time appellee signed the articles of incorporation the only real stockholders of the company were Wilson, Cowper, Stewart and Wolf, the stock of the latter two having been subscribed in the name of Carder and Guthrie, and the same persons were in fact the only stockholders, of the company when the release of appellee, if he ever was a stockholder was consummated, when the twenty shares of stock supposed to have been subscribed by him was divided among the other stockholders named.

It was never contemplated by the parties that any of the stock should be issued to or paid for by appellee. It also appears that at the time of the distribution among the real stockholders of the twenty shares that had been placed opposite his name in the articles of incorporation, the company had not done any business beyond effecting an organization, nor had it contracted

any debts. Upon the facts thus presented the question arises, was the release of the appellee from the payment of the twenty shares of stock legal? Or, in other words, is he liable for the twenty shares of stock, or any part thereof? There can be no question under the evidence but that all the stockholders of the company consented to the cancellation of the appellee's subscription, and had the twenty shares of stock intended for him issued to themselves.

In Cook on Corporations, volume 1, section 169, it is said: "A subscriber for stock in a corporation can not obtain a cancellation of his subscription except by the unanimous consent of the other subscribers. Even a majority of the stockholders can not withdraw and refuse to proceed. These rules are just, and based upon a sound public policy. By unanimous consent of the stockholders a subscription may be cancelled and a subsequent creditor of the corporation can not complain."

The doctrine *supra* seems to be recognized in *Gathright, & Co. v. Oil City Land Co.*, 21 Ky. Law Rep., 1657, though the facts in that case were unlike those of the case at bar.

The lower court gave but one instruction in this case, which was as follows: "The court instructs the jury that when the defendant, John P. Starks, signed the articles of incorporation of the Scottish Security Co. he became a subscriber for twenty shares of the capital stock of said company, and they should find for the plaintiff in the sum of \$1,600, with interest from the 12th day of November, 1901, unless they shall believe from the evidence that after the said company was incorporated all of the persons then holding or owning stock in said company agreed or consented that the defendant should not be held upon his said subscription, and that the twenty shares of stock subscribed for by him was by reason of the said agreement or consent, if such there was, issued to other persons, and that the company did not then have any outstanding debts. If such is the fact, then they should find for the defendant."

We think this instruction submitted to the jury in explicit terms the only question of fact necessary to be decided by them, consequently no other instructions were necessary. The fact that the cancellation of appellee's subscription was not effected according to the laws of West Virginia is, in our opinion, entitled to no weight. The chief office of the company seemed to be in Louisville, this State; at any rate the meetings of its board of directors, with one exception, were held in that city, and if the release of the appellee was effected according to the laws of this State, we think it legal and binding.

The case here is not one in which the appellee is seeking to avoid the execution of a contract by relying upon a contemporaneous parol agreement contradictory of a writing, but he is relying upon the fact that the contract was executed and his release effected, whereby all liability under the contract, if any existed, was discharged. It seems to us, therefore, to be immaterial whether the agreement resulting in his release was in parol or otherwise. The fact remains that the release resulted, and that the company, by reason thereof, issued to others stock which, but for the release, appellee would have been entitled to. How can appellant compel the payment by appellee of the subscription to its capital stock when it is not in his power

to issue to him the certificate of stock to which he would have been entitled in the event of such payment?

Being of the opinion that the record discloses no error that is prejudicial to the rights of the appellant the judgment is affirmed.

GRANT COUNTY BUILDING AND LOAN ASS'N V. LEMMON, &c.

(Filed February 12, 1904—Not to be reported.)

1. Building and loan association—Debtor and creditor—Payments—Where a secretary and treasurer of a building and loan association defaulted, in an action upon different bonds to the association it was error to adjudge that secret deposits in a bank to the credit of the association were payments within the meaning of the law, and to apply them to the elder debt.

2. Same—Actions—Where a secretary and treasurer of a building and loan association defaulted, the cause of action against him and the sureties by the association arose instantly upon the misappropriation of funds and not at the end of the year in which the secretary was elected.

Clare, Dickerson & Clayton and R. L. Webb for appellant.

A. G. DeJarnette for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Barker.

John R. Westover was elected secretary and treasurer of the Grant County Building, Loan and Savings Association in July, 1895, and was annually thereafter re-elected until 1902, inclusive. For each of the years he was so elected and acted as secretary he gave a separate bond with sureties. During the year elapsing from July 8, 1895, to July 8, 1896, he fraudulently misappropriated and withheld the sum of \$101.94 of the association's money; in the year elapsing from July 8, 1896, to July 8, 1897, he fraudulently misappropriated and withheld the sum of \$100, and in 1901 and 1902 he fraudulently misappropriated and withheld the sum of \$2,500. During the latter period he surreptitiously, and without the knowledge of the association, commenced to pay back in sums of \$20 per month, by secretly depositing in the bank where its funds were kept, until he had covered back into the treasury the sum of \$520.

About this time the association employed an expert bookkeeper to examine his accounts, who discovered the various defalcations herein set forth, and the various monthly deposits. When this fraud was discovered the secretary agreed with the association that the monthly deposits, amounting in the aggregate to \$520, should be credited upon the defalcations occurring during the years 1901 and 1902. Having made this settlement, the association instituted this action on the bonds of the secretary for the years 1895-6 and 1896-7 for the purpose of recovering judgment against the sureties therein. The petition is in two paragraphs, the first setting up the bond for the year 1895-6 and the breach, and praying judgment against the sureties for the sum of \$101.94; the second paragraph setting out the bond for 1896-7 and the breach, and praying judgment for the sum of \$100 against the sureties.

To the action set up in the first paragraph of the petition the sureties pleaded the seven years' statute of limitation, contained in section 2551 of the Kentucky Statutes; and to the first and second paragraphs they pleaded the monthly payments made during the years 1901 and 1902, which aggregated, as before said, the sum of \$520, claiming that as neither the defaulting secretary nor the association had made application of these sums, the law applied them to the oldest indebtedness existing at the time, to wit, the defalcations occurring during the years 1895-6 and 1896-7. There is no contrariety in the evidence in this case, and the issues arising, therefore, are of law. The case was submitted to the court without the intervention of a jury upon an agreed statement of the facts. The court held that the \$520 paid during the years 1901 and 1902 were to be applied upon the oldest indebtedness, for the following reasons: After stating the facts, as agreed by the parties, it is said in the opinion: "Upon the foregoing finding of facts, the court is of opinion that the agreement between plaintiff and J. R. Westover, to apply the \$520 to the payment of the \$2,500 default made in 1901 and 1902, was void as to the defendants, because it was not applied at the time of payment, but several months after, and that the law, in the absence of an agreement to apply at the time of payment, made the application to the oldest items of default; and, therefore, should be applied to discharge the default for which the defendants had become liable."

To this conclusion of the court we can not agree. Assuming it to be true, as a proposition of law, that where a debtor owes several different sums and makes payments, in the absence of any application of these payments to any special debt, by either the debtor or creditor, the law applies them to the oldest debt, we think the court erred in concluding that there had been such a payment by the debtor as puts the creditor upon its election as to which of its several debts it would make the application. The debtor has the first right of applying the payment; if he fails to make application, then the creditor may apply it as he sees fit. This is a valuable right to a creditor, and one of which he can not be deprived without his consent, or without laches on his part. No payment can be made without the acceptance of the creditor. This rule is well stated in the Am. & Eng. Ency. of Law, 2d edition, volume 22, page 577, in the following language: "In order that a transaction may operate as a payment, it is essential that the money or property delivered to the creditor be accepted as a discharge of the debt; if it is accepted for some other purpose, it does not operate as a payment; and, a fortiori, a mere tender by the debtor, without acceptance by the creditor, has no effect as a payment. The payment is complete as soon as the money or property is delivered to and accepted by the creditor as payment."

Applying the principle thus announced, it would follow that the secret deposits of money by the secretary to the credit of the association were not payments until the latter accepted them as such; and the agreed facts show that as soon as the association became aware of the defalcation and various deposits, with the consent of the debtor, it applied them to the last defalcation. If these monthly deposits can be considered as payments within the meaning of the law, so as to put the creditor upon its election, then it would follow that one can do secretly and surreptitiously what he can not do openly and above board. One who owes a debt can not make a lawful

tender of a part of the sum due by him; in order to make a legal tender of an indebtedness the debtor must tender the full sum due in lawful money. The conclusion reached by the learned trial judge makes a surreptitious deposit of \$20 per month, without the consent of the creditor, a payment, when no one will dispute that if he had come to his creditor with the \$20 in his hand and tendered it, it would not have constituted a payment pro tanto, without the creditor's consent. The application of the money deposited to the last indebtedness was made, both by the debtor and the creditor, as soon as the latter knew of or accepted it as payment, and this, we think, was conclusive of the rights of the sureties.

The conclusion thus reached makes it necessary for us to pass upon the validity of the plea of the statute of limitations as to the cause of action set up in the first paragraph of the petition. Appellant contends that inasmuch as the bond of the secretary was executed annually, the statute of limitations did not begin to run until the end of the year in which the defalcation occurred. If this be so, then the statute did not bar the cause of action in question; but if the statute began to run from the time of the defalcation, then the seven years had elapsed and the bar was complete. We know of no basis for the contention of appellant on this question. The cause of action of the association arose against the secretary and his sureties the instant the fraudulent misappropriation of its funds took place, and not from the end of the year for which the secretary was elected; and it follows, as a consequence, that the cause of action set up in the first paragraph of the petition was barred on the 17th day of January, 1903, at which time this action was instituted.

In the case of *Schweerman v. Commonwealth*, 99 Ky., 296, which was an action against sureties on an official bond, it was contended that the cause of action did not commence to run against the sureties until the fraud of the principal was discovered. This court held that this contention was not sound, but that the cause of action arose upon the perpetration of the fraud, and said: "In our opinion, the only conditions or acts which do stop the running of the statute of limitations in favor of sureties are prescribed in section 2553;" and these have no application to the case at bar.

For these reasons the judgment is reversed for proceedings consistent with this opinion.

SMITH, & CO., EX'ORS V. ISAACS, & CO.

(Filed February 12, 1904—Not to be reported.)

Wills—Where a testator provided in his will that his property should be divided equally among his children, each child to have possession of his or her share when the age of eighteen years was reached, and that none of his children should have power to sell or mortgage any portion of the estate until the age of thirty-five years was reached, it was the intention of the testator that when the age of thirty-five years was reached each child should become vested with the complete title to the land.

H. K. Bourne for appellants.

W. S. Pryor and R. D. Jackson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Burnam.

I. M. Smith departed this life on the 20th day of July, 1902, a resident of Henry county, and his last will and testament was duly probated in the Henry County Court on the 4th of August following. He was survived by a widow and seven children, who were his only heirs at law, and to whom he devised his estate after the payment of his debts, which consisted in the main of about 1,050 acres of land in Henry county of the value of about \$20,000, some personal estate, and some realty in Indiana, which was applied to the payment of his indebtedness, leaving as a charge against his landed estate a debt amounting to about \$7,000. His executors instituted this suit for a settlement of his estate, making the children defendants, and asking that the third and fourth clauses of the will of testator be declared null and void; and that it should be adjudged that the children took a fee-simple title in the real estate devised by testator subject to the rights of creditors. These sections of the will read as follows: "I desire all of my estate in Kentucky, real, personal and mixed, to be divided equally among my children and such possessions as my wife may hold at her death: also each child to have possession and use of his or her share when he or she may become eighteen years of age. But it must be expressly understood that none of my children shall have the power to sell or incumber, by mortgage or otherwise, any portion of my estate received under this will until he or she shall have arrived at the age of thirty-five years. And no such sale or incumbrance made by or for my daughters, or any of them, shall be so made or executed as to change the character of the estate vested in them. All property that my daughters received under the will shall be their separate property, free from the debts and control of any husband any of them may have, and such property may only be sold under the provisions of this will.

"4th. Should any of my children die either before or after going into the possession of the property to which she or he may be entitled under this will without leaving issue alive at the time of his or her death, the share of the one so dying shall revert to my other children or their descendants, share and share alike."

It is insisted that these two clauses of the will of testator can not be reconciled to each other; and that consequently both should be declared null and void. It is also suggested that the limitation upon the alienation contained in the third clause of the will is illegal and unenforceable. It is a universal rule in the construction of wills that the intention of the testator as gathered from the instrument as a whole must be given effect, and to do so the chancellor will, when it can be done without violence to the plain language of the will, so construe clauses of doubtful meaning as to effect the manifest purpose of testator. While the weight of authority outside of the State of Kentucky appears to be against the validity of restraints upon alienation however limited in time, that rule does not obtain in this State. This question was fully considered in *Stewart v. Brady*, 66 Ky., 623; *Stewart v. Barrow*, 70 Ky., 869; *Wallace, &c. v. Smith*, 24 Ky. Law Rep., 139, and the validity of similar restraints to that contained in the third clause upheld. We think it is quite clear that testator intended that each of his children should have the possession and use of their respective shares of his landed estate when they became eighteen years of age, but that they should have no

power to sell or incumber it by mortgage before they arrived at the age of thirty-five years, at which time they became vested with the complete fee-simple title. And construing the third and fourth clauses together, it is manifest that the reversion to his other children, or their descendants of such of his children as might die without issue at the time of their death, expires upon their arrival at thirty-five years of age, at which time they became invested with the fee simple under the third clause.

As the judgment appealed from conforms to this conclusion it is affirmed.

WALKER v. COMMONWEALTH.

(Filed February 12, 1904.)

1. Bawdy house—Evidence—In a prosecution for maintaining a bawdy house, evidence showing the corruption of the public morals by the house, or its influence thereon is admissible, and evidence that the keeper of such a house took the occupants thereof out with her walking and driving, displaying them as truly as a merchant would his goods in his shop window, was competent.

2. Same—Conduct of Commonwealth's attorney—Where the argument of the Commonwealth's attorney in a prosecution was based on the evidence admitted by the court, except reference to an immaterial question, it is not the subject of objection.

A. O. Stanley and J. H. Powell for appellant.

L. C. Flournoy, N. P. Taylor and N. B. Hayes for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was indicted and convicted of the offense of keeping a bawdy house. Her punishment was fixed at a fine of \$800. She complains that the court erred in admitting incompetent evidence against her, and that the Commonwealth attorney made a certain statement to the jury in his concluding argument.

The Commonwealth proved by a number of witnesses that the defendant kept a bawdy house; that her reputation for morality and chastity is bad; that the reputation of the women that she kept was also bad; that the house was frequented by men and women of ill-fame; and that it was in fact a bawdy house seems from the cross-examination of the witnesses to have been undisputed on the trial. The defendant offered no testimony, but on the cross-examination of the Commonwealth's witnesses showed that her house was the most quiet and orderly place of the kind in the city, and that no conduct out of the way was to be seen about the premises. On the other hand, the State was allowed to prove over the defendant's objection that the house was on a prominent street, not far from the sanitarium, and in view from it; also that it was near two of the schools of the city. The State also showed, over the defendant's objection, that the defendant was seen walking and driving on the streets of the city in company with the lewd women she kept in the house. A witness was permitted to make this statement: "I have seen men going into this place and coming out at all times of the day—

and night in various stages of intoxication, and have seen hacks stop there day and night. I have often seen defendant take women of evil name and fame, who lived with her, and drive about the streets of the city with them, and have seen these women get out of her trap at her door and enter her house in her company. The sanitarium is on Green and this place is on Eighth, about a half a square above. The Seventh street school is on the block below, the school being on the far side of Seventh from this house. It is almost opposite the colored school, that school being on the corner of Eighth and Elm, and this place is in the middle of the block between Elm and Green, on the same street. The house of Mollie Walker is only half a square from, and in full view of, the street car line that runs out Elm street to Atkinson's Park."

Another witness said that it was almost opposite the colored school. The State was allowed to show that a petition had been presented to her, signed by citizens, asking her to move out. All this evidence was objected to. In arguing the case to the jury the Commonwealth attorney said this: "She has been petitioned by the good citizens of Henderson to leave that locality. Instead, she drives about the city with her trap and white lines. If she must run such a place, let her not parade her nefarious calling in the face of schools and sanitariums."

To this statement of the Commonwealth attorney she objected, and her objection being overruled, excepted. In 2 Bishop on Criminal Procedure, section 112, it is said: "A bawdy house being indictable because corrupting to the public morals, evidence is admissible that it is frequented by reputed strumpets and rakes; for by the character of such frequenters its business is advertised, and the intent of the keeper is evinced."

Again, in section 116, it is said: "Where the other facts are sufficient, it will not justify the keeper to prove that the neighborhood was not disturbed."

So in 2 Roberson on Criminal Law, section 640, it is said: "The keeping of a bawdy house is a common nuisance and a public offense for the reason that its direct tendency is to debauch and corrupt the public morals and to disturb the public peace. But it is not an essential element of the offense that the immoral practices should be open to public observation, or that the public should be disturbed by noise."

As the jury have a wide discretion as to the punishment to be imposed, it is proper for the Commonwealth to show the character of the house kept by the defendant. If the house was a small affair, little frequented, and having few occupants, a less serious offense would be committed than if it was widely advertised, much frequented, and a powerful agent for debauching and corrupting the public morals, for the thing aimed at is the protection of the public morals, and evidence which would properly show the corruption of the public morals, or the wide influence of the house thereon, would be properly received. A house kept quietly, with only two or three women in it, would be a much less grave public nuisance than one kept with a hundred, publicly blazoned forth and held up to public attention, so that the women might more successfully ply their calling. The evidence that the defendant took the women out with her walking or driving in her trap, whereby she displayed them as truly as a merchant would his goods in a

show window, was, therefore, competent. The location of the house near the two schools and the sanitarium made it a more certain menace to the public morals than if located away from the young and not where those who, from youth and inexperience, are liable to be led astray would be most likely brought in contact with it. The fact that the citizens had petitioned her to leave the locality, and that she had continued her business after this as before, was competent at least on the question of knowledge, for it showed that the defendant was not unadvised as to what she was doing, and that it was not a case where ignorance of intention to violate the law could be presumed. The argument of the Commonwealth attorney was based on the evidence which the court had admitted, except that we do not see anything in the bill of exceptions about her driving her trap with white lines; and that is immaterial. We do not, therefore, see that there was any error of the court in the matters referred to.

Judgment affirmed.

Whole court sitting.

Judge Paynter dissents.

UNDERHILL v. MURPHY, &c.

(Filed February 12, 1904.)

1. Injunctions—Labor unions—Where the members of a labor union, as the result of a difference with a contractor because of his relations with them, undertook to prevent nonunion laborers from working for him, threatened his workmen and entered into a conspiracy to break up his business, he was entitled to relief by injunction.

2. Same—Where a contractor has built up a valuable and prosperous business his right to carry it on is a property right, and no less intrinsically property than if the same amount of money were invested in other forms of valuable property.

3. Same—The rule that an injunction will not be granted where there is an adequate remedy at law refers to legal remedies and not to criminal proceedings.

Orlando P. Schmidt for appellant.

J. L. Elliston for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, John T. Underhill, is a plumber, engaged in business in Covington, Ky., taking contracts in plumbing, and has in his employ journey men plumbers. He has followed the occupation for a number of years, and has built up a large and lucrative business in Covington and adjoining cities which is of great pecuniary value to him. He had on hand a number of important contracts in plumbing, including the contract for the plumbing in the new courthouse in Covington. The appellees, with the exception of Horgan, had been employed by Underhill in his plumbing business, working for wages. The appellees were members of a union organized for the protection of labor. A difference arose between Underhill and his workmen, who were members of the union, in reference to its relations with

employers, and they then quit his employment. About this time a general strike occurred among those employed by master plumbers in Covington. In order to carry out his contracts when his employes left him, Underhill employed nonunion men to work in place of the union men who had quit. The appellees thereupon undertook to prevent the nonunion men from working by following them from place to place about the city, assembling about Underhill's shop, denouncing and threatening Underhill and his workmen. This continued for several weeks, and Underhill filed suit, asking an injunction restraining the unlawful acts of the defendants. He alleged that he depended upon his business for a livelihood; that for three weeks continuously next prior to the institution of the action the appellees, in pursuance of a conspiracy to break up his business, had collected together daily near and in sight of his place of business, where they could observe every one going into or coming out of it, and by threats, intimidation, force and violence attempted to compel his employes to quit his service; that they followed him and his employes to the places in the city where they were engaged at work carrying out contracts previously made by him, and there insulted them with opprobrious epithets, threatened them with violence and assaulted them so that on several occasions he had been compelled to call in the police force of the city to escort them away from the place, and protect them from the violence of the appellees; that the defendants threatened to assault and beat him and his employes, to prevent any one from working for him, to prevent his customers from coming to or employing him, to destroy his good will, and to break up his business, and that all of these unlawful acts had continued from day to day and from hour to hour in pursuance of the conspiracy formed between appellees; that the appellees were insolvent and had no property subject to execution out of which the damages sustained by him might be made, and that unless restrained by the court they would proceed to carry out their threats and completely break up his business and destroy its good will. Proof was heard on a motion for an injunction which fully sustained the allegations of the petition; in fact the proof is perhaps stronger than the pleading. It shows that the appellees not only picketed plaintiff's place of business, but that to protect his employes from violence he had to take them to and from the places where they worked in a conveyance, and that they had to enter his place of business through the alley and back door and over rear fences, and even then one of them was waylaid and beaten by three of the appellees. The proof shows a determined effort, by conspiracy on the part of the defendants, to break up and destroy the plaintiff's business by force and violence unless he acceded to the demands of the union to which they belonged. At the conclusion of the evidence the court sustained a demurrer to the petition and overruled the motion to grant the injunction. The plaintiff declining to plead further the action was dismissed.

When a man has, by years of toil and fair dealing with his customers, built up a valuable business and good will, he is as much entitled to protection by the law in this species of property as in the home that shelters him or the coat that protects him from the winter's cold. The right of the plaintiff to carry on his business and to carry out the contracts which he had made was a valuable property right, and no less intrinsically property

than if the same amount of money had been invested in a stock of merchandise or a city lot. If the defendants had conspired together by force and violence to burn up the merchandise, or to carry off the surface of the lot, upon elementary principles the chancellor would protect the plaintiff from the destruction of his property. The acts of the defendant as truly destroyed the plaintiff's property when they broke up his business by force and intimidation as they would have done in the case of visible property by burning it or carrying it off. Among the inalienable rights which by the first section of the State Constitution are guaranteed as inherent in all men in "the right of acquiring and protecting property," the right to acquire and protect property is as sacred in the case of intangible property as tangible, and an injunction may be granted to protect intangible rights no less than those that are tangible.

The learned circuit judge refused to interfere on the ground that the acts committed by the defendants are criminal in nature and punishable by the police department; that if he had jurisdiction to enjoin the commission of the acts it necessarily followed that he had jurisdiction to enforce a penalty for a violation of his order; and that this would amount in substance to holding that he could try and convict the defendants for a criminal act without the intervention of a jury. We can not concur in this reasoning. If the defendants were undermining the plaintiff's house, or about to slide it with his family in it out into the Ohio river, an injunction would not be refused on the idea that if they thus drowned any of the people in the house they might be punished for murder, or if they destroyed the house only they might be indicted under the statute for the willful destruction of private property. The reason is plain; the punishment of the defendants for murder or for the destruction of the house, while it would vindicate the majesty of the law, would not help the plaintiff in any way. To relegate him to the processes of the criminal law is to allow his property to be destroyed, and to give him no remedy therefor but the satisfaction of seeing the wrongdoers punished. The inherent and inalienable right of acquiring and protecting property which is guaranteed by the Constitution means nothing if it means only this. If a man must stand by and see his property destroyed and has no remedy but the slow process of the criminal law which only punishes the offender, but restores nothing to him, then the constitutional guarantee of the enjoyment of life, liberty and property under the law is a meaningless generality. If in this case the defendants are fined in the police court, this will not restore the plaintiff the loss he has sustained by reason of the interruption of his business and his consequent inability to carry out his contracts. When his customers are driven away, and the good will of his business is destroyed, it will be too late, so far as he is concerned, for the punishment of the appellees by the criminal law to re-establish his ruined business or even prevent future loss.

If the circuit court had granted the injunction and the defendants had disobeyed it and he had punished them for contempt, the punishment would have been for their disobedience of the order of the court, regardless of whether their acts were also a violation of the criminal law of the land for which they might be indicted and punished in the criminal court. His judgment punishing them for contempt would have been no bar to the crim-

inal proceeding against them for their violation of the law, and would not have affected this proceeding in any way. His judgment would have established nothing more than that they were guilty of contempt of court in disobeying his orders. Whether they were also guilty of a criminal offense would have to be tried in the proper forum, and not in this action. The power of a court to punish for contempt is as old as the common law, and inherent in every court. The punishment for contempt would relate only to acts done after the injunction was granted, in disobedience of it, and even in this proceeding the defendants are protected as to a jury trial by section 1291, Kentucky Statutes, which provides: "A court shall not for contempt impose upon the offender a fine exceeding \$30, or imprison him exceeding thirty hours, without the intervention of a jury."

It is also urged that the plaintiff had an adequate remedy under the Criminal Code by having the defendants to give security to keep the peace and be of good behavior. (Criminal Code, section 382.) The rule that an injunction will not be granted where there is an adequate remedy at law refers to legal remedies, and not to criminal proceedings. In no case has it ever been otherwise applied so far as we can find. The proceeding to require security to keep the peace is given in the Code, under title 10, which embraces proceedings to prevent the commission of offenses. It looks to the prevention of offenses, and not to the redress of private wrongs. It is begun by a warrant issued in the name of the Commonwealth, and is a prosecution by the Commonwealth, under the control of its officers. If a bond is required it is taken to the Commonwealth. (Criminal Code, sections 383-392.) When the plaintiff's property is about to be destroyed he is entitled to a remedy in his own name, and which he can himself control to protect him in the enjoyment of his own. The fact that the Commonwealth might also take out a proceeding to require the defendant to give security for good behavior is immaterial, for both proceedings may be prosecuted at the same time, one in the criminal court by the Commonwealth and the other in equity by the plaintiff, one to prevent the commission of offenses, the other to preserve the plaintiff's property from destruction. Were the rule otherwise, an injunction could never be granted in the case of repeated trespasses, for in such cases the defendants might be put under bond for good behavior under the Criminal Code; but it has been uniformly held by this court that in such cases an injunction will lie. (Preston v. Preston, 85 Ky., 16; Ellis v. Wrenn, 84 Ky., 204; Walker v. Leslie, 90 Ky., 642.) The rule is universal. (High on Injunctions, section 702.)

The question before us has often arisen, and the decisions uniformly, so far as we can find, uphold the power of the chancellor to interfere by injunction in cases of this character. The subject was exhaustively considered by the United States Supreme Court in *re Debs*, 158 U. S., 564, where the court thus stated its conclusion: "Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

In *Vegeahn v. Guntner*, 167 Mass., 92, a case very much like this, the court, in answer to the objections made here, said: "Nor does the fact that the defendant's acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime."

So in *Bar v. Essex Trades Council*, 58 N. J. Eq., 101, which was also a case very like this, the court upholding the jurisdiction of the chancellor, said the cases were all against the defendant's contention. In *Beck v. Teamster's Protective Union*, 118 Mich., 518, which was also a similar case, the Supreme Court of Michigan said: "While some writers have doubted the remedy by injunction, it is now settled beyond dispute." To same effect see *O'Neil v. Behanna*, 132 Penn., 237; *Flaccus v. Smith*, 199 Penn., 128; *Shoe Co. v. Saxey*, 131 Mo., 212; *Plant v. Woods*, 176 Mass., 492; *Jackson v. Stanfield*, 137 Ind., 592; *Mobile v. L. & N. R. R. Co.*, 84 Ala., 115; *High on Injunctions*, sections 20, 745, 752, 770.

The constitutional right of free speech may not be infringed. Peaceful persuasions or lawful appeals to reason or sentiment may not be interfered with; but when intimidation and violence are resorted to, and thereby property is destroyed or its safety imperiled, the chancellor may properly, by injunction, protect the owner of the property in the enjoyment of his constitutional right that his property shall not be taken from him. The enforcement of the criminal law is for the criminal court, but where the breach of the criminal law is also a violation of a property right the chancellor may interpose by injunction to protect property.

The judgment appealed from is reversed and the cause is remanded, with directions to overrule the demurrer to the petition and grant the temporary injunction as herein indicated.

Whole court sitting.

Judges Paynter and Nunn dissent.

ILLINOIS CENTRAL R. R. CO. v. JOLLY.

(Filed February 12, 1904.)

1. *Railroads—Damages—Proximate cause*—Where a passenger on a train had placed herself at the car door before the train stopped, such action on her part was the proximate cause of injuries sustained by her in falling when the train stopped.

2. *Same—Instruction*—In an action against a railroad for damages resulting from being thrown on the platform when the train stopped, resulting in injury, the court should have instructed the jury that if they believed from the evidence that plaintiff left her seat before the train stopped and stood at the door of the car and fell when the train stopped, they should find for the defendant.

H. P. Taylor and Pirtle & Trabue for appellant.

Glenn & Ringo, John B. Wilson and E. E. Kelley for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hobson.

Elizabeth Jolly, who was then seventy-six years old, took the passenger train of the Illinois Central R. R. Co. at Caneyville, Ky., for Owensboro, intending to change cars at Horse Branch, and there take the train on the road running to Owensboro. She was accompanied by her son, and they had two telescopes. She and her son state that when the train reached Horse Branch, and had stopped for the station, after two other passengers had gotten off, she said to her son that they had better get off; that he picked up the two telescopes, and she walking in front, they went to the door; that as she got to the door the train started to back, and by the lurch or jerk of the train she was thrown down, her head falling on the platform of the car, and her ankle being twisted under her and severely sprained. She was unable to walk on the foot. The ankle swelled up and turned black; for two or three weeks she could not walk a step, and had to remain in bed. She suffered a great deal, and it was two months before she could put a shoe on. At the trial in March, 1903, she was still unable to walk on the foot, or to do anything except such things as she could do sitting in a chair, such as knitting and sewing. Previous to that time she had done all her housework, including washing.

On the other hand, the defendant proved by W. D. Stith, a drummer who was on the train, that as it approached the station he was in the smoker and came to the door facing the door of the car in which Mrs. Jolly was; that he saw her coming toward the door before the train had come to a stop; that she reached it while the train was yet moving, and when the train stopped she was in the door, and fell forward on the platform; that there was no jerk or lurch of the train, but it stopped in the usual and customary manner, without any backing, and that she simply fell forward when the train stopped. The defendant also proved by W. P. Miller, who lived at Horse Branch, that he was standing on the platform and saw the train as it pulled into the station; that as the train came up he saw the lady standing in the door, and as it stopped she fell. He also stated that there was no jerk or bump of the cars, and no backing of the train. The conductor of the train, who was standing on the platform in front of the car, testifies to the same facts, and all the other employes on the train testify that the train stopped in the usual way, without jolt or jar, and that it was not backed after it stopped. The brakeman on the Owensboro train said she told him that her son was at the time rushing her off the train, and she thought that if he had not rushed her off she would not have gotten hurt. The porter on the train testified that when he called out the station the old lady started to get up, and he said, "Lady, wait until the train stops," and went to the smoker door and called out the station again, and then went out and took out the baggage, but did not see her any more because he had his baggage up to the platform and stepped off as soon as the train got still enough. A witness at the hotel at Horse Branch, to which the old lady went after she left the train, testified that she said that if her grandson had been along she would not have gotten hurt. And another witness at the hotel says that she added that her son had her to get up before the train stopped, and he was the cause of her getting up so quick. By several of the witnesses it was also proved that she said her ankle had been hurt before, and was weak.

On these facts the court instructed the jury as follows:

"1st. The court instructs the jury that if they believe from the evidence that while the plaintiff was a passenger on one of the defendant's passenger trains and cars, and after said train had reached Horse Branch, a station on its railroad, at which point she was to get off of said car, and after she had been notified by the conductor, or other servants of defendant in charge of said train and car, to get off, and after the train had stopped she started to get off the train, and while herself in the observance of ordinary care the servants and agents of the defendant in charge of its said train carelessly and negligently started said train backward, causing a sudden and violent jerk, by which the plaintiff was thrown down and her ankle sprained, and she thereby damaged as the direct or proximate result of the negligence of the defendant's servants in charge of its said train, they should find for the plaintiff the damages sustained by her as a consequence of her injuries, not exceeding the amount claimed, \$1,999.

"7th. If the jury do not believe from the evidence that the train on which plaintiff was a passenger had stopped for Horse Branch station, and she had been notified by the conductor or other servant in charge of the train to get off, and after stopping, while plaintiff was starting to get off, said train was, by the negligence of the agents and servants of defendant, caused to move with a violent jerk, by which plaintiff was caused to fall and was injured, and she was not so caused to be injured by the negligence of the defendant's servants, they should find for the defendant. Or, if they believe from the evidence that before reaching the station, and before being notified to get off the train, plaintiff voluntarily left her seat and negligently stood up in the door, and was caused to fall by the ordinary stopping of the train, and but for her own negligence, if they believe from the evidence she was negligent, she would not have been hurt, they should find for the defendant."

The other instructions of the court give the measure of damages, define negligence and ordinary care, and state correctly the degree of care required of the defendant in the operation of its train. The first instruction sets out the state of facts on which the plaintiff was entitled to recover if the jury accepted as true the version of the transaction given by her and her son. The only question we deem it necessary to decide is whether the seventh instruction fairly submitted to the jury the state of facts shown by the evidence for the defendant on which it sought exoneration from liability. We have had great difficulty to determine just what the jury were authorized to understand the court meant by the instruction. If the first clause of it was meant as the converse of No. 1, then there was no necessity for the second clause. The instruction can not mean that the plaintiff could not recover unless she was thrown down by a sudden jerk from the backward movement of the train after it had stopped, for by the last clause, if the plaintiff left her seat before the train reached the station and stood in the door and was caused to fall by the ordinary stopping of the train, yet she could recover unless she did this negligently, and but for her own negligence she would not have been hurt. Taking the entire instruction together, we conclude its fair meaning to the jury was that if the plaintiff left her seat and went to the door while the train was still moving, and while standing there was caused to fall by the ordinary stopping of the train, the jury was still war-

wanted to find for her unless they believed that in so doing she failed to exercise such care as might be ordinarily expected of a person of usual prudence situated as she was, and but for this would not have been injured. The question then arises, is this the law of the case?

It is a matter of common knowledge that as a rapidly rolling passenger train stops at a station there is a forward movement of persons even sitting in the car. This movement is much more pronounced when one is standing up, and there is greater danger of an old person falling than in the case of one younger, or who is on the lookout from experience for the forward surge of the body, just as the train abruptly stops. The railroad company is not responsible for this. No amount of care can avoid it. It is not due to any jolt or jar of the train, but simply to the fact that the body of the person standing up continues to move forward when the feet resting on the floor of the car have stopped. It is safest for passengers on railway trains to keep their seats until the train stops. If they leave their seats when the train is approaching the station they take the risk of those things which are incidental to the stopping of the train in the usual way and with proper care. In *Hughlett v. L. & N. R. R. Co.*, 15 Ky. Law Rep., 178, the court said: "All who board trains as passengers know that the announcement is usually made as the trains approach to a depot before it actually reaches it, to enable passengers to prepare for leaving."

A passenger is not required to keep his seat during his whole journey. He may move from one part of the car to another. When the train approaches his station, and it is announced, he may prepare to leave the train. Whether he is wanting in reasonable care in leaving his seat then and standing in the aisle is a question for the jury, if while so standing he is injured by some jerk or bump of the train not incidental to its proper management. (*New Jersey R. R. Co. v. Pollard*, 22 Wal., 341; *Treat v. Boston, &c.*, R. R. Co., 131 Mass., 371; 5 Am. & Eng. Ency. of Law, 682; 6 Cyc., 650, and cases cited.) A passenger who rides in a place more dangerous than that intended for passengers, and is there hurt by the usual and proper operation of the train, when he would not have been hurt had he remained in his seat, can not be said to have been injured by the negligence of the carrier. In the case at bar, if the evidence for the defendant is true, there was no negligence on its part, and the proximate cause of the accident was the old lady's placing herself at the car door before the train stopped. In lieu of instruction 7 the court should have instructed the jury that if they believe from the evidence that before the train stopped at the station the plaintiff left her seat and stood up at the door of the car, and while standing there was caused to fall by the stopping of the train in the usual manner, with no more jerk than was incidental to the stopping of the train in the exercise of proper care as defined in instruction 3, they should find for the defendant. The court gave no distinct instruction on contributory negligence, and, in addition to the instruction indicated, the jury should have been instructed in effect that, although the defendant was negligent as above defined, still it was incumbent on the plaintiff to exercise such care for her own safety as might be ordinarily expected of a person of usual prudence of her age and condition, situated as she was, and if she failed to exercise such care, and but for this would not have been injured, she could not recover.

Judgment reversed and cause remanded for a new trial.

GEORGETOWN WATER CO. v. FIDELITY TRUST AND SAFETY
VAULT CO.'S TRUSTEE, &c.

MONTGOMERY, &c. v. SAME.

(Filed January 15, 1904.)

1. Sale of mortgaged property—Appeals—Where upon an appeal from an order confirming a sale of mortgaged property the court held that the sale should be confirmed unless the mortgagee could show that the surety was endangered, the sale was binding where there was no such fact established, and the purchasers were liable on the sale bond.

2. Same—Receiver—Where there was a sale of mortgaged property ordered and a receiver appointed to take charge of it the court could not require the receiver to control and operate the property without compensation, and the holder of such property is entitled to the rents and profits while it is in possession.

3. Same—Corporations—Holders of bonds—The holders of bonds of a corporation, which were issued upon being secured by a mortgage, should share in the proceeds upon a sale of the property in accordance with the number of bonds held, and although such bonds were taken in the due course of business, having been issued by a corporation organized under the laws of this State, they are subject to prior equities in the hands of an assignee.

4. Same—Assignment—The assignment of a bond of a corporation which had been issued upon the faith of a mortgage, the person making the assignment having no title to the bond, such assignment will be treated in an action to enforce the lien as an assignment of the proceeds belonging to him, as will be sufficient to satisfy the debt.

5. Same—Where the property of a mortgaged corporation was kept in repair, worn out parts being replaced, improvements made and all net earnings put into improvements, causing it to bring when sold much in advance of what it was worth when acquired, the rule is that such chattels attached to the realty by purchasers at sale are not subject to lien when they are not intended as a permanent acquisition to the freehold, and may be removed without substantial impairment of the property.

M. S. Tyler, H. P. Montgomery, Victor F. Bradley, A. T. Wood, J. W. Rodman, C. M. Thomas and R. A. Mitchell for appellants.

W. C. Bell and R. P. Jacobs for appellees.

Appeals from Scott Circuit Court.

Opinion of the court by Judge Hobson.

The Georgetown Water Co. was incorporated June 21, 1889; the incorporators were R. A. Mitchell, John Nichols and E. H. Patterson; the stock of the company was fixed at \$100,000, and was issued to the incorporators, they transferring to the corporation a contract made by them with the city of Georgetown in payment of the stock. They put into the company each \$4,000. They bought ground, erected a plant, and laid mains. They also bought electrical machinery for an incandescent light system. They borrowed from a bank at Pineville \$10,000. They owed the Central Thompson-Houston Co., of Cincinnati, for machinery, about \$8,000. In January, 1890, they organized the Georgetown Electric Light Co., but no business appears to have been done in the name of this company, everything being transacted in the name of the Georgetown Water Co. On April 15, 1890, the

water company executed a mortgage to the Fidelity Trust and Safety Vault Co., as trustee, for the bondholders to secure seventy bonds of \$500 each, with interest at 6 per cent., having coupons attached, due in twenty years. The mortgage was upon all the property of the company, real and personal, including privileges and franchises then owned or thereafter to be acquired by it, "the said property (as recited in the mortgage) consisting in part of the waterworks plant, pipes and mains of said first party in the county of Scott and town of Georgetown, and its electric plant erected, and to be erected, with all appliances, machinery, etc., together with all other property of every kind as hereinbefore stated."

The mortgage also provided that when any of the machinery became worn out the first party should have the right to replace it with new machinery of equal or better quality, and might then dispose of the old machinery, the clause concluding with these words: "And the lien of this mortgage shall attach to such new machinery or other property that may be acquired and added by said party of the first part." In July, 1890, they bought out the Georgetown Gas Co. and consolidated the three companies in the name of the Georgetown Water Co. In payment of the machinery bought of the Central Thompson-Houston Co. they delivered to it, according to contract, ten of the mortgage bonds referred to, leaving a balance due it of about \$3,000. They ran the electric plant in the summer, the gas plant in the winter, and it would seem from the evidence that the profit from the operation of the plants, including the waterworks, was small. On February 2, 1891, the Central Thompson-Houston Co. filed an ordinary action in the Montgomery Common Pleas Court against the Georgetown Water Co. to recover the balance of its debt. The case was tried at the September term, 1891, of the court, and the plaintiff recovered judgment for the amount sued for. On November 6, 1891, the Georgetown Water Co. borrowed from the Fidelity Trust and Safety Vault Co. \$10,000, executing therefor its note, due in six months, with Nichols, Mitchell and Patterson as sureties, and also securing the note by pledging with the company fifty-four of the mortgage bonds referred to. This \$10,000 was used to pay the debt to the Pineville bank, above referred to. They had still in their hands six of the seventy mortgage bonds, having delivered ten to the Central Thompson-Houston Co. and fifty-four to the Fidelity Trust and Safety Vault Co. Of these six bonds Mitchell took two and Nichols four. Nichols turned over the four he had to John L. Caswell, who was his security, and to whom he assigned all his interest in the company. On March 8, 1892, the Central Thompson-Houston Co., having had execution issued on its judgment and returned no property found, filed an equity action in the Montgomery Common Pleas Court, seeking to subject the property of the water company to its debt, and to have it placed in the hands of a receiver. In that case a judgment was entered, directing a sale of the property of the water company, subject to the mortgage above referred to. The sale was had, and appellants, H. P. Montgomery and others, were the purchasers, at the price of \$3,525. The sale was reported to the court, and confirmed. A writ of possession was issued in favor of the purchasers, and they were placed in possession of the property. After all this, the water company prosecuted an appeal to this court from the judgment in the ordinary action in favor of the Central Thompson-Houston Co.,

and also from the judgment in their favor in the equity action. The judgment in the ordinary action was reversed for an error in the instructions. (Georgetown Water Co. v. Central Thompson-Houston Co., 17 Ky. Law Rep., 1270.) The case was returned to the circuit court, where it was tried again, the plaintiff recovering as before, and this judgment on a second appeal was affirmed by this court. (Georgetown Water Co. v. Central Thompson-Houston Co., 20 Ky. Law Rep., 1899.) On the original hearing of the equity case the judgment of sale and the confirmation of the sale were both reversed; but on petition for rehearing, the court's attention being called to the condition of the pleadings, the opinion was modified, and it was held that the sale must stand except as to the trust company, and that as to it it should be permitted to stand unless the trust company showed that its security had been endangered. The court said: "Evidently the plant brought what it was worth; the purchasers are not complaining; the water company can not do so; and, in our opinion, the trust company has not shown that its interests are at all prejudiced by the order confirming the sale. The order of confirmation, therefore, will not be disturbed here, and the former opinion is modified to that extent. While this modification is made in the original opinion, the judgment must stand reversed as to the Fidelity Trust Co., so that the rights of the bondholders it represents may not be affected or prejudiced by the sale to the appellees, and any lien it may have in its own right, or for those it represents, on the property of the water company, its rights and franchises, will be retained as if no such judgment had been rendered. On the return of the case the judgment, in so far as it affects the Fidelity Trust Co., will be set aside, with the right of the trust company to show, if it can, by appropriate pleadings and proof, that its security had been endangered by reason of the sale to appellees, and, if so, the sale will be set aside, and not otherwise." (Georgetown Water Co. v. Central Thompson-Houston Co., 17 Ky. Law Rep., 1270.)

No steps appear to have been taken by the trust company in the circuit court to show that its security was endangered, but at the next term of this court a motion was made that the court withdraw the modified opinion. The motion was overruled. (Georgetown Water Co. v. Central Thompson-Houston Co., 18 Ky. Law Rep., 711.) A year or more after this, on January 19, 1898, the Fidelity Trust and Safety Vault Co., as trustee for the bondholders, instituted an equity action in the Scott Circuit Court, making all parties in interest defendants, and seeking the foreclosure of the mortgage. Montgomery and his associates who had organized themselves into the Georgetown Water Supply Co. were in possession of the property, and has been since they were put in possession of it under their purchase. The town of Georgetown had nearly doubled in size since the year 1889. The incandescent light system, which was originally put in, was suitable only for lighting residences and the like. To light the streets of the town they had put in an arc light system in addition to the incandescent system. There were only about fifty poles up when they took charge. They bought and put up something over three hundred more. They extended the lines until now they have about fifteen miles of electric light line. They also put in additional water mains as demanded by the exigencies of the public necessities, in order to preserve the franchises of the company. The machinery

of the arc system was separate from the machinery of the incandescent light system, and could be moved without injury to the freehold. They put it in upon the idea that they would have the right to remove it when they were required to give up the property. After this suit was brought the court allowed them to remove all the machinery from the lot where it stood to the lot of the street railway company upon their giving bond that they would return it to the original lot when required by the court. After they removed the machinery to the premises of the street railway company they added other machinery, costing them \$4,800. When the court required the machinery which had been removed to be returned to the lot of the Georgetown Water Co., he allowed them to retain the additions which they had purchased and had on the lot of the street railway company, amounting to \$4,800; but refused to allow them to remove the arc light system or the other additions which they had made to the plant before its removal from the original lot, and ordered the whole property sold, giving them no compensation for their betterments, which had cost them something over \$12,000. He also held that they were responsible to the bondholders for the rent of the property while in their possession, from the time that a motion to put the property in the hands of a receiver had been made and overruled in that action at a preceding term.

After the note for \$10,000 to the Fidelity Trust and Safety Vault Co. fell due Mitchell, as surety, was forced to pay it; the notes and bonds pledged to secure it were then turned over to him. He turned over the bonds to E. S. Jameson, his brother-in-law, who was his surety, who held them for a while and finally sent them to Mitchell, who pledged them to various parties to secure loans made in the main to his mother, Ann E. Mitchell. R. A. Mitchell sent one of the bonds to E. H. Patterson, in Philadelphia, to exhibit it to some persons there to whom they were trying to make a sale of the property. Patterson kept this bond and hypothecated to it to D. B. Logan to secure a debt of his own. The money which Patterson put into the concern belonged to his wife, and he transferred to her his interest in the corporation. The court, on final hearing, held that the mortgage included property acquired after it was executed and not owned by the Georgetown Water Co. when the mortgage was given; that H. P. Montgomery and his associates having purchased subject to the mortgage, simply stood in the shoes of the Georgetown Water Co., and could not question the lien of the mortgagee on the after-acquired property; that \$27,000 had been put into the plant, made up of \$12,000 contributed by Nichols, Patterson and Mitchell, \$10,000 borrowed from the trust company, and \$5,000 of the account of the Central Thompson-Houston Co. for the machinery furnished which had been paid in the ten bonds of \$500 each accepted by that company at par; that Nichols transferred to Cassell and that Patterson transferred to Logan the bonds referred to in due course of trade, and that Cassell and Logan took them free of prior equities. He adjudged the property to be sold and after the payment of certain prior debts not here in dispute, five twenty-sevenths of the proceeds should be paid to the Georgetown Water Supply Co., the assignee of the Central Thompson-Houston Co., as the part of the proceeds coming on the five bonds held by it; that twenty-two twenty-sevenths of the proceeds should constitute a fund for the payment of the

other bonds; that Cassell and Logan should be paid the part of the proceeds represented by their bonds; that out of the proceeds of the fifty-four bonds held by the trust company as collateral Mitchell should be paid the \$10,000 he had paid the trust company, with its interest; and that the remainder of the proceeds of these bonds belonged equally to Mitchell, Patterson and Nichols, or their assigns. The water supply company offered to surrender the property to the court when the judgment was entered; the court refused to permit this, and ordered it to retain possession of the plant and operate it upon the same terms as if the company had been appointed a receiver until delivered to the purchasers, except the company should receive no compensation for its services as receiver and kept a full and accurate account of the receipts and expenditures in the operation of the plant, and report them to the court at the next term. From this judgment all the parties have appealed. The property was sold under the judgment and brought \$30,000. The sale was confirmed. The court also ordered Montgomery and his associates to pay their bond executed upon their purchase of the property subject to the mortgage above referred to, this bond having never been collected.

It was held by this court in the modified opinion that the order of confirmation of the sale to Montgomery and his associates would not be disturbed here, and that on the return of the case it might be set aside if the trust company showed, by appropriate pleadings and proof, that its security had been endangered, but that otherwise the sale should stand. The sale was, therefore, left in effect by this court. The trust company did not show by pleading or proof that its security had been endangered; and no order was made setting aside the sale. The court, therefore, properly ordered the purchasers, Montgomery and his associates, to pay their sale bond. Their sale standing, and they being required to pay the purchase money, they held the property as purchasers, and are not liable to the Georgetown Water Co. or the bondholders, or the trustee for them, for the rents on the property. The mortgagee is only entitled to the rents from the time that he has a receiver appointed to save them for him. When the motion was made for a receiver and was overruled, the remedy of the mortgagee was to appeal. He could not acquiesce in the decision of the court refusing to appoint a receiver and then hold the defendant accountable for the rents. If the Georgetown Water Co. had remained in possession it would have been entitled to the rents up to the confirmation of the sale, and Montgomery and his associates succeeding to all the rights of the water company are entitled to the rents of the property while in their possession. This is what they obtained by their purchase. The court had no authority to order them to operate the plant as receiver without compensation. The court might have appointed a receiver for the property if he had seen fit to do so, but he could not require the defendant to act as receiver, and assume the responsibilities of the position over its objection.

The Georgetown Water Co. was incorporated by articles filed in the county court under the General Statutes. It had no power by law to issue coupon bonds which should pass by delivery. The paper issued by it was not placed on the footing of a bill of exchange as provided by the statute. Although the bonds had coupons attached to them and were payable to bearer, they

were in legal effect only promissory notes, and each assignee took them subject to prior equities. (*Richie v. Cralle*, 108 Ky., 483; *Fidelity Trust and Safety Vault Co. v. Carr*, 24 Ky. Law Rep., 156, and cases cited.) None of the bondholders, therefore, are protected by the fact that they took the bonds in the due course of business and without notice. We find no evidence in the record that the corporation ever disposed of the four bonds which Nichols took possession of and delivered to Cassell or the two which Mitchell took possession of and disposed of as his own. These bonds were the property of the corporation, and not having been disposed of by it, remain its property, and can not be enforced in this action as a lien on its plant. The ten bonds delivered to the Central Thompson-Houston Co. and the fifty-four bonds delivered to the trust company as collateral to the note of \$10,000 are the only bonds which constitute a lien on the property. After the prior claims, as adjudged by the circuit court, are paid, ten sixty-fourths of the fund remaining should be applied to pay the ten bonds sold to the Central Thompson-Houston Co., and fifty-four sixty-fourths of it to pay the fifty-four bonds pledged to the trust company to secure its note. The trust company had the right to look to the entire proceeds of these bonds for the payment of its debt, and when Mitchell paid the debt as surety he succeeded to all the rights of the trust company, and had the right to look to the entire proceeds of the fifty-four bonds for the repayment of his money and interest. The remainder of the proceeds of these fifty-four bonds, after the payment of Mitchell's debt with interest, is, as between it and Mitchell, the property of the water company; for Mitchell has no claim on them except the lien for the repayment of his money, with interest. If the ten bonds held by the Central Thompson-Houston Co. are not paid in full by ten sixty-fourths of the net proceeds of the sale above directed to be paid upon them, the remainder of the principal and interest of these bonds should be paid in full out of the funds set apart to the water company after the payment of Mitchell's debt out of the proceeds of the fifty-four bonds as above indicated, for the water company is the obligor in the bonds held by the Central Thompson-Houston Co., and must discharge its obligation out of the funds coming to it before it can be allowed to withdraw any part of the proceeds of the sale. The substance of the situation as between the Central Thompson-Houston Co. and the water company is that the former company holds the promise of the latter to pay it \$5,000, secured by a lien on the property in contest, and as between the two the water company's right to the proceeds of the sale is subordinate to the lien of the Central Thompson-Houston Co.

When all the bonds are thus paid off, so far as they are a valid lien on the property, the remainder of the funds, if nothing else appeared, would be the property of the water company; and the question arises whether this fund thus remaining should all be adjudged to the water company, or whether Montgomery and his associates should be adjudged compensation out of it to the extent of its enhancement by reason of the betterments placed by Montgomery and his associates on the property. The proof leaves no doubt that Montgomery and his associates not only kept the plant in repair, replacing what was worn out, but put in the arc light system, extended the mains and lines, advancing a large sum of money for this purpose, and putting all the net earnings of the company into it, thus causing it to bring, when

finally sold, \$30,000, when it was at the time they got it, under the evidence, worth very much less. The rule is as between vendor and vendee or mortgagor and mortgagee that chattels attached to the realty by the vendee or mortgagor are not subject to the lien when they are not intended as a permanent accession to the freehold, and may be removed without substantial impairment of the property. In *Clore v. Lambert*, 78 Ky., 224, a steam engine and planing mill attached to a building by bolts and screws by the vendee were allowed to be removed after a suit was brought to enforce the vendor's lien. Under the rule thus declared the arc light system and other machinery bought by Montgomery and his associates, which might be removed from the building without injury to it, might, as between vendor and vendee, have been detached and taken away. But it is insisted that the mortgage in this case provides that it should cover after-acquired property placed on the land by the water company, and that as Montgomery and his associates bought subject to the mortgage, they stand in the shoes of the water company, and can not be heard to say that after-acquired property which they bought and placed on the land is not covered by the mortgage. Where negotiable bonds have been issued secured by a mortgage of a railway company on property then on hand or thereafter to be acquired, the mortgage is upheld in favor of the bondholders as to after-acquired property; otherwise long-time bonds could not be issued and money raised upon them. (*Westinghouse Electric, & Co. v. Citizens St. R. R. Co.*, 24 Ky. Law Rep., 334; *Porter v. Steel Co.*, 123 U. S., 283; *Jones on Mortgages*, section 436.) But where no bondholder is interested and the controversy is between the bona fide occupants of the property and the mortgagor after the mortgage debt has been satisfied, a different question is presented. As between them the occupants should have been allowed to remove from the premises all such fixtures as were removable as between vendor and vendee. To illustrate: If it had turned out in this action that none of the bonds were enforceable against the water company, and that there was no lien on the property under the mortgage, it would hardly be maintained as between Montgomery and his associates on the one hand and the water company on the other, that they would not have the right to remove from the property such fixtures as are removable between vendor and vendee; for the stipulation in the mortgage as to after-acquired property is for the protection of the mortgagee, and affords no reason for putting into the treasury of the water company the property of the purchaser who bought subject to the mortgage and placed the chattels on the property on the idea that they might remove them when they were required to surrender possession. If none of the bonds had been sold by the water company the relation of mortgagor and mortgagee would, in effect, exist between the water company and the parties who bought subject to the mortgage and held possession under their purchase. The water company would then be entitled to the benefit of the mortgage to the extent of the amount named therein; but this would not enable it to say that the stipulation of the mortgage as to after-acquired property placed on the land by it, made for the benefit of the bondholders, should inure to its benefit as against the purchasers who took subject to the mortgage, and give it a lien on their after-acquired property, which it

would not otherwise have. If the water company had paid the note to the trust company, and had taken up the five bonds held by the Central Thompson-Houston Co., and had then filed this suit itself to have the mortgage foreclosed, and the amount of the mortgage debt paid to it, it could hardly maintain that it was entitled to have a foreclosure on anything more than its property, or that Montgomery and his associates could not remove anything in that event from the premises which would be removable between mortgagor and mortgagee. Yet this is in substance the case we have as to the surplus left after the payment of the bonds, as the bonds were not negotiable, and are not enforceable against the water company further than as indicated. (2 Jones on Mortgages, section 1491.)

We, therefore, conclude that out of the surplus left after the payment of the bonds which would otherwise be adjudged to the water company, compensation should be made to Montgomery and his associates to the extent that the price which the property brought at the sale was enhanced by the betterments placed thereon by Montgomery and his associates which were removable by them under the rule laid down in *Clore v. Lambert*. This will include not only the machinery in the power house, but the additional water mains put in by them, and the additional electric lines put up by them, for these could be disconnected from the old mains and lines without any impairment of their value. Nothing will be allowed for repairs on the old plant, or the old mains or lines, or for anything which was put in to supply the place of what was originally mortgaged, but worn out. The amount of compensation to be allowed them is not the cost of the property which they added, but the extent to which these additions enhanced the price which the property brought at the sale as near as it can be ascertained by proof of what the whole property consisted of and its value and proof of the value of the additions above referred to, and such other evidence as may be had. On the return of the case to the circuit court it will be referred to a commissioner to report in detail what additions were made by Montgomery and his associates for which they should be allowed, as above explained, giving the value of each, the value of the other property covered by the mortgage and to ascertain as nearly as can be done how much of the \$30,000, for which the property sold, represents the additions made by Montgomery and his associates, for which they should be compensated, as above explained.

After Montgomery and his associates are paid the rest of the fund will be adjudged to Mitchell, Patterson and Cassell, or their assigns, Mitchell being first paid \$206.95, as adjudged by the circuit court. The assignment of the bond to D. B. Logan should be treated as an assignment to Logan of \$250, with interest from April 1, 1897, out of Patterson's share of the proceeds. The assignments of the other bonds by R. A. Mitchell, or his assignees, should be treated as assignments of the proceeds of the bonds as herein adjudged, which should be paid accordingly. Patterson took no title to the bond which Mitchell sent to him simply to show to others, and Patterson's assignment of this bond to Logan should be treated simply as a transfer by Patterson to Logan of enough of his share in the surplus to pay Logan's debt of \$250. The court properly held that this surplus should be equally divided between Patterson, Mitchell and Nichols, or their assigns.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

Chief Justice Burnam and Judge O'Rear dissent from so much of the opinion as gives Montgomery and his associates compensation for their betterments.

BOOTH & CO. v. BETHEL.

(Filed February 16, 1904—Not to be reported.)

Judgments—Where upon a return of a case to the lower court it is tried in strict conformity to the rule laid down by this court, the judgment will not be disturbed.

H. D. Gregory and W. W. Symmes for appellants.

Myers & Howard for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

The facts of this case are fully stated in the opinion rendered on the former appeal. (Bethel v. Booth, 24 Ky. Law Rep., 2024.) It was there held that there was an implied contract that Booth & Co. would pay Bethel the difference between the amount paid for the assets of the store and its actual value on the day the purchase was made, and in addition would compensate Bethel for the loss which he sustained of the good will of the business. On the return of the case to the circuit court it was tried in strict conformity to the rule thus laid down, and the plaintiff having recovered judgment for something over \$800, the defendants appeal.

The evidence on the last trial is much the same as when the case was here before. The opinion on the former appeal is the law of the case. There was sufficient evidence to go to the jury as to the authority of the general manager of Booth & Co. to make the contract. It was apparently within the scope of his general authority, and the defendants had received the benefits of the contract. The action does not proceed upon the idea that the contract was a valid one, which could be enforced against them, but that they could not be allowed to retain the benefits of the contract after they repudiated it, and that as Bethel had given up to them his business as well as the personal property they must account for what they had received.

The proof as to the amount of business done and what Bethel was making was sufficient to go to the jury on the value of the good will of the business, and we do not see that the defendants were in any way misled by the rulings of the court. On the contrary, they seem to have presented fully their evidence on the subject.

While the verdict is large, as there have been three trials of the case and the evidence was conflicting, we deem it improper to disturb the verdict. The credibility of the witnesses was for the jury, and their verdict shows that they believed the plaintiff and his witnesses.

Judgment affirmed.

METROPOLITAN LIFE INS. CO. v. MOORE.

(Filed February 16, 1904.)

1. Insurance—Construction of statutes—By the provisions of section 679, Kentucky Statutes, where the application for insurance is not attached to the policy it shall not be received as evidence in a controversy between the insured and the company.

2. Same—Where it was not shown upon the trial in an action to recover upon a policy of insurance that the unsoundness of health of insured occurred between the application and medical examination and delivery of the policy, the provision in the policy that it shall not be binding "unless upon the date of delivery the insured is alive and in sound health," such defense is not available, and the company must rely on the statements in the application, and not upon this clause in the policy.

R. H. Cunningham and F. M. Sackett for appellant.

John C. B. Hall and C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Paynter.

This appeal brings in review the judgment of the court on a policy for \$5,000 on the life of Abram R. Moore for the benefit of the appellee, Annie M. Moore. The policy did not have attached to it a correct copy of the application, as signed by the applicant, and not being so attached section 679, Kentucky Statutes, declares that it shall not be received as evidence in any controversy between the parties to or interested in the policy, and shall not be considered a part of the policy or of the contract between such parties. (Provident Assurance Society v. Beyer, 23 Ky. Law Rep., 2460; Rice v. Rice, 23 Ky. Law Rep., 635; Manhattan Ins. Co. v. Meyers, 22 Ky. Law Rep., 875; Provident Assurance Society v. Puryear, 22 Ky. Law Rep., 980; Supreme Commandery v. Hughes, 24 Ky. Law Rep., 984.)

In view of the statutes, as interpreted by this court, the application can not be considered in determining the rights of the parties to this controversy. There is another defense based upon a condition in the terms on the policy itself, and which is as follows: "No obligation is assumed by this company upon this policy until the first premium had been paid, and the policy duly delivered, nor unless upon the date of delivery the insured is alive and in sound health."

It is pleaded in the answer that the insured was not in sound health when the policy was delivered, and, therefore, it is argued that the policy is void and never created any obligation upon the company. The policy seems to have been delivered on the 6th of November, 1901, and the insured died in June, 1902. It was not pleaded that there had been any material change in the health of the insured between the date of the application and the time the policy was delivered. The information obtained by the application and the medical examination necessarily relates to the family history of the insured, his previous condition of health and the condition of his health at the time of the examination. It will be observed that in the condition quoted it is stated the policy is not binding "unless upon the date of delivery the insured is alive and in sound health."

This clause does not have reference to any unsoundness of health at the

time of or previous to the application and medical examination. Although insured had not been in sound health at that time, and there had been no material change since then and the delivery of the policy, the clause would not render it void. When it is not shown, as in this case, that the unsoundness of health did not occur between the application and medical examination and the delivery of the policy, the company must rely in the statements in the application to void a recovery on the policy, not upon the clause in question. As to what is the meaning of the words "sound health," it is unnecessary here to define or to state what unsoundness of health would prevent recovery, nor as to what delay would estop the insurance company from pleading the cause of the policy referred to as a defense to an action on the policy.

There is another reason why the appellant did not show its right to prevent a recovery upon the policy. The annual premium on the policy was \$295.15. If its theory be correct, that the insured was not in sound health and the policy was not obligatory upon it, then before it could prevent a recovery on the policy it should have tendered back the premiums it received. If the policy created no obligation on it, then the company assumed no risk for which it was entitled to be paid the \$295.15, or any part of it, nor is it entitled to withhold it. It has not earned any part of it. Suppose the company had brought an action to cancel the policy for the reason that the insured was not in sound health when it was delivered. Most certainly would it have been necessary for it to tender back the money it had received to maintain the action. The mere fact that the insured had accepted the policy when not in sound health, and for that reason it was not obligatory upon the company, would not impose a penalty of \$295.15 for the benefit of the company. When a party seeks to cancel a contract upon the ground of fraud or otherwise, he must first offer to restore what he received in consideration of the contract. If A. practices fraud upon B. in the exchange of property, and B. seeks to recover the property which he let A. have, he is not entitled to maintain an action unless he tenders back what he received in the trade. This rule is applicable to the case at bar.

The judgment is affirmed.

STEELE v. FARIS.

(Filed February 17, 1904—Not to be reported.)

Evidence—Custom—Partners—Where it was sought to establish that where two bid on a mail contract, it was the custom to enter the bid only in the name of one of them, and it is not clear from the bill of exceptions what the ruling of the court was intended to be on the admission of evidence as to the partnership, such evidence being sometimes excluded and at other times admitted, and it not being a reversible error to have admitted such testimony where there was no objection, and where the instructions fairly submitted such question to the jury the verdict of the jury supporting the existence of a partnership will not be disturbed.

C. R. Brock, J. A. Craft and J. W. Alcorn for appellant.

W. R. Ramsey, Hazelwood & Parker and H. C. Hazelwood for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge O'Rear.

The fact to be established in this case was whether A. K. Cook and S. G. Steele had been partners in the bidding for, and operation of, certain mail route contracts. (See statements of petition *Faris v. Cook*, 110 Ky., 887; 28 Ky. Law Rep., 828.)

Certain evidence was offered by the surety who had signed the contracts, and who was attempting to hold Steele as a partner of the principal, Cook, that it was the custom at the time these contracts were made for partners who bid on such contracts to enter the bid in the name of only one of the firm. It is not quite clear from the bill of exceptions and evidence what the ruling of the court was intended to be on the admission of this evidence, for we find that in a number of instances it was excluded, in two instances it was admitted over objections, in several others it was admitted without objection from appellant. So that if it was error to have admitted it to be proved by the witnesses when the objection was made, it was not reversible error to have admitted it where the objection was not made. If the same fact be proved without objection it can not be reversible error if evidence of the fact has also been admitted over objection, for if the court had excluded the evidence to which the objection was interposed, notwithstanding that the fact would have been established by other evidence not objected to.

We doubt if the matter sought to be proved as a custom and above discussed was relevant as evidence tending to show that Steele and Cook were in fact partners in these transactions. The witnesses who testified as to the supposed custom only knew of two firms who transacted that character of business under that practice. How long they had so conducted it was not shown, nor was it shown that appellant Steele knew of the custom, or that it was general enough for him to have known of it. We are of opinion that the instructions fairly submitted the question to the jury whether in fact Steele and Cook were partners in the transactions, and the evidence, even aside from that complained of, is sufficient to have sustained the verdict of the jury finding the partnership to have existed.

Perceiving no prejudicial error the judgment is affirmed.

PATTERSON v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed February 16, 1904—Not to be reported.)

Master and servant—While the law in this State is well settled that if the act of the servant was committed in the course of his employment and while acting within the scope of his authority as agent of a corporation, the corporation may be held liable, a corporation is not liable for the malicious acts of an employee which were not committed within the scope of his authority.

A. E. Cole & Son and Allan D. Cole for appellant.

W. H. Wadsworth and E. L. Worthington for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, William Patterson, brought this suit against the Maysville & Big Sandy R. R. Co., the Chesapeake & Ohio Ry. Co. and C. R. Morarity. The defendant, Morarity, was not brought before the court by service of summons, and the defendant corporations filed a general demurrer to each paragraph of the petition, which was in three paragraphs, which was sustained by the trial court, and plaintiff's petition dismissed, and he has appealed. In the first paragraph of his petition appellant attempts to state a cause of action for assault and battery; in the second, for false imprisonment; and in the third, for malicious prosecution.

At common law these separate grounds of complaint could not be joined in the same action, but in the Code States, where each cause of action is founded upon and grows out of the same facts, it is generally held that they may be all relied upon in the same action, when stated in separate paragraphs. Good pleadings, however, require that the petition should state the facts relied on for recovery in plain, direct and positive language. Neither of these simple and necessary requirements have been complied with in this case, and we have found some difficulty in determining the exact facts attempted to be relied on in this action. Going upon the theory that the alleged cause of action grows out of the same transaction, and considering each paragraph with reference to this fact, the first paragraph appears to allege that the defendant, Morarity, was a conductor in charge of a train operated by the Chesapeake & Ohio Ry. Co., and that while plaintiff was traveling as a passenger upon this train near Ashland he was forcibly seized, handcuffed and carried by the agents and servants of the company to Vanceburg; and that the defendants' agent in charge of the train could have prevented all these injuries upon him. The second paragraph alleges that Morarity, while in the employ of the defendant as a conductor, caused and permitted him to be assaulted and arrested and carried along the streets of the city of Ashland to a certain office and to the county jail, and suffered him to be imprisoned therein; and publicly carried, handcuffed as a prisoner, through the counties of Boyd, Greenup and Lewis to the city of Vanceburg. In the third paragraph it is alleged that Morarity, while in the employment of the defendant, made an affidavit before the county judge of Boyd county, charging him with the crime of rape on the person of Jennie Bell Murray, whereupon the county judge issued a warrant for his arrest; and that by authority of this warrant he was arrested by the sheriff of Lewis county and confined in the Lewis county jail; that the grand jury of Lewis county refused to indict him for the offense, and he was subsequently discharged. These paragraphs, taken together, appear to allege that the plaintiff was arrested at Ashland, Ky., under a warrant sworn out by R. C. Morarity while he was conductor in the employ of the Chesapeake & Ohio Ry. Co., charging him with the crime of rape, committed in Lewis county; that he was arrested under the warrant and taken on the train of appellee from Ashland to Vanceburg, and confined in jail until after the investigation by the grand jury, who failed to indict him.

Neither of these paragraphs charge that the prosecution or proceedings against appellant were instigated, instituted or continued by the direction or procurement of defendants. The only connection between appellees and the alleged injuries to appellant, attempted to be set out by the petition, is

that one of their conductors set the prosecution on foot by swearing out a warrant for his arrest. There has been great diversity of opinion as to whether a corporation was liable for damages for the unauthorized malicious acts of its agents, committed in the course of their employment. But in this State the law is well settled that if the act of the servant was committed in the course of his employment, and while acting within the scope of his authority as agent of the corporation, that they may be so held; but so far as we are advised they have never been held liable for the malicious acts of one of their employes, which was not committed in the scope of their employment or while acting within the line of their duty to the employer. (Lexington Railway Co. v. Cozine, 23 Ky. Law Rep., 1837; Williams v. Southern Railway in Kentucky, 24 Ky. Law Rep., 2214; Lyon v. Pingree, 67 Am. St. Rep., 426; Richmond, &c., Railway Co. v. Jefferson, 32 Am. St. Rep., 100.) It can not for a moment be contended that there was anything in the employment of Morarity, as conductor of one of appellee's trains, which imposed upon him the duty to swear out warrants for the arrest of persons charged with committing rape; nor was it the duty of such conductor, or the employes of the company, after the arrest of such person upon warrant based upon the affidavit of the conductor, to interfere with the arresting officer in taking his person from the point of arrest in Ashland to Vanceburg. We think it necessarily follows that the trial court properly sustained a demurrer to each paragraph of the petition.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. BROUGHTON.

(Filed February 16, 1904—Not to be reported.)

Railroads—Damages—In an action to recover of appellant for injury sustained by being struck by its train, where appellee was a mere trespasser on the track, having no duty to perform, the employes of the railroad were not bound to anticipate his presence, and not discovering his peril could be guilty of no negligence, and a peremptory instruction should have been given the jury to find for appellant.

H. P. Taylor for appellant.

C. E. Smith, M. L. Heaverin and E. M. Woodward for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barker.

The appellee, at the time of his injury, was in the employ of the Taylor Coal Co., at its mines in Ohio county, Kentucky. His usual business was working under the tipple loading cars, and dressing off the tops of those loaded, so as to prevent the coal from jostling off during the moving of the train, being what is technically called a "trimmer." After the regular working hours it was his duty to clean up the fallen coal around the tipple, and remove sulphur lumps out of the way, and to look up such tools as he and his assistants had been using during the day.

Appellee received the injuries of which he complains at or near 5 o'clock, p. m. The regular work for the outside employes of the company was over at 4 o'clock, p. m.; but appellee and his assistant, Jim Miller, were required

to do the extra work of cleaning up sulphur lumps and locking up the tools after the regular day's work was over. This required some twenty or thirty minutes. Appellee testifies that after he and Jim Miller had cleaned up round the tippie he carried about half of the tools over to the toolhouse, and placed them therein; that instead of going back at once for the remainder, he left them where they were, and went up to the company's store, for the purpose of obtaining checks with which to purchase his landlady a lamp and chinney; that after making these purchases he came back with them in his hand, and his dinner bucket on his arm, and thus laden, he undertook to go back to the place where he had left the tools, in order to bring them over to the toolhouse. There were standing upon the switch, which led to the company's tippie, six empty coal cars, which were standing directly between him and the tools on the far side; instead of going around these empty cars he undertook to cross over them by climbing upon one of them, and walking along a projecting plank about eighteen inches wide. While he was thus standing erect upon this plank an engine and nine additional empties were backed in on the switch by the employes of appellant, bumping against those over which appellee was crossing, and throwing him to the ground by the jostle, dragging him some distance, and injuring his leg and heel so severely as to make him permanently a cripple.

Appellee did not know of the immediate proximity of the train, although he had heard it whistle some distance off, but did not hear it whistle at a crossing about two hundred yards from the empties, at which point it was their duty and custom to sound the whistle, upon which appellee and other employes of the mine had come to rely. No bell was sounded, and he did not know of any immediate danger until the train was backed against the empties over which he was crossing.

Upon the trial of the case below the jury awarded a verdict of \$1,800 in favor of the appellee, from which judgment this appeal is prosecuted. The first question which arises for decision is whether or not appellant was entitled to a peremptory instruction. According to his own testimony, appellee had no duty to perform which required him to climb upon the empty cars after 4 o'clock; his boarding the empty car, for the purpose of crossing over, was for his own convenience entirely, and not in the discharge of any duty which he owed the mining company; he had no right to use appellant's cars as a passway; having no duty that called him thereon, but using them for his own convenience, he was a mere trespasser, and appellant owed him no duty other than to refrain from injuring him after his perilous position was discovered, of which latter fact there is no evidence in the record. The fact that he had to go back for his tools did not authorize him to cross over appellant's empty cars; its employes were not bound to anticipate his presence where he had neither duty nor right to be, and, owing him no duty, could not be guilty of negligence with regard to him until after his peril was discovered.

This case comes both within the letter and the reasoning of the opinion in the case of the Louisville & Nashville R. R. Co. v. Hocker, 28 Ky. Law Rep., 982. Hocker was in the employ of the Louisville & Nashville R. R. Co. as telegraph operator at its station at Latonia, Ky.; having occasion to go to a water closet placed in the yard for the convenience of the employes,

he left his post, walked across the company's tracks, and, instead of going to the closet, went between some cars which were standing on one of the tracks, for his own private purpose. While there an engine was backed against the cars, between which he was standing, seriously injuring him. No whistle was blown, and no bell was rung, to warn him that the engine was about to be backed against the cars. After reviewing the authorities the court said: "The cars between which he was standing were coupled, and there was no reason to expect his presence at that place, and there is no testimony which tends in the slightest degree to show that any servant of the company knew he was there. He knew from long experience that the switch opening from this track to the lead track could be opened, as he testifies, in a second, and was likely to be so opened at any moment. Both ordinary prudence and the rules of the company required that he should look after and be responsible for his own safety. It seems to us from the undisputed facts of this case that as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his perilous position. Even if it be admitted that there was negligence on the part of the employes of the company in running cars upon the switch, the contributory negligence of appellee was so great as to preclude a recovery."

In response to the petition for rehearing, *Id.* 1274, it was said: "It was gross negligence in appellee to stand between the cars for this purpose, and there being no proof that his danger was perceived by those in charge of the train before the injury, or in time to avoid it, a peremptory instruction should have been given to the jury to find for the defendant. A railway yard is necessarily a dangerous place, and one who goes between standing cars in such a yard for purposes of his own takes the chances of injury." (*McDermott, By. &c. v. Ky. Cen. R. R. Co.*, 14 Ky. Law Rep., 487; *Kentucky Cen. R. R. Co. v. Gastineaux, Adm'r*, 88 Ky., 132; *Brown's Adm'r v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 145.)

Appellant was injured on the 5th day of February, at or near 5 o'clock, p. m.; it was then dark; he knew that it was about time for the train to come in, and he knew that when it did come in on the switch it was liable to back against the empties over which he was crossing; he heard the train far down the track, but did not know of its immediate proximity; and, as said in the *Hooker* case, even if it be considered negligence for appellant's employes to back against the empties without warning, appellee's undertaking to cross in the manner in which he did, by walking upon a narrow plank eighteen inches wide, standing perfectly erect, with his hands occupied in holding a lamp and chimney and his dinner bucket, so as to prevent the possibility of his saving himself in case of an accident, was such gross negligence as warranted the granting of appellant's motion for a peremptory instruction. We are of opinion that, upon appellee's own testimony, the court should have awarded the peremptory instruction asked for in favor of appellant.

Judgment reversed for proceedings consistent herewith.

GORMAN v. GLENN.

(Filed February 16, 1904—Not to be reported.)

Presumption that officer performed duty—Where a clerk issued an execution directed to another county it is presumed that the proper affidavit authorizing the issue of such execution was filed, and an allegation in an answer denying that an execution had been issued in the county where judgment had been rendered is insufficient to overthrow the presumption that the clerk properly performed his duty.

Hall & McLean and W. C. Hall for appellant.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

D. A. Glenn on January 14, 1897, had an execution issued from the office of the clerk of the Boone Circuit Court in his favor against Eliza Gorman for \$67, with interest from September 8, 1877, and \$11.90 costs, directed to the sheriff of Kenton county, who levied it on January 8, 1897, on two lots in Covington, Ky., as her property, subject to a mortgage held by the Erlanger Building and Loan Association. She thereupon filed suit in the Boone Quarterly Court, in which the judgment against her had been rendered, enjoining the collection of the execution, but she did not execute the bond to discharge the levy under section 278 of the Civil Code. That case was tried out, and judgment having been given against her dissolving the injunction, she appealed to this court, but her appeal was dismissed for want of jurisdiction. (Gorman v. Glenn, 22 Ky. Law Rep., 839.)

On January 8, 1898, the mortgage held by the building association was released, and on May 6, 1898, Glenn had another execution in his favor issued and levied on the same two lots. On May 26th Eliza Gorman executed to Anna Sullivan a mortgage on the two lots to secure, as recited therein, the payment of \$1,400. On December 21, 1900, the injunction suit, having been finally settled, Glenn filed this action against Eliza Gorman and Anna Sullivan, alleging the facts above stated, also that he had a superior lien on the land; that the mortgage from Gorman to Sullivan was executed without consideration, and was given to hinder and delay him in the collection of his debt. He prayed judgment subjecting the property to his claim. Eliza Gorman filed a general demurrer to the petition, and also filed an answer in which she set up again the same matters that had been litigated in the injunction suit. She also denied that the mortgage to Anna Sullivan was without consideration, or made to delay or hinder the plaintiff in the collection of his debt, and alleged that the executions had been issued to the sheriff of Kenton county before there had been any execution issued to the sheriff of Boone county. Anna Sullivan filed an answer, in which she denied that the mortgage to her was without consideration or made to hinder or delay the plaintiff in the collection of his claim, and she alleged that there was no record of the execution liens relied on in Kenton county, no lien of record in the Kenton county clerk's office or circuit clerk's office of either execution at the date the mortgage was given to her, and that she had no notice of the execution levy; but she does not allege that she in fact paid Eliza Gorman any money or parted with any consideration on the faith of the mortgage.

The case being submitted to the court on the pleadings, he entered a judgment directing the land, or so much of it as might be necessary to satisfy the plaintiff's debt and costs, to be sold. The sale was made, and on motion of Anna Sullivan was set aside. She then filed an amended answer, asserting a lien on the property under her mortgage. The court ordered a resale, and at this sale she bought the property for \$725, it being appraised at \$600. This sale was confirmed without objection. Within two years from the entry of the original judgment Eliza Gorman and Anna Sullivan have sued out from the clerk of this court an appeal therefrom. While ordinarily an execution plaintiff must enforce his execution lien by a sale as provided by the statute, he may file a petition in equity under section 1907a, Kentucky Statutes, to set aside a fraudulent transfer, conveyance or mortgage, and as the chancellor has jurisdiction of the parties, he may grant complete relief while they are before him. The general demurrer to the petition was, therefore, properly overruled. The second execution created a lien on the land without regard to what had been done under the first.

Section 1556, Kentucky Statutes, authorizes the issuing of an execution to a county other than that in which the judgment is rendered, or in which the defendant resides, before an execution has been returned therein no property found, when the plaintiff, his agent or attorney, shall file with the clerk an affidavit stating that the defendant in the judgment has not sufficient property in either of these counties to satisfy the same subject to execution. It must be presumed that the clerk did his duty, and that the proper affidavit was filed before the executions in controversy were issued. The allegation of the answer is insufficient to overthrow the presumption, the allegation being merely that no execution had issued to Boone county. Besides the proper forum for quashing the execution, if this question was desired to be raised, would be the Boone Circuit Court, from whose clerk's office the execution issued.

Anna Sullivan does not state facts sufficient to bring her within subsection 2 of section 2358a, Kentucky Statutes. The execution levy was older in date than her mortgage, and was superior to her unless she was a bona fide purchaser without notice. She does not plead any facts sufficient to show that she was a bona fide purchaser. The statute only protects those who have parted with value without notice of the execution lien where the required memorandum has not been filed in the county clerk's office.

The court ordered only so much of the property sold as was necessary to pay Glenn's debt and costs. This was proper; we must presume that the property was divisible as it consisted of two separate lots. No appeal is taken from the order confirming the second sale, and in fact no exception was filed thereto.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. GENTRY.

(Filed February 17, 1904—Not to be reported.)

Railroads—Damages—Where appellant, as lessee, agreed by its agent to pay one damages to his land and crops resulting from the construction of a line of road, damages being sustained, where the instructions were proper and the evidence competent and sufficient to authorize the verdict of the jury it will not be disturbed.

Robbins & Thomas, J. M. Dickinson, Pirtle & Trabue and Jacob Corbett, for appellant.

J. M. Nichols & Son for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn.

The appellant has prosecuted this appeal, asking a reversal of a judgment in favor of appellee for the sum of \$600.

The facts as appear of record are in substance as follows: During the year 1902 the applee rented the Halliday farm, which was situated on the river opposite Cairo, Ill. That portion rented by the appellee contained eighty acres, which he planted in corn. During this same year the appellant, as lessee, and in the name of the Chicago, St. Louis & New Orleans R. R. Co., constructed a railroad from the city of Paducah to a point opposite Cairo, Ill., passing through this Halliday farm and the portion rented by appellee. Appellee alleged and proved that on or about the 20th of May in that year, and after his corn was planted and had begun to grow, the agent of the appellant, T. M. Orr, as an inducement to appellee to permit the laborers of the appellant to enter his premises for the construction of the road, promised and agreed to pay him the damages to his interest in the land actually taken for the construction of the road, and also the damages, if any, to the remainder of his corn crop; that upon the faith of this agreement he permitted the laborers to enter his field; that those who constructed the dump did not injure his crop other than that actually destroyed in the construction of the dump. But those who followed and constructed the trestle and bridges, in the latter part of July, left the gates open, tore the fencing down and permitted cattle and hogs in large numbers to enter and destroy his corn crop; that he was able to save only about 500 bushels, when if it had not been destroyed he would have realized about 8,000 bushels.

Appellant claims that Orr did not represent it in the agreement with reference to paying him for his losses, but represented the Chicago, St. Louis & New Orleans R. R. Co., which last-named company was constructing this road, and controverted the damages alleged to have been sustained by appellee.

The evidence was heard on these issues and the jury, under proper instructions, found a verdict for appellee. There was sufficient and competent evidence to authorize the jury to find that the appellant constructed this road in the name of the Chicago, St. Louis & New Orleans R. R. Co.; that T. M. Orr acted as appellant's agent in making the contract with him, and as to the extent of his damages, and we do not feel authorized to disturb their verdict.

Wherefore, the judgment of the lower court is affirmed.

JAHN'S ADM'R v. McKNIGHT, &c.

(Filed February 17, 1904.)

Damages—Master and servant—In an action for damages for the death of a boy against appellees, a peremptory instruction to find for appellees was proper where the boy was killed by a delivery wagon whose driver was not a servant of appellees, he conducting a delivery business on his own account and where appellees exercised no control over the driver of the delivery wagon, who was only an independent contractor.

O'Neal & O'Neal for appellant.

Kohn, Baird & Spindle and Stanley E. Sloss for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

Albert Jahn, a messenger boy for the Western Union Telegraph Co., fifteen years old, while riding his bicycle on Main street, between Third and Fourth, in Louisville, Ky., was struck and instantly killed by a delivery wagon drawn by a runaway horse that had become frightened at a passing drove of hogs during the absence of his driver, who had gone inside of a store for the purpose of delivering certain packages, leaving the horse unhitched and unattended. The petition alleges that the horse and wagon which caused the death of plaintiff's intestate was in the employ of W. H. McKnight & Co. at the time of the accident, and that the death of the boy was caused by the gross negligence of John Thomas Hooper, the driver, in leaving the horse unhitched and unattended, who it is alleged was a servant of appellee. In the second paragraph of the answer the defendants deny that John Thomas Hooper was in their employ at the time of the runaway, or that either the horse or wagon was their property, or under their dominion or control; and allege that the delivery wagon and horse belonged to Granville Hooper, who carried on an independent hauling and delivery business in the city of Louisville; that for some time prior to the accident Granville Hooper, by contract with them, delivered packages of goods to their customers in the city of Louisville at an agreed price per week; that they had no interest in or control over the manner or means by which this was accomplished; that Hooper had full power and authority to select such means to accomplish this end as he saw fit; and was an independent contractor, and not a servant. At the conclusion of plaintiff's testimony the trial court directed a verdict for the defendant, to which plaintiff excepted, and has appealed. The only question for decision is whether there was any evidence that John Thomas Hooper was defendant's servant at the time of the accident.

Upon the trial Granville Hooper was called as a witness by the plaintiff, and testified that at the time of the accident he carried on a hauling and delivery business in the city of Louisville; that he also ran a stone quarry and delivered stone for building foundations for houses, and operated two wagons and teams in this business; that he also had a contract with defendants to deliver packages to their customers in a one-horse delivery wagon at the price of \$18 per week; that if they had more work in this line than the one-horse delivery wagon could perform that he furnished extra teams and received extra pay for it, or they would call in other wagons to do it; that if

defendants did not need the services of his wagon and driver at any time he was at liberty to haul for any one else; that usually his delivery wagon would call at the store of defendants some time in the morning from 7 to 9 o'clock to see if they had any packages to deliver; that if there were any he always found them piled up in the front part of the store addressed to the person for whom they were intended; that the wagon and horse were his property; that he hired the driver and paid all necessary expenses for running the wagon; that the defendants under their contract with him had no right to employ or discharge the driver, or to direct how or in what manner his work should be done; that the driver of the wagon was in his service, and not in that of the defendants.

Thompson on Negligence, says:

"Section 631. It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's methods and without being subject to control except as to the result of his work, and subject to other qualifications hereafter stated, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work.

"Section 632. An independent contractor within the meaning of this rule is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants.

"Section 633. One who, under a public license, exercises a certain employment on behalf of any member of the public who may hire him, such as a licensed public drayman, does not stand in the relation of servant of one who may hire him to do a particular job, such as he is licensed to do, but he is deemed an independent contractor within the meaning of subdivision 11."

Shearman and Redfield on Negligence, section 164, defines an independent contractor as follows: "Although in a general sense every person who enters into a contract may be called a contractor, yet that word, for want of a better one, has come to be used with special reference to a person who in the pursuit of an independent business undertakes to do a specific piece of work for other persons, using his own means and methods without submitting himself to their control in respect to all its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as the means by which it is accomplished."

In *Roberson, &c. v. Webb*, 74 Ky., 464, it was decided that in order that the relation of master and servant should exist, the parties sought to be charged as master must have the right to control the person with whose negligence it is sought to charge him. "He is deemed to be the master who has the supreme choice, control and direction of the servant, and whose will the servant represents not merely in the ultimate results of the work, but in all the details."

In *Driscoll v. Towle*, 68 N. E., 922, decided by the Supreme Court of Mas-

sachusetts, the court had before it the same question involved upon this appeal. In that case the defendant was engaged in a general teaming business, owned the horse and wagon, driven by K., employed K., paid him his wages. The defendant contracted with another company to do its hauling, and K. reported each morning with the horse and wagon at the office of the company, and was thereafter engaged in carrying out the orders of that company's foreman. K. had exclusive control of the management of the horse and wagon, chose his own route, harnessed and unharnessed the horse, and at night returned it to the defendant's stable. It was held in an action for injuries to a person in the street by being struck by such horse and wagon, while driven by K. in performing the orders of such company, that the evidence was sufficient to authorize a finding that K. was the servant of the defendant, and not of the company. In discussing the case Chief Justice Holmes said: "In cases like the present there is a general consensus of authority that although a driver may be ordered by those who have dealt with his master to go to this place or to that, to take this or that burden, to hurry, or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore, he can make no one else liable, if he negligently runs a person down in the street."

In this case appellee exercised no control over the driver of this wagon. They did not employ or pay him; had no right to discharge or to direct in any manner how his work should be done, further than that the package should be promptly delivered to the addressee. Under this state of fact the driver of the wagon was not the servant of appellee, and consequently there could be no liability on their part for his negligence. We, therefore, conclude that the instruction of the trial court to find for the defendant was not error.

This conclusion is not in conflict with the opinion in *Adams Express Co. v. Scofield*, 23 Ky. Law Rep., 1120. In that case the alleged independent contractor was the sole representative of the defendant at Shelbyville, and in complete charge of all its business at that point, and subject to its orders.

Judgment affirmed.

MOONEY, &c. v. KENTUCKY WESTERN RY. CO., &c.

(Filed February 18, 1904—Not to be reported.)

M. C. & G. D. Givens for appellants.

W. E. Bourland, J. M. Dickinson and Pirtle & Trabue for appellees.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Paynter.

Substantially the same questions are involved in this case as were in the case of *H. M. Curry v. The Kentucky Western Ry. Co.*, and by the authority of the opinion delivered in that case, ante, 1872, February 3, 1904, the judgment is affirmed.

DOWELL, &c. v. WORKMAN, &c.

(Filed February 18, 1904—Not to be reported.)

Wills—Antenuptial contract—Where the deviser in a will divided his property among his wife and children, designating with particularity the part that each was to receive, the fact that he had entered into an ante-nuptial contract with the wife did not prevent her from taking under the will, that instrument charging her with the amount settled upon her by the marriage contract, and his having clearly shown in the will that the part devised to her was given as a supplement of the amount due her under the antenuptial contract.

Noggle & Graham and Eugene Hubbard for appellants.

B. W. Penick for appellee, Annie Workman.

Appeal from Green Circuit Court.

Opinion of the court by Judge Paynter.

This appeal involves the interpretation of the will of A. K. Workman, deceased. The controversy is as to the meaning of items 8 and 12, which read as follows:

"Item 8. To my beloved wife, Annie Workman, I will and bequeath my buggy horse, which I call Celam, which is to be charged to her, for the purpose hereinafter mentioned, at the price of \$90; also my buggy and buggy harness, which are to be charged to her at the price of \$25; also my Jersey cow, named 'Patsey,' which is to be charged to her at the price of \$35; also my white-faced cow, named 'Bally,' which is to be charged to her at the price of \$35; also one share in the capital stock of the Greensburg Deposit Bank, which is to be charged to her at the price of \$100; also one \$20 gold coin, which coin has engraved on the eagle side the words: 'United States of America Twenty Dollars;' on the reverse side of said coin is the head of 'Liberty,' and the date '1861,' which coin is to be charged to her at the price of \$20; also one large arm cushion chair, with rollers and adjustable back, being the chair which I purchased of W. E. Ward, which is to be charged to her at the price of \$3; also thirty barrels of corn, which is not to be charged to her at all; also eight thousand pounds of good hay, which is not to be charged to her at all; I also will and desire that my beloved wife and her three infant children, Della L. Workman, Mary F. Workman and Ruth Workman, live with my two sons, Demmon K. Workman and William Robert Workman on my home place on Big Russell creek, in Green county, Kentucky, until the 25th day of December, 1906; and it is my desire that my said wife, her three infant children and my said two sons, Demmon K. Workman and William Robert Workman, live together on said farm and enjoy all the rights and privileges incident to said farm and necessary to render their home life on said farm pleasant and comfortable; that my said wife and two sons jointly run and cultivate said farm for their mutual benefit as aforesaid, and that at the end of each year my said wife shall receive one-third of the net proceeds of said farm and my two sons one-third each of said net proceeds; but in the event my said wife does not desire to reside with my said sons on said farm, I still desire her to have one-third of the net rents and profits of said farm. In making this will it is not my inten-

tion to change, cancel, modify or annul in any way whatever the antenuptial contract entered into between me and Annie Moss, now Annie Workman, on October 30, 1898, but the same shall remain in full force and effect. It is simply my intention to reward her kindness and devotion to me by supplementing the amount secured to her by said antenuptial contract with the additional amount she will receive under the provisions of this will; but in the event she renounces the provisions of the will, I desire that said contract shall regulate and control the marital rights existing between her and me and my estate.

"Item 12. It is my desire, and I so will and bequeath, that each of my children, to wit, Luella A. Dowell, Effie E. Buckner, Demmon K. Workman, William Robert Workman, Della L. Workman, Mary F. Workman and Ruth Workman, have and receive each one-eighth part of my estate, and that my wife receive the other eighth part of my estate; but that Luella A. Dowell be charged with \$940; that Effie E. Buckner be charged with \$215; that Demmon K. Workman be charged with \$2,068; that William Robert Workman be charged with \$2,139; that Della L. Workman be charged with \$100; that Mary F. Workman be charged with \$100, and that Ruth Workman be charged with \$200; and that my said wife be charged with \$1,608, these amounts thus charged to my children being the value of the property heretofore devised and the advancements heretofore mentioned in the various items of this will, and the amount charged to my wife being the actual value of her interest in the \$2,000, as secured to her by the antenuptial contract entered into by and between my wife and me on the 30th day of October, 1898, which actual value of her interest in said contract being estimated by me at the date of this will at \$1,300, and the value of property bequeathed to my said wife in item 3 of this will being \$308, the two amounts added together making \$1,608; that in order to produce equality in the division of my estate the above amounts shall be treated in the same manner as advancements are treated under section 1407 of Kentucky Statutes, that is, the amount that each of the devisees receives as above stated must be regarded as a part of the one-eighth that such devisee is to receive under this will; and that each devisee is to receive one-eighth of my entire estate, including the property, bank stock, money and advancements heretofore mentioned."

The testator in item 3 said that it was his intention to supplement "the amount secured to her by said antenuptial contract with the additional amounts she will receive under the provisions of this will." By item 12 he bequeathed to his seven children each one-eighth of his estate, and to his wife, Annie Workman, the other eighth part of it. After doing this he designated the amount with which each child is to be charged as an advancement. And in the same connection he provides that his wife is to be charged with \$1,608, "actual value of her interest in the \$2,000, as secured to her by the antenuptial contract, * * * being estimated by me at the date of this will at \$1,300, and the value of the property bequeathed to my said wife in item 3 being \$308, the amounts added together making \$1,608."

The testator says to produce equality in the division of his estate the amounts which he charges to his children and his wife shall be treated as advancements as under section 1407, Kentucky Statutes. The testator fearing that his will might be misunderstood, further explains his meaning by

saying that the amount that each of the devisees receives "must be regarded as part of the one-eighth that such devisee is to receive under this will; and that each devisee is to receive one-eighth of my entire estate, including the property, bank stock, money and advancements heretofore mentioned." It seems to us that we can not employ language which would make the intention of the testator plainer than was done by the language used by him. His evident purpose was to respect the antenuptial contract and to supplement it with one-eighth of his estate, less the amount due on such contract. He did not intend to give his wife one-eighth of his estate regardless of the amount due her under the antenuptial contract. He wanted to give her a child's part, but thought proper in giving her the one-eighth of his estate, the amount which she was to receive under the antenuptial contract should be estimated as part of his estate the same as should be the advancements with which he charged his children. While he gave her one-eighth of his estate, he prescribed the rule by which the amount of his estate should be ascertained and which required the amount due his wife under the antenuptial contract to be estimated as part of it. If he had not so intended there was no occasion for making any reference in item 12 to the amount due her under the antenuptial contract. The explanation which he makes in that item of his will shows what part of his estate was given as a supplement to the amount due under the antenuptial contract. The amount which the widow receives under the will is much greater than that she would have received under the antenuptial contract, and that excess is the supplementary amount referred to in the third item of the will.

The judgment is reversed for proceedings consistent with this opinion.

INDIANA ROAD MACHINE CO. v. LEBANON CARRIAGE AND
IMPLEMENT CO.

(Filed February 18, 1904—Not to be reported.)

Contracts—Commissions—In an action to recover commissions for the sale of an article which was sold upon condition that the sale might be countermanded, if done within a given time, and such sale was countermanded and another article sold by another party, the original seller took the risk of not consummating the sale of his article, and he can not recover commissions.

C. S. Hill for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

Appellees were agents of appellant for the year 1899 for the sale of certain machinery, including its stone crushers, in the counties of Marion, Washington and Nelson; they learned that Nelson county was contemplating the purchase of two rock crushers and so notified appellant, requesting it by telegram to send expert with model machine to meet one of them at the Bardstown fair grounds the next day, it being stipulated in the contract that appellant would do this if requested. The parties met at the fair ground and the committee made an order for two rock crushers complete at \$1,750, but

reserved the right to countermand the order at any time within three days. On the same day the agent of the Champion crushers offered the committee two machines for \$1,800, and the committee then countermanded the order for appellant's machines. After this appellees made an arrangement for another meeting with the committee, and notified appellant to send the man there again to meet them on a certain day. Before this day arrived, however, appellant's man went to Bardstown the second time, and finding that he could not sell his machines to the county for more than \$1,800, finally, rather than be underbid by the Champion Co., sold the crushers to the county for \$1,800, appellees not being present or consulted. By the contract of agency appellees were to have for their commission all amounts that machinery sold for over and above the net list prices at the factory. The net price got for the two machines by the agent was not as much as the list price referred to. Appellees then sued appellant for their commission on the sale and recovered judgment for \$428.70, which would have been their commissions if the sale had stood at \$1,750. The proof on the trial shows that the machines could not have been sold to the county except at the price of \$1,800, and that the agent did his best to get more, but failed, simply because of the bid of the Champion Co. Whether the appellees are entitled to recover commission on the sale depends on whether or not their contract created an exclusive agency for the sale of the machinery in the territory named. So far as material to this question the written contract is as follows:

"Indiana Road Machine Co., of Fort Wayne, Ind., of the first part, and Lebanon Carriage and Implement Co., of Lebanon, county of Marion and State of Kentucky, of the second part:

"Witnesseth: Said party of the first part, in consideration of the agreement by the party of the second part, hereinafter mentioned, hereby agrees:

"1st. To authorize said party of the second part to sell under the stipulations and conditions of this contract The Indiana Reversible Road Machine, Indiana Stone Crusher, Indiana Reversible Road Roller, Drag and Wheel Scrapers, and Plows, in and for the following-named territory only: Marion and Washington and Nelson counties in Kentucky, said sale privilege to become exclusive on Indiana Reversible Road Machines only, for 1899, as soon as said party shall have sold one machine therein, from the date of this contract until date of final settlement mentioned below."

In *Aultman & Taylor Co. v. Joplin, &c.*, 8 Ky. Law Rep., 62, it was held as follows: "Under a contract whereby appellant agreed to furnish appellee with machines and to allow them certain commissions on each sale within a certain territory, appellant was not precluded from making sales within that territory, and appellees are not entitled to commissions on sales made by appellant, there being nothing in the contract which conferred on appellees the exclusive right to sell within the designated territory."

The contract before us authorizes the appellees to sell the road machines, the stone crushers, the road rollers, the drag and wheel scrapers, and plows, in the counties named. So far there is nothing in the contract from which an exclusive agency can be inferred. Then these words are added: "Said sale privilege to become exclusive on Indiana Reversible Machines only, for 1899,

as soon as said party shall have sold one machine therein, from the date of this contract until date of final settlement mentioned below."

The contract is dated April 29, 1899, and the final settlement was to be made December 1, 1899. The natural meaning of the words quoted is that the sale privilege is to become exclusive on Indiana Reversible Road Machine only, and that this exclusive privilege on the road machine is only to begin as soon as the second party has sold one machine. Otherwise, we do not see what effect would be given the word "only." If the parties had meant to say that the sale privilege should become exclusive on all the machinery, and not on the road machines only, from the time that the second parties sold one road machine, it can not be presumed that they would not have used words indicative that the sale privilege was to be exclusive as to the other machines, but only exclusive on the Indiana Reversible Road Machine from the time the second party sold one road machine. An exclusive agency will not be created by implication where the words of the contract do not naturally import this meaning. Appellees had not sold a road machine.

As the contract does not create an exclusive agency, appellant might lawfully sell the machinery in the territory named. Still if it sold to a customer gotten by appellees, it would be responsible to appellees for their commissions on the sale where appellees would have been entitled to commission had they gone on and completed the sale themselves. But in this case if appellees had made the sale themselves they would have been entitled to no commission for the reason that the price got for the two crushers was less than the net list price therefor, and they were only to have for commissions the excess over and above the list prices. While the result is a hardship on appellees, as they are out the time and money spent by them in the negotiation, still they took the risk of this on the chance of getting the full commission if the sale at \$1,750 had gone through. As it is, appellant is about \$200 worse off than it would have been if that sale had stood, and it can not in addition be made liable to appellees for commission.

Judgment reversed and cause remanded, with directions to dismiss the petition.

DODSON v. COMMONWEALTH.

(Filed February 18, 1904—Not to be reported.)

Criminal law—Bill of exceptions—Where the bill of exceptions does not show that the Commonwealth's attorney made any statement in argument to which the defendant objected, or that he excepted to the ruling of the court as to such question, the verdict will not be disturbed, nor can the bill of exceptions when signed by the judge be assailed by affidavits of the parties or of bystanders.

E. E. McKay and Edwards & Ogden for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Branch.

Opinion of the court by Judge Paynter.

The indictment under which the appellant was tried charges him with the

murder of Henry Warner, and the jury found him guilty of manslaughter. The principal ground relied upon for reversal is alleged objectionable statements made by the Commonwealth's attorney to the jury in closing the argument in the case.

The bill of exceptions signed by the judge does not show that the Commonwealth's attorney made any statement in argument to which the defendant objected, or that he excepted to the ruling of the court on any question as to the propriety of the argument of the Commonwealth's attorney. The defendant seeks to supplement the bill of exceptions, or to impeach its correctness, by affidavits which were filed on the motion for a new trial. These affidavits purport to give the alleged objectionable remarks of the Commonwealth's attorney. The judge certified to his own rulings and exceptions taken during the progress of the trial, and the validity of the bill of exceptions as thus made can not be assailed by bystanders or the affidavits of the parties interested in the litigation. (*Garrott v. Ratliff*, 83 Ky., 889; *Patterson v. Commonwealth*, 86 Ky., 325.)

The judgment is affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. V.
VAUGHT.

(Filed February 18, 1904—Not to be reported.)

1. Railroads—Damages—Contributory negligence—In an action for damages where contributory negligence was affirmatively pleaded and there was evidence to support such plea, an instruction based upon such defense should have been given.

2. Same—Instructions—In an action against a railroad company for injuries sustained by being struck by a heavy door of a refrigerator car, which being open struck appellant's platform and was slammed with such violence as to injure appellee, who was looking out of the window of the car, there should have been an instruction to the effect that it was the duty of the company to exercise reasonable care not to inflict injury and if its agents failed to warn appellee that the car which he was in was about to be moved it was guilty of negligence.

O. H. Waddle and John Galvin for appellant.

Denton & Robinson for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Cincinnati, New Orleans & Texas Pacific R. R. Co., is a corporation operating a railroad through the State of Kentucky, a part of its line being in Pulaski county. The appellee, D. F. Vaught, was at the time of the occurrence which produced this litigation in the employment of the Somerset Ice Co. The appellant had hauled a refrigerator car loaded with ice to the place of business of the Somerset Ice Co., and left it there to be unloaded. Appellee, by order of his employer, had unloaded the ice from the car, and was engaged in cleaning out the straw on the floor and gathering up the ice hooks for the purpose of turning over the car, unloaded and cleaned, to appellant; but just before he left it an engine in the custody

and control of appellant's employes backed down, coupled on to the empty car and hauled it away. The door of the car, which was large and heavy, opened out on hinges, and was swinging open when it started. After the car started appellee went to the door, in order to look out, and, as he says, to see where he was being carried, at which time the heavy door, which was swinging outwardly, struck against a platform, which constituted a part of appellant's station, with such violence that it was slammed to, striking him on the head, shoulder and abdomen, knocking him senseless, and severely injuring him.

Appellee's evidence was to the effect that he was not notified of the fact that appellant's servants were about to move the car, and knew nothing of their purpose so to do, until it was started on its journey away from the place where it had been standing; that being a refrigerator car, there was no place from which he could look out except the open door, and that he went to this door to look out and see where he was being carried.

For the appellant John Starkie testified that he was one of the brakemen in charge of the train which moved the car upon which appellee was engaged in working; that before the engine was attached to it he saw appellee, and told him he must get out, as they were going to take it away; that appellee answered "all right," and at once threw out some of his implements; whereupon he, supposing appellee had left the car, gave the signal which started it on its destination.

The jury returned a verdict of five hundred dollars in favor of appellee, of which appellant is now complaining.

The court gave two instructions, one of which, marked "B," is as follows: "It was the duty of the defendant in handling its cars to do so in such manner as not to inflict injury upon any person who had the right to be upon or in any of the said cars of defendant, and if the defendant's agents failed to use due care and diligence to ascertain plaintiff's presence and warn him of danger, they were guilty of negligence."

It is complained by appellant that the effect of this instruction was to make it the insurer of the safety of appellee, and we are inclined to think it justly subject to this criticism. It may be that the court intended the last half of the instruction to qualify the language of the first half, but we doubt if this is accomplished. The first half relates to the handling of the cars, whereas the last half is applicable alone to give him warning of the danger incident to starting the train in motion.

Appellee was not injured by the starting of the car, and was in no danger from that fact. His injury accrued from the fact that appellant's servants were hauling the car away with the door swinging open, so that it struck the platform and was slammed to with such violence as to inflict the injury which appellee received.

We think the court should have instructed the jury that it was the duty of the defendant, in handling the car, to exercise reasonable care and diligence not to inflict injury upon appellee, and if the defendant's agents failed to warn him that the car was about to be moved, they were guilty of negligence.

We think the court also erred in refusing to give any instruction on the subject of the contributory negligence of the appellee. This was affirma-

tively pleaded by appellant, and there was evidence which, if true, supported it; it was, therefore, entitled to an instruction based upon this theory of its defense.

Instruction No. 2, offered by appellant, modified as follows, should also have been given:

"If the jury believe from the evidence that the plaintiff was notified that the car in which he was working was about to be moved, and he was required to leave it, and assented thereto, and appellant's agents in charge of the train believed, and had reasonable grounds to believe, at the time it started he had left the car, they should find for the defendant."

Negligence and ordinary care should have been defined to the jury substantially as contained in instruction No. 4, tendered by appellant.

Appellee was not bound to jump from the car after it started, as is contended for by appellant, although he might think that could be done with safety; and if the car was being hauled off with him in it, without his knowing where he was being taken, it was but natural for him, and he had the right, to go to the door, which afforded the only means of obtaining the information he desired of the situation, although he might have known there was danger attending his doing so; but he was not entitled to unnecessarily place himself in peril, and the question, whether he did or not do so, under all the circumstances of this case, was a question for the jury. His perturbation of mind would necessarily be increased or diminished by the fact as to whether he was being carried far from home, or merely shifted around in appellant's yards, with the opportunity, after a few minutes, of being allowed to leave the car in safety.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

ADKINS v. WILLIAMS.

(Filed February 18, 1904—Not to be reported.)

Appeals—An appeal will lie to this court from a judgment of \$75.00 although the cause of action grew out of a conveyance of real estate, the judgment itself being simply personal.

Roscoe Vanover for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hobson.

Appellees filed this action alleging in their petition that on April 30, 1894, appellant, in consideration of \$315 in hand paid, conveyed to appellee Sanders a tract of land in fee simple, with general warranty, fraudulently concealing from her that he had previously conveyed away the minerals, coal, etc., under the land; they alleged that the minerals under the land were of the value \$75, and prayed judgment against him for \$75 in damages. The defendant answered, denying the fraud and pleading five years' limitation, but admitted the conveyance of the land with warranty, and that he had previously sold the coal and mineral privileges. The court sustained a demurrer to his answer and gave judgment against the defendant for \$75. From this judgment he appeals.

By section 950, Kentucky Statutes, no appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy is less than \$300, exclusive of interest and costs. The judgment appealed from is simply a personal judgment for \$75. The matter in controversy is, therefore, not within the jurisdiction of this court.

The fact that the cause of action grew out of a conveyance of land does not affect the rule. The judgment is simply for the recovery of money and for an amount less than \$300. No question of title to land is involved. The only thing in contest is the matter of damages. The amount of the judgment determines the jurisdiction of this court in such cases. The appeal, is therefore, dismissed.

CORNETT, &c. v. COMMONWEALTH.

(Filed February 18, 1904—Not to be reported.)

Peace bonds—Section 382 of the Criminal Code, providing that a defendant may be required to give surety to keep the peace where it appears that he is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, the sureties in such bond are not liable where he was convicted for selling spirituous, vinous or malt liquors, that offense not being a breach of the bond.

Cook & Jones for appellants.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Hobson.

On March 26, 1903, James H. Cornett being in custody and required by the Leslie Circuit Court to give bond in the sum of \$500 to keep the peace and be of good behavior to all the citizens of the Commonwealth for the period of one year from that date, H. H. Hensley and A. B. Asher appeared in open court and entered into a bond to the Commonwealth of Kentucky, conditioned that for the period of twelve months Cornett would keep the peace and be of good behavior to all persons of the Commonwealth, and that during this period he would not be guilty of any offense involving a breach of the peace or of any felony, nor engage in the unlawful sale of spirituous vinous or malt liquors, directly or indirectly, nor aid any one thus offending, nor permit same to be sold on his premises, and if he failed to perform any of these conditions they would pay to the Commonwealth \$500. At the June term, 1903, Cornett was indicted for selling spirituous, vinous and malt liquors to Hiram Begley and A. B. Couch in June of that year, contrary to the local prohibitory law in force in the counties of Bell, Harlan, Perry and Leslie, approved February 9, 1884. He was tried on this indictment at the March term, 1903, and convicted. Thereupon this proceeding was instituted on the bond referred to against his sureties. They demurred to the petition; their demurrer was overruled. They then filed answer denying that Cornett had sold any whisky in Leslie county to Begley or Couch. The court sustained a demurrer to their answer and gave judgment against them. From this judgment they appeal.

By section 382 of the Criminal Code if the defendant has threatened to commit an offense against the person or property of another, and there are

reasonable grounds to fear the commission of the offense threatened, or if he is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, and there are reasonable grounds for apprehending such violence or felony, the defendant may be required to give surety to keep the peace or for his good behavior. By section 891 a judicial conviction of the defendant for an offense involving a breach of the peace, or for a felony within the time specified in the bond, is a breach of the bond. Under these provisions it has been held that a conviction of the defendant of an offense not amounting to felony, and not involving a breach of the peace, is not a breach of the bond. (*Rankin v. Commonwealth*, 72 Ky., 553; *Commonwealth v. Mahoney*, 2 Ky. Law Rep., 814.) The conviction, therefore, for selling spirituous, vinous and malt liquors in violation of the local prohibitory law was not a breach of the bond.

There is nothing in the Code of Practice authorizing the court to put the defendant under bond except the provisions of sections 888-891 above referred to, and these do not refer to offenses not amounting to a breach of the peace or to a felony. We have examined the local prohibitory act above referred to (1 Acts 1888-4, page 214), and the act amendatory thereof (Acts 1887-8, page 874), and find nothing in them authorizing such a bond to be taken. We have been referred to no statute giving the court power to require the execution of a bond of this character. The act of March, 1903, had not taken effect when this proceeding was had. In the absence of some statutory authority the court was without power to take the bond in so far as it provided as to the sale of spirituous, vinous and malt liquors, and the bond was to this extent without consideration and void.

The judgment appealed from is, therefore, reversed and the cause remanded, with directions to dismiss the proceeding.

MARKS & STIX v. HARDY'S ADM'R.

(Filed February 18, 1904.)

1. Partnerships—Evidence—In a defense to an action by one on the ground that he was not a partner, reports of mercantile agents or the general report in the neighborhood are inadmissible to establish the existence of the partnership, it not being shown that such reports were founded upon any statements made by the alleged partner.

2. Same—Where there was no evidence to show that the father knew his son was carrying on a store in his name, to hold him responsible as a partner would be to place him wholly in the power of designing persons who had it in mind to ruin him.

3. Same—Where one was defending an action on the ground that he was not a partner, evidence of compromise was properly rejected where it did not appear that such party made any offer of compromise or knew that such offer was made.

W. B. Pugh, S. J. Pugh and Robt. D. Wilson for appellants.

W. C. Halbert and T. R. Phister for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Barker.

The appellants, Marks & Stix, are boot and shoe merchants of Cincinnati, Ohio. At the time this action was instituted William Hardy resided in Vanceburg, Lewis county, Kentucky. A. T. Hardy, who is his son, lived at Willard, Carter county, Kentucky, where he carried on a general store under the firm name of William Hardy & Son.

The firm of William Hardy & Son, in June, 1900, purchased of the appellant four hundred and fifty dollars worth of shoes on credit. The bill not having been paid when it fell due, this action was instituted against William Hardy and A. T. Hardy, as composing the firm of William Hardy & Son. A. T. Hardy made no defense; William Hardy filed an answer, putting in issue the fact that he was a member of the firm in question. After the issues were made up William Hardy died, and the action was, by consent, revived in the name of his administrator, Andrew J. Hardy.

About a year after the completion of the issues, the action coming on for trial, appellants offered to file an amended petition, setting up certain matters alleged in the way of estoppel as against William Hardy. The motion to file this amendment, upon objection, was overruled by the court. Upon the trial the jury returned a verdict in favor of appellee, of which the appellants are now complaining.

The uncontradicted facts show that William Hardy was a man about seventy-one years of age, and that he lived in Vanceburg, Lewis county, Kentucky, from fifty to seventy-five miles from Willard, Carter county, Kentucky; that for many years prior to the events constituting the subject-matter of this litigation he had been engaged in the business of buying and selling staves for wine casks, and had built up quite a reputation in this business, and accumulated some money; that his son, A. T. Hardy, was not of age, and that his father sent him over to Willard for the purpose of buying wine cask staves for cash; that after he was settled there he opened up a general merchandise store, under the firm name and style of William Hardy & Son, which was the name of the firm engaged in the business of buying and selling wine cask staves; that he advertised the store under the firm name of William Hardy & Son and all of his bill heads and letters were so marked, but that there was no sign over the store.

The first error complained of is the refusal of the court to permit the amended petition to be filed after the case was called for trial. The issues had been made up for fully a year theretofore. William Hardy had in the meantime died, and the conduct of the defense to the action was in the hands of his administrator. We do not think, under these circumstances, that the court abused the large discretion conferred upon it in the matter of permitting amendments to be filed by refusing the one in question. (*Elizabethtown, Lexington & Big Sandy R. R. Co. v. Catlettsburg Water Co.*, 22 Ky. Law Rep., 1632.)

The second error complained of by appellants is the refusal of the court to permit them to prove by mercantile agents' reports who composed the firm of William Hardy & Son, or the general report in and around Willard, that the partnership was composed of William Hardy and A. T. Hardy. It was not shown that the mercantile agents' reports were based upon any information given by William Hardy, or by any one authorized by him, or that he knew that such reports were being gotten up, or that he knew of the exist-

ence of what is called the "general reputation" that he was a member of the firm. The great weight of authority, as well as sound reason, is against the admissibility of this evidence. The Am. & Eng. Ency. of Law, volume 22, 2d edition, page 50, thus states the rule as to "general reputation:"

"The existence or nonexistence of a partnership between certain persons cannot be proved by evidence of general reputation or understanding that such persons were or were not partners, and such evidence is inadequate even in aid of other testimony to the same effect. But evidence of general reputation in the community is admissible to show that plaintiff gave credit in reliance upon the supposed partnership, and this evidence has been admitted where it appeared that such common report was known to the partners sought to be charged."

The learned author also lays down the rule that reports from a mercantile agency are inadmissible.

The inadmissibility of general reputation to establish a partnership is sustained by the following cases: *Cook v. Slate Co.*, 38 Am. Rep., 568; *Hunt v. Jucks*, 1 Am. Dec., 555; *Grafton Bank v. Moore*, 38 Am. Dec., 478; *Smith v. Griffith, Id.*, 639; *Macey v. Combs*, 77 Am. Dec., 103; *Adams v. Morrison*, 113 N. Y. Rep., 152; *Brown v. Crandall*, 11 Conn., 92; *Tanner & Co. v. Hall, & Co.*, 86 Ala., 805; *Stlewell v. Borman*, 63 Ark., 30; *Bowen v. Rutherford*, 14 Am. Rep., 25; *Earl v. Hurd*, 5 Blackford (Ind.), 248; *Bryden v. Taylor*, 3 Am. Dec., 554; *Goddard v. Pratt*, 16 Pick., 412; *Sager v. Tripper*, 38 Mich., 259; *Taylor v. Webster*, 39 N. J. Law, 102; *Halliday v. McDougall*, 20 Wend., 81.

William Hardy was an old man, and lived from fifty to seventy-five miles from Willard. There is no evidence in the record to show that he knew his son was carrying on a general merchandise store under his name, or that he ever heard any of the rumors that he was a member of the firm. To hold one responsible as a partner under such evidence would be to place him wholly in the power of designing persons, who had it in mind to ruin him. As well said by Judge Cowen, in the case of *Halliday v. McDougall*: "There is scarcely a question upon which common reputation is more fallible. A contract of partnership is, in its nature, incapable of being defined by laymen, and whether an apparent partnership be really so, or a contract of some other character, is often a most embarrassing legal question with the ablest lawyers. General reputation of the ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be much more proper subject of proof by general report. This the law rejects, yet I am not aware that there is a necessity for resort to such proof in the one case more than the other."

In *Brown v. Crandall*, 11 Conn., 92, the court said: "A person of doubtful credit might cause a report to be circulated that another person was in partnership with him, for the very purpose of maintaining his credit. His creditors might also aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts."

The court also properly rejected the evidence of the compromise sought to be introduced by appellants. It did not appear that William Hardy made any offer of compromise himself, or authorized any one to do so for him, or that he knew that such an offer was made. Neither his assignee nor the attorney of the assignee was his agent for this purpose.

It is also complained that the court erred in permitting A. H. Parker to testify of declarations of William Hardy as to the existence of the firm of William Hardy & Son at the time the articles of dissolution between himself and his son were signed. It seems when William Hardy finally heard that his son was engaged in the business of general merchandise at Willard in his name that he went with his lawyer, A. H. Parker, to Willard, and then and there severed all business connection with him; in pursuance of which formal articles of dissolution were drawn up and signed by the parties. Appellants introduced A. H. Parker as their witness, to show the contents of this paper (having given notice to the appellee requiring its production at the trial) for the purpose of establishing the fact that the existence of the firm was recognized by William Hardy in the articles of dissolution. This evidence having been introduced by appellants, appellee undertook to show by Parker that, although William Hardy finally signed the articles of dissolution, he, at the time, denied the existence of the firm, and only signed the paper upon the assurance of his counsel that it was right so to do, and would not obligate or bind him as a partner.

The court very properly admitted this evidence. It constituted a part of the transaction, which appellants had themselves undertaken to introduce. The rule is elementary that where a transaction is placed in evidence, all that took place at the same time, and which was a part of it, may also be shown. One can not introduce a part of a conversation or transaction which he deems to his interest and exclude the remainder. What was said by William Hardy at the time the articles of dissolution between his son and himself were drawn up and signed was a part of the transaction itself, and he had the right to introduce his declarations on the subject, in order to show his construction of his position in the matter. Nor was this in violation of the rule against introducing oral testimony to alter or modify a written contract, in the absence of an allegation of fraud or mistake. That rule might apply as between the father and son, but it has no place in the controversy between William Hardy and appellants. In speaking upon this subject, in the case of *Strader v. Lambeth, &c.*, 7 B. Mon., 589, it was said: "Between the parties to the instrument such evidence, it is true, is only admissible when the party offering it first shows that the writing, either by fraud or mistake, was drawn differently from what the parties intended, or was executed under circumstances tending to prove that the contract was usurious. But when the parties themselves do not rely upon the writing as drawn, but admit the contract to be other than that which it exhibits, this rule has no application. Nor are strangers to the instrument concluded by its terms, or estopped to show by parol evidence that the contract of the parties is different from what it purports to be on the face of the writing; and as estoppels where they exist must be mutual, it follows that in a controversy with strangers to the instrument the parties to it are not themselves estopped to explain or contradict it by parol evidence." (Greenleaf on Evidence, 16th edition, volume 1, section 279.)

But the court erred in permitting appellees to prove by various witnesses declarations made by William Hardy in his own interest, to the effect that he was not a partner with his son in the general merchandise venture, which the latter was conducting at Willard under the style of William Hardy &

Son. These declarations were essentially hearsay, and contrary to the rule, that one may not make evidence in his own behalf by his declarations, and were highly prejudicial to the interests of appellants.

It is said in section 110, volume 1, Greenleaf's evidence, 16th Edition: "It is to be observed that where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence. They must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the co-existing motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct. It is a necessary consequence of the principle, as above explained, that declarations made after the equivocal act has ended can not be regarded as forming part of it, complimenting and interpreting the physical part of the act, and they, therefore, come as ordinary assertions of a past fact, obnoxious to the hearsay rule and not admissible under the present principle."

The American & English Ency. of Law, volume 9, 2d edition, page 50, thus states the rule: "An extra judicial self-serving declaration of a party is generally hearsay evidence, and is no evidence in his behalf unless it constitutes a part of the *res gestæ*, or is made in the presence of the opposite party, and is acquiesced in by him." (Terrell v. Commonwealth, 18 Bush, 346; Penn. v. Fightmaster, 18 Ky. Law Rep., 449.)

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

BENNETT v. RYAN.

(Filed February 19, 1904—Not to be reported.)

Timber—Contracts—In an action to recover upon a timber contract it was error for the trial court to award judgment against appellant for timber which he did not receive and which was left in the possession of the appellee with his approval and consent.

Wilfred Carrico and J. C. Jonson for appellant.

W. L. Reeves for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1897 the land of the appellee, J. B. Ryan, was sold under four executions, and was bought by the plaintiffs in the executions for less than two-thirds of its value. There was also some taxes against the land. These execution claims and taxes made an indebtedness of \$2,000, which it was necessary for appellee to raise to redeem the land. For the purpose of raising this sum the appellee entered into an agreement with appellant, in which it was stipulated that appellant should cut the white oak and poplar timber of specified sizes from this land, and the appellee was to receive a credit on the indebtedness of \$2,000 of thirty cents per hundred feet for the amount so cut, and if the amount of timber purchased under this contract at that price exceeded the \$2,000, then appellant was to pay to appellee the excess; but if the timber did not amount to as much as \$2,000, then the appellee was to pay

the appellant the difference. Appellant was to have three years in which to remove the timber from the land.

Appellant ceased to cut and remove timber from the land about July, 1898, and at that time rendered a statement to appellee of the amount of timber so received under this contract, amounting to \$788.18. Thus matters stood until July 24, 1900, when appellant brought this action, seeking to recover the difference between the \$788.18 and the amount he had paid for appellee in redeeming the land, to wit, \$3,000.

Appellee answered, admitting the amount and value of the timber received by appellant from the land, but alleged that there was other timber upon the land which had not been cut and removed, and which had been purchased by appellant under his contract, amounting to more than the amount sued for by the appellant. In other words, that if appellant had cut all the timber called for under the contract, that appellee would not be owing appellant anything, but, on the contrary, the appellant would be owing the appellee. Afterwards appellee filed an amended answer, in which he stated that appellant not only cut and removed \$788.18 worth of timber from this land, but that he cut and removed over \$1,000 worth.

Appellant replied, denying these allegations, and alleged that a portion of this land on which much of the timber was situated was covered by a dower interest or claim of one Mrs. Blaine, who objected to the cutting and removal of the timber therefrom, and appellee directed the appellant not to cut this timber; that upon the remaining portion of the land there were only a few trees left uncut within the size and specifications of the contract, and these were not cut by the request of appellee.

The proof was heard by the lower court and it adjudged that the appellee was entitled to a credit of \$696.22 as the value of the timber actually cut and received by appellant under his contract, and also adjudged that appellee was entitled to a further credit of \$812.69, the value of the trees uncut, and which were then standing upon the land that were within the size and specifications of the contract.

As to the amount credited to the appellee for the timber actually received we are not disposed to disturb the finding of the court thereon. But we can not agree with the action of the court in allowing a further credit of the \$812.69 for the timber not taken and received by the appellant under his contract, for the reason that the preponderance of the evidence shows that the timber failed to be cut by appellant was not cut by the direction, consent and approbation of appellee. In addition to this it is also shown by the evidence that the timber was left standing on the land uninjured, owned by and in the possession of appellee, and was of much greater value than the price agreed to be paid by appellant in his contract, and instead of appellee being damaged by the failure of appellant to comply with his contract and remove the timber, he was benefited thereby.

It would be unconscionable to make appellant pay and account for timber which he did not receive under his contract, which was left in the possession of appellee and growing upon his land, especially when the same was not received by appellant and left standing and growing upon his land with the approval and consent of appellee.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HAGAN, &c. v. CLEMONS, &c.

(Filed February 19, 1904—Not to be reported.)

Inheritance—Where a negro man and woman who as slaves had cohabited made a statutory declaration of their intention to live together as man and wife, and the wife acquired title to a lot with the provision in the deed that the lot was to be for "Ellen Lewis, Eddy Brown and Rebecca Brown," the two latter being infant children of the man and woman who had contracted the slave marriage, the deed providing that upon the death of one or two the property should go to the survivor, upon the death of the wife without other issue and the death of the two children without issue, the father took the property under section 1401, Kentucky Statutes.

John D. Wickliffe for appellants.

Geo. S. & John A. Fulton for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

Ellen Lewis was a negress and a slave. Before the emancipation of slaves she and John Brown, who was also a slave, had contracted a slave marriage. There were born to them two children, Eddy Brown and Rebecca Brown. On the third of January, 1868, they made and entered of record in the proper county clerk's office the statutory declaration of their intention to live together as husband and wife. In 1870 Ellen Lewis purchased from J. W. Muir a house and lot in Bardstown, this State, and paid for it with her own means. Muir's deed conveying the property contained this clause: "The house and lot conveyed by this deed to be for Ellen Lewis, Eddy Brown and Rebecca Brown, and at the death of either one or two the property to survive to the longest liver of the three."

Eddy Brown and Rebecca Brown named were infant children of John Brown and Ellen Lewis. Eddy Brown died in infancy in the lifetime of her mother, and without issue. The mother, Ellen Lewis, then died, leaving Rebecca Brown and her husband John Brown. Afterward Rebecca Brown died without issue and an infant. John Brown continued to live upon the property and to claim it as his own for a long while. He then sold and conveyed it to appellees.

This suit by appellants, who are brothers of the half-blood of Eddy Brown and Rebecca Brown, being sons of Ellen Lewis, but not of John Brown, seek to recover the property, appellants claiming that they inherited as heirs at law of their half-sister Rebecca Brown. Under section 1393 of the Kentucky Statutes, when a person having title to real estate of inheritance dies intestate as to such estate, it descends in parcenary to his kindred in the order, first, to his children and their descendants; if none, then to his father and mother, if both are living, a moiety each, but if either parent be dead, then the whole estate shall pass to the other. Section 1401 provides that if an infant dies without issue having title to real estate derived by gift, devise or descent from one of the parents, the whole shall descend to that parent and his or her kindred in the manner provided by the statute.

It is the contention of appellants that upon the death of Rebecca Brown in infancy and without issue, she being the survivor of the three beneficiaries named in the deed, and having succeeded to the entire estate under the deed,

that the title thus acquired was by gift from her mother. In the recent case of *Guler, &c. v. Bridges*, 24 Ky. Law Rep., 945, the question was involved whether an inheritance passing from an infant dying without issue, leaving a mother and father surviving, and the conceded purchase of the land and payment therefor by the father, descended to the father, or under the statute, section 1398, to both father and mother in equal portions. In that case the father claimed the entire estate in consequence of his having paid for same when it was conveyed to the infant. This court denied the father's claim, and in speaking of section 1401, observed: "It has always been most strictly construed, and the statute has been held to apply only to those cases where the title to the real estate owned by the infant came to him by gift, devise or descent from one of his parents. * * * The infant's title to the real estate did not come from the father, but from his vendor."

That decision controls this case.

Therefore, the judgment is affirmed.

NELSON COUNTY v. BARDSTOWN & LOUISVILLE TURNPIKE CO.

(Filed February 19, 1904—Not to be reported.)

Dismissing appeal—An order refusing to enter a judgment non obstante verdicto is not such a final order as may be appealed from.

Nat W. Halstead, C. C. McChord, W. S. Pryor, Morgan Yewell, Eli H. Brown, Jr. and Robt. L. Greene for appellant.

John A. Fulton, J. S. Kelly and G. S. & J. A. Fulton for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

We have this day decided the appeal of Bardstown & Louisville Turnpike Co. v. Nelson County. In that case, after the verdict for the Turnpike Company, the appellant here moved the court for a judgment non obstante verdicto. The motion was overruled, and from that action this appeal is prosecuted. The motion seems to be based upon the theory that the pleadings showed that the county had not the power under the vote for free turnpikes to enter into the contract for the purchase of the road; also that the plea of estoppel by judgment discussed in the other opinion was a bar to this action. Those matters are disposed of adversely to appellant's contention. The order refusing to enter a judgment for the defendant upon the pleadings, notwithstanding a verdict for the plaintiff, is not such final order as will sustain an appeal.

This appeal by Nelson County is, therefore, dismissed.

BISHOP, ADM'R v. MATNEY.

(Filed February 19, 1904—Not to be reported.)

Jurisdiction—In an action to enforce a lien upon real estate this court has jurisdiction of an appeal without regard to the amount or value of the matter in controversy.

Roscoe Vanover for appellant.

J. M. Roberson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge O'Rear.

In this suit to enforce a purchase money lien of less than \$200 upon a tract of land the judgment denied the plaintiff any relief, upholding the defendant's plea of payment. It is first contended on this appeal that this court has not jurisdiction of the case because the amount in controversy, exclusive of interest and cost, is less than \$200. Where the action seeks to enforce a lien upon real estate this court uniformly holds that it is an action involving the title to real estate, and, therefore, this court has jurisdiction of the appeal without regard to the amount or value of the matter in controversy.

The plea of payment was supported only by this proof: The note sued on was executed to William Bishop, who is now dead. Before an administrator had been appointed for his estate, he having died intestate, one of his sons, Andy Bishop, attempted to transfer the note to the payor, appellee, in consideration of the compounding of a felony. The plea of payment was not sustained. In the first place the title to personal property, including choses in action, of one dying intestate passes to the administrator. The heir at law has not the right to collect the chose or dispose of it. In the second place the consideration shown for the attempted cancellation of the note was vicious. The agreement was void.

The judgment is reversed, and cause remanded for further proceedings not inconsistent herewith.

PEACOCK DISTILLING CO. v. COMMONWEALTH.

(Filed February 19, 1904—Not to be reported.)

1. Indictment—Nuisance—An indictment charging a distillery company with permitting its still slops to flow into the waters of a creek, "whereby the said stream of water was rendered foul, noisome, and unfit for man or beast, and caused the fish in said stream to die," etc., did not charge two offenses, and a demurrer to it was properly overruled. The gravamen of the offense was the creation of unhealthful odors, and the fact that fish were killed was an incident of the main offense.

2. Same—The fact that a distiller sold its slop to owners of cattle under an agreement that the distiller should be held harmless from any prosecution for permitting slops to escape into a stream, will not relieve the distiller where the primary conditions resulting in the pollution of the stream were produced by him.

Emmet M. Dickson for appellant.

Dennis Dundon and N. B. Hays for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was indicted, convicted and fined \$1,500 for suffering and committing a common nuisance. The indictment describing the offense charges that the defendant corporation, being in the possession and control of a cer-

tain distillery in Bourbon county, which was located on Stoner creek, and near a public highway, "did unlawfully suffer and permit the still slops and refuse from said distillery to accumulate at and around said distillery, and did suffer and permit same to flow into the waters of said Stoner creek, whereby the said stream of water was rendered foul, noisome and unfit for use for man or beast, and caused the fish in said stream to die, whereby there did arise from a distillery, still slops and refuse, stream of water and dead fish, foul, unhealthy and disagreeable odors, and render the atmosphere foul, noisome, disagreeable and dangerous to the health, comfort and happiness, and to the common nuisance and annoyance, of all citizens of the Commonwealth of Kentucky, and especially to those living in the neighborhood of said stream and distillery, and passing along said highway," etc.

Appellant complains that the indictment charges two offenses: One the common law offense of maintaining a nuisance, and the other the statutory offense of poisoning or polluting a stream of water, whereby fish are sickened and killed, and that, therefore, it was demurrable for multifariousness. It not infrequently occurs that the same act may constitute, in whole or in part, two or more offenses. In that event it is the accusative part of the indictment that determines the offense charged by the Commonwealth. This indictment does not go upon the idea that the statute has been violated. It is not a prosecution for a violation of that or any statute, but it is drawn to charge the common law offense of maintaining and suffering a nuisance. The description of the acts constituting the offense states not only the suffering of the filth and slop to accumulate so as to create unhealthful and offensive odors, but that by letting the slops and filth escape into the stream it killed the fish, which, decomposing, added to the offensiveness of the other odors. The gravamen is the creation of unhealthful, noisome, odors; that fish were killed and waters polluted by the slop were only incidents and parts of the main offense. The indictment was not duplex, and the demurrer was properly overruled. (*Commonwealth v. Megibben*, 19 Ky. Law Rep., 292; *Greenbaum v. Commonwealth*, 10 Ky. Law Rep., 723.)

Appellant showed that it had sold all of its slop for the season to Lair & Houston, and let to them its cattle stables and pens under an agreement that Lair & Houston were to feed all the slop to their cattle there, and to hold the distillers harmless from any prosecution for suffering the slops to escape into the stream, and to so use the premises as not to create a nuisance. It is claimed for appellant that as the only nuisance shown was such as was created by the conditions in and about the cattle pens, and the escape of refuse therefrom into Stoner creek while Lair & Houston were in possession under their contract, that the court should have instructed the jury to find the defendant distillery company not guilty.

To fully understand the applicability of the principle invoked by appellant we must state the facts showing the situation. The distillery is situated on the side of Stoner creek, and on the Paris and Peacock turnpike road, north of the city of Paris. The capacity of the distillery, at least its operating capacity at that time, was to mash 800 bushels of grain each day. The slop produced from this was forced through an overhead main across the creek into a number of large tubs or vats, whence it was drawn off into the cattle stables and there fed to the cattle and hogs. Three hundred and seventy cat-

tle, and about seventy hogs, were provided to consume this slop. The distillery began running about the 1st of March, and continued till about the 10th of June. The cattle and hogs were confined in pens and stables. The excrement from this live stock, the filth, mud, spilled slop, and any surplus slop, all were run into a large pool in the lot, probably 100x200 feet. The effect of the hot, dry weather on this mass of refuse was to decompose it. The odor for miles around, especially on damp days and of evenings, was so strong as to necessitate citizens closing their doors and windows while serving meals, and to escape its discomforts. Stock would not drink the water from the creek. Fish in great quantities were killed. Craw fish, and even snakes and turtles, were killed and driven from the water to the banks where their decomposition attracted great flocks of buzzards and carrion crows. Persons traveling the road were assailed by the stench. Although there was some evidence that the sink was allowed to run off into the creek. It may be that this occurred only after a heavy rain when the pool was filled to overflowing by surface water. It is not shown that Lair & Houston neglected to do anything that they could have done to prevent the conditions complained of. On the contrary, they seem to have used the means provided by the distillery company for caring for this refuse matter. The result was such that it must have been inevitable in the use of the means at hand. Hot weather will decompose damp animal and vegetable matter. The decomposition is essentially offensive to smell, and poisonous. We are asked to say that the distiller who produces these conditions can escape the consequences by contracting with a tenant that the latter will stand for the prosecutions, and agree to prevent a nuisance. It may be doubted whether one can contract to shift the consequences of his violation of the law to protect health upon another. It would seem to be contrary to a sound public policy to permit it.

Wood on Nuisance, volume 1, page 100, 3d edition, cited by appellant, says: "A landlord who lets premises for a particular purpose, which may or may not become a nuisance, according to the manner in which the tenant conducts the business, is not liable either to an action or to an indictment therefor unless he had reasonable grounds to believe that the nuisance would be created from such use. Neither is the landlord liable for a nuisance created by the tenant when the nuisance arises from a use of the premises which was not contemplated by the lease."

The soundness of the text is not called in question by the court. But if it applies to this case it sustains the argument that the landlord is liable. In this case the so-called landlord, the distiller, furnishes the slop, the pens in which it is to be fed, and the cess pool for the collection and care of the offal and refuse matter. The distillery itself creates the primary conditions. If let alone those things would inevitably become a nuisance. Their decomposition, overflow into the creek, especially in time of rains and their chemical effect in hot weather, were actually known, and the consequences must have been in the thought of the distiller. It undertakes to rid itself of them, and thereby discharge itself from liability to the community. It sells the slop to cattlemen to feed on the premises, and puts upon the feeders the duty to keep the premises from becoming a nuisance. Manifestly the means provided by the distiller were inadequate. The result shows it. The distill-

ler claims, and the feeders, Lair & Houston, declare, there was no negligence in their manner of managing the business of taking care of the slop, so far as failure to use the means at hand was concerned. Nor does the evidence show that there was. The question then comes back to this: The distiller having created the conditions, has failed to provide sufficient means to care for them so as to prevent their becoming a nuisance. For this the distiller ought to be liable. It has no right to set in motion causes reasonably sure to injure other people, and then fail to provide against such injury.

Every person must use his own property and conduct his business with regard to certain rights of his neighbors. He can no more neglect to provide against known consequences of certain uses of his property, where it would become deleterious to the health and comfort of others rightfully in the neighborhood, than he could purposely injure them in that respect, without answering in damages. We think the instructions asked for by appellant were properly refused.

The evidence for the Commonwealth clearly, and beyond question, established appellant's guilt. Much of the evidence in defense corroborated it. Whether they should believe that, or the other evidence in defense, was a matter which the jury had the sole right to determine. It is complained that the verdict is excessive. Conceding that we are at liberty to reverse a judgment in a penal prosecution on that account, the instance must be rare, and the abuse of its power by the jury be flagrant indeed, to warrant such interference by this court. Trial juries are peculiarly fitted for the imposition of such penalties as will not only adequately punish the offender in hand, but serve to deter others from a repetition of the breach. They are the people who must execute the criminal and penal laws of the State as directly affecting their community. We decline to interfere with their judgment in this case.

Judgment affirmed, with damages.

SMITH v. LAWLER & SON.

(Filed February 19, 1904—Not to be reported.)

Limitation of actions—Where five years intervened from the accrual of a cause of action to the day next preceding the institution of a suit, the plea of the statute of limitation was a bar against a recovery.

Chatterton & Blitz for appellant.

Crawford & Krieger for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

On the 21st day of August, 1897, the board of public works of the city of Louisville made an order that William T. Smith should pay to M. Lawler & Sons, contractors, \$36.10 as his proportion of the cost for improving Lucia avenue from the southwesterly line of the Bardstown road to the northwesterly line of Vonbories avenue. On the 21st day of August, 1902, Lawler & Son instituted this action in the Jefferson Circuit Court against Rebecca and

James Smith, in which they alleged that Wm. Smith was the owner and in possession of a lot of land fronting Lucia avenue sixty feet at the date of the apportionment warrant issued to them for improving the carriage way of Lucia avenue; that subsequent to the issue of the apportionment warrant W. T. Smith died intestate, leaving the defendant, Rebecca Smith, his widow, and James Smith, his brother, his only surviving heirs at law, and asked that they be adjudged a lien upon the lot to secure the payment of the apportionment warrant, and for an enforcement of their lien. The defendant, Rebecca Smith, answered, denying that William T. Smith was ever the owner or in possession of the lot of land described in the petition, or that James Smith was his brother or heir at law, and that he ever had a brother by the name of James Smith, and alleged that the lot sought to be subjected to plaintiff's claim belonged to her at the time mentioned in the petition, and was her property. On the 8th of November thereafter the plaintiffs filed an amended petition, in which they allege that the lot sought to be subjected to the payment of their claim had been assessed as the property of Wm. Smith, and the apportionment warrant issued against Wm. Smith, but that as a matter of fact they had discovered that it was at the time mentioned in the petition and was then the property of the defendant, Rebecca Smith, and prayed as in their original petition. The defendant, for answer to the amended petition, plead that more than five years had elapsed between the issue of the alleged warrant filed with the petition and the institution of this action for its collection, and plead the lapse of time and statute of limitation in bar of recovery. Plaintiff thereupon demurred to the plea of limitation, which was sustained, and defendant declining to plead further, judgment was entered subjecting the property, and the defendant has appealed.

Section 2515 of the Kentucky Statutes provides: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, * * * should be commenced within five years next after the cause of action accrued."

The first question, therefore, to be determined is when appellees' cause of action accrued upon the apportionment warrant issued by the board of public works. In *Childs v. Smith's Heirs*, 52 Ky., 460, it was held by this court that the rule in regard to the computation of time is that, "when the computation is to be made from an act done, the day on which the act was done must be included, because since there is no fraction in a day, the act relates to the first moment of the day on which it was done. But when the computation is to be made from the day itself, and not from the act done, the day in which the act was done must be excluded."

The rule announced in this case has since been adhered to in numerous decisions. (*Irwin v. Irwin*, 105 Ky., —, and authorities there cited.) Plaintiff could have instituted suit for the collection of this warrant immediately upon its issue and delivery to him. It, therefore, follows that the five years from the accrual of his cause of action expired on the 20th day of August, 1902, the day preceding the institution of this suit. We are, therefore, of the opinion that the plea of the statute of limitation was an effectual bar against recovery in this proceeding. In view of our conclusion on this question, it is unnecessary to consider the other questions relied on by appellant to escape liability.

For reasons indicated the judgment is reversed and cause remanded, with instruction to dismiss the petition.

LITER v. JOHNSON'S EX'OR, &c.

(Filed February 18, 1904—Not to be reported.)

Lands—Title—In an action by appellant to recover a house and lot where a deed had been made to her father, now deceased, by one who at the request of the father paid the balance of purchase money, where the deed had been made without her knowledge, and where an amount about equal to the value of the lot had been charged to her by her father's will, it was error in the trial court to fail to adjudge that she was the owner, and a statement by her to her mother upon her father's death when the mother was bewailing her distressed financial condition: "Mother, don't grieve so: you have a home at Elizaville. If they sell you out, come live there, and I'll rent a house," was not a disclaimer of her ownership in the house and lot.

John P. McCartney for appellant.

B. S. Grannis for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

One Jas. T. Johnson, of Fleming county, Kentucky, died in February, 1899, testate. By his will, made in the year 1895, he directed his debts paid by the sale of such personal property as could best be spared, and gave all the balance of his property, real and personal, to his wife, Eliza Johnson, for life, at her death all to be sold and divided amongst his six children, after charging his son, John, with \$1,000, and his daughter, Mary Ruth Liter, with \$1,500. When he made his will he was practically out of debt, but afterwards, by reason of the failure of the Exchange Bank of David Wilson, his brother-in-law, he became much involved, and at the time of his death he owed some \$7,000 or \$8,000, an amount largely in excess of his personal property. S. P. Scruggs, his son-in-law, was appointed and qualified as his executor of the will, and on the 9th of March, 1899, filed his petition in the Fleming Circuit Court for the settlement of the estate, and for a sale of enough of the real estate of the decedent to satisfy the debts. At the time of decedent's death he owned a farm near Johnson's Junction of 150 acres, worth about \$12,000, certain lots at the Junction, worth some \$1,500, ninety acres known as the Clark farm, worth \$2,000, and held the paper title to the house and lot in controversy, worth about \$600.

Appellant filed her answer to this petition, and denied that Jas. T. Johnson owned this house and lot, and claimed that under the statute of fifteen years' adverse possession she was the owner of it; that her father paid \$600 of the purchase price, and that \$500 of the \$1,500 charged to her as an advancement against her in his will was made on that account, and that the legal title was taken to Jas. T. Johnson by mistake. The issues were formed, proof heard, and the trial resulted in a judgment for appellee, to reverse which this appeal is prosecuted.

The proof shows that some years prior to the year 1883 the appellant married Joseph Liter, and her father, Jas. T. Johnson, advanced her \$1,000 to

aid her and her husband to purchase a farm. On account of the poor management and intemperate habits of her husband they soon lost the farm, and then her husband bought a small house and lot in the town of Elizaville, from a Cincinnati firm of Lee & Pinckard, and paid \$100 in cash, and executed their notes for the balance, taking from them a bond for title. Shortly after this her husband died. She and her husband took possession of this house and lot in the year 1883, and she has resided in this house continuously from that time until the trial, claiming it adversely to all. She listed it and paid the taxes from 1883 up to the present, and he never did list it or pay an taxes thereon. She had made and paid for all the repairs on the property, and it was generally known and understood to be her property all the time.

Soon after the purchase of this property Lee & Pinckard began to press for the purchase price, and threatened a suit for that purpose. Appellant wrote to her father, who was then in the State of Missouri, appealing to him for assistance. He wrote to David Wilson to pay the unpaid purchase price, which Wilson did, and caused a deed to be prepared from Lee & Pinckard to Jas. T. Johnson. David Wilson died before this action was instituted, and it is not shown whether this deed was prepared in accordance with any direction of Jas. T. Johnson or not, but it is shown that appellant did not know that the deed was so made until a long time afterwards.

It is further shown in the proof that when Jas. T. Johnson became largely involved by reason of the breaking of Wilson's bank, he executed a mortgage to secure the sum for which he was liable, and in this mortgage he included his homestead and every piece of real estate owned by him, naming and describing them, but did not include this house and lot in controversy. It is reasonable to infer, under the facts proven in this case, that \$500 of the \$1,500 charged to appellant in the will of Johnson represented \$500 of the \$600 paid to Lee & Pinckard on this house and lot. In opposition to these facts and circumstances there are some statements said to have been made by Jas. T. Johnson after he became involved by the failure of this bank, but these statements were not made in the presence of appellant.

In addition to this, it was proven by appellee that at the house of Jas. T. Johnson, when Johnson was a corpse, the appellant, in the presence of the appellee, said to her mother, when the latter was bewailing her condition of being left alone with all these debts against the estate, which would take from her her home: "Mother, don't grieve so: you have a home at Elizaville. If they sell you out, come live there, and I'll rent a house."

We are unable to construe this language, used under the circumstances related, as a disclaimer of ownership of the house and lot. It, at least, is not sufficient to overcome and outweigh all the evidence introduced in her behalf. We are of the opinion, under the proof in this case, that the appellant was the owner of the house and lot in controversy, and the lower court should have so adjudged.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

ROBINSON, &c. v. MARSHALL.

(Filed February 19, 1904—Not to be reported.)

Forcible entry—Subsection 1 of section 452 of the Civil Code defines a forcible entry "as an entry without the consent of the person having the actual possession," therefore, in order to entitle one to maintain an action for forcible entry he must show that he was in the actual and peaceable possession of the premises at the time of the entry, and where the testimony was sufficient to show consent that the tenant might enter the premises, the trial court erred in not leaving that question to the determination of the jury.

Montgomery & Lea for appellants.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 7th day of August, 1902, the appellee, Mary Marshall, sued out a writ charging the appellant, W. L. Robinson, with having forcibly entered and taken possession of a house and tract of thirty-five acres of land, of which she was in the actual possession, and with refusing to surrender the possession thereof. The inquisition on the premises resulted in a verdict of a jury finding the defendant guilty of forcible entry, and a judgment for possession in favor of appellee. W. L. Robinson traversed the inquest and executed the bond required by law and carried the case to the circuit court. A trial in the circuit court resulted in a verdict, pursuant to a peremptory instruction by the court, finding the defendant guilty of the forcible entry complained of. The defendant filed grounds and made a motion for a new trial because the court erred in giving the jury a peremptory instruction to find the defendant guilty of the forcible entry complained of; second, because the court erred in refusing to permit the defendant to testify that he had a deed from Richard Marshall, the brother of the plaintiff, for the land in controversy, dated in 1898; and that Marshall was his tenant at the time of his death, and his term expired upon his death; third, because the court erred in refusing to permit the witness, F. H. Abbott, to testify that the appellee promised him that she would get her things out of the house and give him possession; fourth, in refusing to instruct the jury to find the defendant not guilty.

Upon the trial the deposition of appellee was read to the jury, in which she deposed that she had lived upon and occupied the premises in dispute with her brother, Richard Marshall, and his wife for some eight or nine years; that after the death of her brother and his wife she continued in the actual possession of the premises, retaining the key to the dwelling house, and expected to remain there if she could get anybody to stay with her; that defendant on one occasion borrowed the key of the house from her, but subsequently brought it back to her; that the house was locked up; that by agreement between herself and Richard Marshall she occupied the place with him and his wife. She denied that she had ever agreed with defendant that she would take her belongings out of the house, or consented that Abbott, his tenant, should have possession. She testified that she had a bed, a bureau, a trunk, two chairs and a looking glass, and some clothes in the house at the time of the entry by defendant. She also introduced several witnesses

who testified that she lived on the land in controversy with her brother for several years before his death, and was there when he died. The appellant, Robinson, on the other hand, testified that he had been in the undisputed possession of all the land in controversy since 1898; that Richard Marshall had married his mother, and he had agreed to allow them to occupy the house and premises as his tenants as long as they lived; that appellee lived with her brother and his wife, and was also living there when he died; that after the death of Richard Marshall he administered upon his estate and sold his personal property; that his wife occupied the house from the death of Richard Marshall until the day of the sale; and that appellee stayed with her and left the premises on the same day, leaving a few articles of furniture; that he left the key with her so that she could get them out when she found a place to take them; that he notified her that he had rented the house to F. H. Abbott, and that he would want possession in a week or so, and directed her to give him the key to the house when he called for it, and that she said she would do so, and would get her things out of the house as soon as possible, and would not leave them in Mr. Abbott's way; that he lived several miles from the house in controversy, in Owen county; that when Abbott went to take possession of the property he supposed that appellee had taken her things out, but found that she had not; that he did not know where she was at the time he took possession of the house, and that he entered through a door which was not fastened. Appellant also introduced Mrs. Lynn, who testified that a short time after the death of Richard Marshall, Robinson came to her house to see Mary Marshall, and asked her for the key, and told her that he had rented the house to Abbott, and that he would move in in a week or so; that appellee responded "all right;" that she would move her things out so that they would not be in Mr. Abbott's way; that Robinson told her that if she could not get a place to take them that she could put them up stairs out of the way, but that appellee said not to put them up stairs; that she would take them away immediately. Robinson also told her that Abbott would be there to plow the garden the next day, and she did not object. William True testified that he had rented the land in controversy from Robinson for three years immediately preceding the death of Richard Marshall, and cultivated it as his tenant. Fenton Jones testified that he had seen a contract in writing between Richard Marshall and Robinson, which provided that appellee, Mary Marshall, should live with Richard Marshall on the place as long as Richard Marshall and his wife lived.

Subsection 1 of section 453 of the Civil Code defines a forcible entry "as an entry without the consent of the person having the actual possession." In order to entitle one to maintain an action for forcible entry he must show that he was at the time of the entry in the actual and peaceable possession of the premises in question. The specific acts and conditions required to constitute actual possession differ according to the peculiar circumstances of each case. Generally any overt acts indicating a purpose to occupy, and not to abandon, the premises will satisfy the requirements as to possession. (13 A. & E. Ency. of Law. 748.) The only legitimate inquiry upon the trial of a writ of forcible entry is whether the defendant entered upon the land which at the time of the entry was in the actual possession of the plaintiff. The

defendant can not justify an entry in such a case by showing title or right of entry. (Hunt v. Wilson, 53 Ky., 36.) But if a tenancy be determined and the tenant has gone away and locked up the house, consenting that the legal owner, either in person or by his tenants, should take possession of the property, and he does so, under such a state of case he would not be guilty of "forcible entry." We think there was ample testimony introduced by appellant in this case conducing to show that appellee consented for appellant to enter the house; and that the trial court erred in not leaving the determination of this question to the jury. As to the land outside of the house, the overwhelming weight of the testimony is that it was actually in the possession of the appellant, and had been for several years.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

WADE v. KEOWN.

(Filed February 23, 1904—Not to be reported.)

Lands—Liens—Where one entered on land for the purpose of holding and using it as long as he could, having no right or title to it, he was not entitled to a lien on the land for improvements made by him.

Ira Julian and C. W. Massie for appellant.

R. D. Walker, J. E. Fogle and W. S. Pryor for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1888 E. D. Walker sold to one E. H. Basham a tract of ninety-two acres of land, situated in Ohio county, and took his note for the sum of \$450, the purchase price. When it became due, in 1891, Walker sued him on this note, and enforced his lien on the land. The land was sold by the commissioner under this judgment and E. D. Walker became the purchaser, and the court granted him a writ of possession for the land.

When the sheriff, Stephens, undertook to execute this writ he found one E. F. Basham, a son of E. H. Basham, in the possession of the land. E. F. Basham then sued the sheriff and E. D. Walker, and obtained a temporary injunction, restraining them from the execution of this writ and putting him off of this land. Basham in his petition alleged that he was the owner of this land, but did not state how or when he became the owner thereof. The issues were formed and the case remained on the docket until 1902, when the plaintiff, Basham, dismissed his action without prejudice. In the meantime E. D. Walker died, and the action was revived in the names of his devisees, and they obtained another writ of possession and placed it in the hands of appellee, C. P. Keown, then the sheriff of the county, to execute. When he undertook to execute it he found the appellant, Geo. T. Wade, in possession of the land, and he brought this action to enjoin the sheriff and the devisees from ejecting him, claiming that he was the owner thereof; but he also failed to state how or when he became the owner. The issues were completed and the proof, by depositions, was taken, a trial had, and the

court adjudged the land to the devisees of Walker, and dismissed appellant's action, of which he complains.

The preponderance of the evidence shows that E. F. Basham obtained the possession of this land from his father under the promise that he should own it, provided he paid Walker the \$450 note; but after he obtained the possession he changed his mind and concluded that he would, and did, set up claim to the land, and while he was in possession appellant Wade made an arrangement with one Coppage to trade E. F. Basham out of his right of possession, which he did by giving him a wagon and gear, and then appellant at once moved on this land in the night time. Appellant does not claim that he obtained the possession from Basham, but says he found the place vacant and moved on it, concluding that he would set up claim to it in his own right.

The proof shows that E. F. Basham and appellant both recognized the claim and right of Walker to this land, and they knew the pendency of the action referred to, and appellant, prior to his entry on the land, wrote letters to Walker, giving him information of facts and witnesses to enable him to defeat Basham in his suit, and also offered to buy the land of Walker. It is evident that when Basham and appellant entered on this land they knew of the pendency of the actions mentioned above and that the land belonged to Walker; and it was their purpose to hold and have the use of this land as long as they could, and if possible beat Walker out of it. Appellant asked that he be allowed pay and a lien on the land for improvements made by him. Under the circumstances he is not entitled thereto. He entered without any color or pretense of right or title, and at the time knew the land belonged to another.

The judgment of the lower court is affirmed.

SPRIGGS, &c. v. SIMPKINS' ADM'R, &c.

(Filed February 23, 1904—Not to be reported.)

Patents—Lands—Where the evidence shows a tract of land was covered by a prior patent the claim to it by one failing to establish continuous, actual, adverse possession for fifteen years was not made out.

W. H. Vaughn and C. B. Wheeler for appellants.

Alexander & Lackey for appellees.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Nunn.

This case involves the location of patents to land as well as questions of possession and trespass.

In the year 1854 one W. G. Wells obtained four patents, three of them containing 200 acres each, the other 100 acres. This last patent boundary, or a part of it, he sold and conveyed to one Shardlick Ward, who erected a cabin on it near the line of one of the 100-acre patents. After this, and in the year 1865, Ward obtained a patent, the boundary of which included 1,055 acres, but by the terms of the patent 855 acres were excluded therefrom. The boundary of this Ward patent covered the most of the land patented to Wells in 1854, and it is fair to presume that the exclusion of 855 acres from this pat-

ent boundary was meant to exclude the lands covered by the Wells patents. Appellant Spriggs claimed to be a tenant of the Ward heirs, and occupied the house or cabin near the line of one of the 200-acre patents of Wells. Ward, when he occupied this cabin, enclosed and cleared fifteen or twenty acres of land across the line and on the Wells patent. When Spriggs entered as tenant to appellants, the Ward heirs, he began to clear and enclose thirty or more acres to this Wells patent, and appellees, as the owners by purchase of the boundaries covered by the Wells patent, brought this action against appellants to recover this land, and damages for the trespass and destruction of timber, and to enjoin them further trespass. Appellants answered, denying the ownership of this land by appellees, and claimed the whole of it by virtue of the Ward 1,055-acre patent, and also by adverse possession. The issues were completed; proof was heard, and the lower court sustains appellees' claim, except to the extent of the fifteen or twenty acres of land first cleared and enclosed by Ward. This small piece was adjudged to appellants; of this judgment appellants complain.

The appellants have not filed a brief, but we have examined the record, and are at a loss to understand upon what claim or theory they expect a reversal. It is clear that appellees own this land covered by the Wells patents, and they are prior in date to the Ward patent. They have failed to sustain by the proof their claim of fifteen years' continuous, actual, adverse possession of this land, or any part thereof, except the fifteen or twenty acres adjudged them by the court.

For these reasons the judgment of the lower court is affirmed.

STOVALL v. HAYNES.

(Filed February 23, 1904—Not to be reported.)

Lands—Adverse possession—Where one was in the actual, adverse possession of land when the deed was made to another the transaction was champertous and void, the occupant having lived on the land more than fifteen years, and the testimony was conflicting, the purchaser claiming that her occupancy was only permissive, the case should have been submitted to a jury under appropriate instructions, and it was error to give a peremptory instruction.

Geo. W. Reeves and Reeves & Thorp for appellant.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant's husband, J. C. Stovall, occupied a tract of twenty-eight acres of land, which was part of a larger tract of 113 acres. The larger tract was sold under a judgment foreclosing a mortgage on it, executed by J. C. Stovall's father in his lifetime. The suit was brought after the mortgagor's death, J. C. Stovall being made a party defendant. The judgment was rendered without defense. The sale was made and confirmed in 1889, and the deed executed in 1891. There was no writ of possession so far as this record shows. J. C. Stovall continued to live on the twenty-eight acres, and died shortly after the sale by the commissioner. His widow has continued to live there and claim the land adversely, she says, for more than fifteen years be-

fore this suit was brought by the vendee of the purchaser at the commissioner's sale aforesaid. The purchaser claimed that the widow of J. C. Stovall continued to occupy the premises by permission. But this was denied. Upon that evidence the court peremptorily instructed the jury to find for the plaintiff, which was error. If appellee for fifteen years claimed and adversely held the land, the owner's title and right of entry was barred, although appellant's husband had been a party to the suit in which the title was sold to appellant's vendor. But the record shows that the judgment confirming the sale of the land in the foreclosure suit and the order making the deed thereunder were within fifteen years from the time of the bringing of this suit. As appellant claims under her husband's title, and as he, if living, could not claim back of the judgment making the deed to which he was a party, she can not do so. Manifestly her claim did not begin until after his death.

It was attempted to be shown that appellant's husband and the purchaser at the decretal sale, who was his sister, had an agreement at that time by which J. C. Stovall was to continue to hold the land in dispute, and that it was not to be affected by the purchase, and that in consideration thereof he did not make defense to the proceeding. The trial court should have allowed this evidence. A deed executed by the purchaser after the death of J. C. Stovall conveyed all the 113 acres, except the twenty-eight, and in the deed one of the boundary lines is named as being the boundary of the land owned by J. C. Stovall's heirs. This seems to confirm the claim that there was some adjustment between J. C. Stovall and his sister, the purchaser. Furthermore, if appellant was in the actual, adverse possession of the land when the deed was made to appellee by his vendor, the transaction was champertous and void. The case should have been submitted to the jury under appropriate instructions covering these two points.

Reversed and remanded for proceedings not inconsistent herewith.

SMITH v. SMITH.

(Filed February 23, 1904—Not to be reported.)

Passway—Adverse possession—Prescription—Where a father gave to his son a tract of land thirty years ago, but did not make him a deed until 1885, the title to the land was perfected by adverse claim and user before the deed was made, and the use of a passway by him contemporaneously with his possession and use of the land created a prescriptive right to the use of the passway at the end of fifteen years from the time his possession began.

J. F. Montgomery for appellant.

Appeal from Adair Circuit Court.

Opinion of the court by Judge O'Rear.

Joel Smith owned a farm of 610 acres in Adair county, lying between the Columbia and Greensburg road and the Columbia and Campbellsville pike. About thirty years ago he gave to his son, appellee, J. Garrett Smith, a tract of seventy-six acres of this farm, lying immediately on the Columbia and Greensburg road. Appellee took possession of the farm and continued to use it and claim it as his own from that time until the bringing of this suit.

During the same time he also used as a matter of right a passway from his tract to the Columbia and Campbellsville pike. This was his way out to his postoffice, school and stores, where he did the most of his trading, as well as to the church attended by his family. Joel Smith did not make Garrett Smith a deed for the land until 1885; that deed recites that the grantor and his wife "have given to our son, Jeremiah Smith, a certain piece or parcel of land, with all the appurtenances thereto belonging," etc. No express reference was made in the deed to the passway. Garrett Smith continued to use this passway until his father's death some years afterward, and since the partition of the remaining lands among his brothers and sisters. A disagreement having arisen between appellee and his brother (appellant) over other matters originally not connected with the passway, appellant closed the passway through his part of the tract that had been allotted him, and this suit was brought to compel the removal of the obstruction.

The evidence clearly shows that appellee has used this passway as an appurtenant to this tract of land for more than thirty years. Ordinarily this would be sufficient to constitute a complete right by prescription. But it is insisted by appellant that as appellee had not title to the land to which the easement is claimed as an appurtenant, and did not get the title until 1885, his use of the passway as a matter of right then began; that his occupancy of the seventy-six acres of land up until that time was without title, and by the permission of his father, the title holder, and that the use of the passway over the remainder of the father's land was permissive and not adverse. It is not denied that title to land may be acquired by adverse possession where the possession is taken under a parol gift. Appellee's title to his seventy-six acres of land seems to have been perfected by his adverse claim and user before his father made him a deed for it. By using the passway contemporaneously with his possession and use of the land, the prescriptive right to use the passway as such was created and perfected at the end of the fifteen years from the time it began. The fact that appellee accepted a deed subsequently from his father can not affect his adverse claim and use of the passway inasmuch as there is nothing contained in the deed inconsistent with such claim. Indeed the grant of such appurtenances as belonged to the tract conveyed might well be held to include the easement in question.

Such having been the judgment of the circuit court it is affirmed.

ANDREWS v. ERWIN.

(Filed February 23, 1904—Not to be reported.)

Forcible detainer—In an action of forcible detainer it was error for the trial court to dismiss appellant's proceeding against appellee, a tenant, it appearing that he had broken the terms of a lease for five years, the lease providing that if "the lessee shall fail to clear, fence and put the land in a good state of cultivation, by the 1st of January, 1903, he shall forfeit all work and claims under the lease," the relation of landlord and tenant existing, the breaking of the contract by the tenant constituted a forcible detainer.

Zeb Stewart and Will Lewis for appellant.

Simms & Thompson for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 5th of June, 1899, the appellant, Mollie J. Andrews, contracted in writing with H. L. Thompson as follows:

"This indenture witnesseth: Mollie J. Andrews, of Dexter, Calloway county, Kentucky, has this day leased to H. L. Thompson, of the same place, all her timber land lying west of Rock Grass creek and east of the N., C. & St. L. R. R., for a term of five years from the 1st day of January, 1900. Said H. L. Thompson agrees to clear, fence and put said land in a good state of cultivation, and remove all timber except stumps from said land by the 1st day of January, 1903, or to forfeit all work done and all claims on said land. * * * This indenture binds all heirs or assigns of both parties to fulfill said article same as the original parties."

On the 21st of January, 1903, Mollie J. Andrews instituted a proceeding in the Calloway Quarterly Court, in which she alleged that her original lessee and tenant, Thompson, had died on the — day of —, 1900; and that all of his rights and interest in the real estate leased from her had been sold at public outcry, and that appellee, Erwin, became the purchaser thereof, and subrogated to the rights, liabilities and covenants of Thompson with reference to the lease; and that he had taken possession thereunder; that neither her original lessee, Thompson, nor his vendee, Erwin, had complied with the covenants of the lease to clear, fence and put the leased premises in a good state of cultivation, by removing the timber, except the stumps, therefrom by the 1st day of January, 1903; and that in accordance with the terms of the lease she had demanded possession thereof, which he refused to surrender, and forcibly detained possession thereof without right or consent on her part, and asked that he be adjudged guilty of a forcible detainer; and that she have restitution of the premises. The defendant, Erwin, filed a general demurrer, which was overruled, and thereupon filed an answer, in which he denied that either he or Thompson had failed to comply with their contract, or that by reason of such failure he had forfeited his lease, and alleged that prior to the institution of this proceeding he had not received any notice to surrender the possession of the land, and moved the court to dismiss the petition. The motion was overruled, and the law and facts being submitted to the court, it was adjudged that the defendant, Erwin, was guilty of the forcible detainer complained of, and that the plaintiff should have restitution of the premises. The defendant traversed the finding of the lower court, and carried the case to the circuit court, where he renewed his motion to dismiss the proceeding on the face of the papers, which was sustained by the trial court over the objections of plaintiff, and she has appealed.

It is the contention of appellee that the judgment of the circuit court should be affirmed on two grounds: First, because the written contract does not specifically provide that the tenancy or term of lease is to expire on a certain day, as required by section 2295 of the Kentucky Statutes; and, second, because no demand or written notice for possession was served upon him prior to the institution of this proceeding. There can be no doubt that the relation of landlord and tenant is created between the parties by the written

contract, and a forcible detainer is defined by section 453 of the Civil Code as the "refusal of a tenant to give possession to his landlord after the expiration of his term, or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will." The reservation of rent in some form and allegiance to the title are the distinguishing characteristics of a contract by which the relation of landlord and tenant exists. (Sections 2298-95-96, 2326 and 2327 of the Kentucky Statutes.) And the rule is well settled that where a lease expired by its own limitation no written demand from the landlord for possession is necessary in order to bring an action for forcible detainer. While the lease in this case is for five years, it distinctly specifies that if the lessee shall fail to clear, fence, and put the land in a good cultivation, and remove all timber except stumps, by the 1st day of January, 1903, that he shall forfeit all work done and all claims under the lease; and that this provision in the contract shall bind both the heirs and assigns. We, therefore, conclude that the circuit judge erred in dismissing appellant's petition before trial.

Judgment reversed and cause remanded for proceedings consistent herewith.

REED v. TAYLOR, &c.

(Filed February 23, 1904—Not to be reported.)

1. Forcible detainer—Jurisdiction—In a forcible detainer proceeding before a police judge the latter was without jurisdiction to proceed in the action except to return the papers to the court, to which a traverse had been taken.

2. Damages—Judicial officer—It is a well-settled rule that while a judicial officer will be protected against suits for damages resulting from an erroneous exercise of judgment or power, yet where he acts corruptly, maliciously, or beyond his jurisdiction his office is no protection.

W. T. Burch and S. H. Bush for appellant.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was the owner and in the possession of a certain hotel property at West Point, Kentucky. He contracted with appellee Taylor for the latter's services as assistant in the management of the hotel for one year from March 1, 1901. Under the contract Taylor and wife were to occupy one of the rooms of the hotel. The net proceeds of the venture were to be divided between the two parties, Taylor and appellant. Appellant was to receive and disburse all money. Before the expiration of the year, for some reason not shown in this record, appellant instituted a forcible detainer proceeding before appellee, J. L. Shipley, judge of the police court of West Point (which is a town of the 6th class), seeking to oust Taylor from the premises. The judgment of the police court was adverse to appellant, but within three days he traversed the judgment and executed a bond before the police judge, which was approved by him. Thereafter, at the instance of appellee Taylor, Shipley, the police judge, issued warrants of arrest against appellant, and caused him to be arrested thereunder, charged with contempt of the police court, and

held until he had executed bond for his appearance. Other warrants were issued against him of a similar nature thereafter, but which were not executed because he fled. The police judge also issued an order putting the hotel property in the hands of a receiver, and directing the books and papers, etc., belonging to appellant to be turned over to Taylor. The police judge also issued an order, directed to and served upon certain customers of appellant, proclaiming that the hotel was open for business under the contract with Taylor, and forbidding them ignoring Taylor's rights in the premises as adjudged by the said police court, and not to pay any money in violation thereof to appellant.

Appellant brought this suit against Taylor and against the police judge, Shipley, to recover the damages alleged to have been sustained by him because of the false imprisonment under the warrants above named, and because of the annoyance and worry, loss of business and expenses incurred in defending the other proceedings, which were sued for as results of malicious prosecution. It was charged in the petition that there was a conspiracy between Taylor and Shipley by which it was agreed that appellant was to be harrassed and annoyed so as to abandon his property and yield it to Taylor during the balance of the term. At the close of the evidence in appellant's case the court peremptorily instructed the jury to find for the defendants. This was error. There was evidence deducible from the circumstances proven to the jury to sustain the charge of the conspiracy. Furthermore, after the execution of the traverse bond the police judge was utterly without jurisdiction to proceed further in that action other than to return the papers to the circuit court, and in no event did he have authority to appoint a receiver for the hotel property. It is well settled that while a judicial officer will be protected against suits for damages resulting from an erroneous exercise of judgment or power, yet where he acts corruptly, maliciously or beyond his jurisdiction, his office is no protection. (*Blincoe v. Head*, 108 Ky., 106; *Stephens v. Wilson*, 24 Ky. Law Rep., 1832.)

Judgment reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

HANNA'S ASS'ES V. GAY, & CO.

(Filed February 23, 1904.)

Contracts—Homestead—Where a wife joins with the husband in a contract to sell their farm, which was made by his assignees, the consideration of the wife's signing being that she was to be paid \$3,000 cash of the proceeds of the farm, she agreeing to relinquish all claims to dower or homestead, but before the sale was completed the husband died. In a suit for specific performance of the contract the lower court adjudged that in addition to the \$3,000 mentioned, \$1,000 of the proceeds should be set aside to the wife as a homestead. Held—That the lower court erred in setting aside the \$1,000 as a homestead.

Willis & Todd and J. C. Beckham for appellants.

R. L. Pulliam, Pickett & Barrickman for Mrs. E. V. Hanna and infant defendants.

W. W. Jesse, guardian ad litem.

Appeal from Shelby Circuit Court.**Opinion of the court by Judge O'Rear.**

In May, 1902, John S. Hanna being indebted beyond his ability to pay, executed a general deed of assignment to appellants for the benefit of all his creditors. Among the properties embraced in the conveyance was a farm of 261 acres in Shelby county. The deed contained this reservation: "Except there is expressly reserved from this deed of assignment, and there does not pass hereby, any of the property that by the law of this Commonwealth is exempt from execution, attachment or distress, and same is expressly reserved by first party for the benefit of himself and family."

The debtor's wife did not join in the deed. It is admitted that neither her potential right to dower nor the debtor's right to a homestead of \$1,000 in value passed by this deed.

In the following July the assignees contracted with appellee, J. T. Gay, to sell him this farm at the price of \$18,000. The debtor and his wife joined in the contract. The contract contained this agreement, as affecting directly the interests of the debtor and his wife: "In consideration of \$3,000 cash to be paid to Mrs. E. V. Hanna, wife of John S. Hanna, they, John S. Hanna and E. V. Hanna, his wife, hereby agree and bind themselves to sign the deed hereinbefore set out, and to release and relinquish all claims to dower and homestead in the property hereinbefore described. But it is expressly agreed if the deed herein provided for shall not be made, or for any reason this contract shall not be consummated, then the aforesaid \$3,000 shall not be taken or considered in any way the value of said dower or homestead in future transactions, this agreement as to same being applicable to this agreement only."

Before the contract of sale could be confirmed by the county court to whom it was submitted by the assignees, and before the deed could be executed, the debtor, John S. Hanna, died.

This suit was brought by the assignees against the purchaser, J. T. Gay for a specific execution of the contract. The widow and children of John S. Hanna were made parties to the suit. J. T. Gay answered that he was willing to accept the title to the land if it could be conveyed by the judgment of the court, and was willing to pay for it as agreed. The widow answered that she was willing to join in the deed if she was paid the \$3,000 mentioned in the contract, but not otherwise. A guardian ad litem for the infant children answered, claiming a homestead of \$1,000 value out of the proceeds of the sale. The circuit court adjudged the specific execution of the contract; required the adult heirs to sign the deed with the assignees; required the widow to do the same; and had the commissioner of the court convey for the infants. But the court adjudged, and there was paid over to the widow the \$3,000 mentioned, and \$1,000 additional of the proceeds of sale to Gay were set aside as a homestead for the widow and children during the life of the former and the minority of the latter. The assignees have appealed from as much of the judgment as set apart the homestead money for the widow and children.

By the contract the wife of the debtor was not bound at all. A married woman's potential dower interest in her husband's land can be relinquished only in the modes pointed out by the statute—by the execution of a deed

with her husband or by separate deed if he has already conveyed, and by privy acknowledgment before a proper officer of her execution of the deed. After the death of her husband Mrs. Hanna's inchoate dower became dower consummate. As to it she could then sell it by deed or contract. Voluntarily filing her answer in the suit, offering thereby to conclude the agreement made by her during marriage, and executing the deed and receiving the consideration stipulated in the contract, she divested herself of dower in the land.

It has been repeatedly held that the widow of a decedent can not claim both dower and homestead in his lands; but she may elect which she will take. The homestead in the decedent's land is declared by statute (section 1707, Kentucky Statutes) to be for the benefit of the widow and infant children of the decedent. Therefore, if she elects to take dower in lieu of homestead, the infant children's right to a homestead, to be jointly occupied with their mother during their minority, would attach to the land set apart as the widow's dower. But a more serious question arises in this case: Was there a right of homestead available to either the widow or infant children? The statutes prohibit the subjection of the debtor's homestead to the payment of his debts only when it is attempted to be taken under an execution, attachment, distress or judgment. But it does not prevent the debtor's selling his homestead. The debtor can not mortgage his homestead without his wife joins in the mortgage. (Section 1706, Kentucky Statutes; *Thorn v. Darlington*, 6 Bush, 448; *Wing v. Hayden*, 10 Bush, 276; *Lear v. Totten*, 14 Bush, 101.) But he may sell it whether or not she joins in the deed or contract. (*Brame v. Craig*, 12 Bush, 404; *Whitesides v. Cushenberry*, 8 Ky. Law Rep., 590; *Gullett v. Arnett*, 19 Ky. Law Rep., 1892.) Of course if he should die first her right to dower would then prevail over to the deed to that extent.

In this case it will be observed that the debtor had sold by executory contract all of the remaining title in fee owned by him in the land. There can not be a homestead without title to the land, and as the husband had contracted to convey, and had bound himself to convey all the title he had in the land, it necessarily divested him, and all others who might have been entitled by relation to it, of a homestead in the land. The cases of *Schnabel v. Schnabel*, 22 Ky. Law Rep., 234, and *Kiesewetter v. Kress*, 24 Ky. Law Rep., 1242, relate alone to where the owner of the homestead died having title to it, and treat of the power of the widow to elect, or to waive or relinquish a homestead so as to defeat the claims of the infants, which would attach but for such waiver or election.

The judgment is reversed and cause remanded, with directions to the lower court to set aside so much of the judgment as sets apart the \$1,000 to the widow and infant children as a homestead in this case, and for further proceedings not inconsistent herewith.

BEATTYVILLE BANK v. ROBERTS, &c.

(Filed February 23, 1904.)

1. Construction of statutes—Under section 483, Kentucky Statutes, the partial or total failure of consideration or fraud in the execution of a note, made payable and negotiable at an incorporated bank which has been dis-

counted before maturity by a bank, is not available as a defense to it if purchased in good faith by the bank without notice of its infirmity.

2. Parol agreement—In a sale of an article a parol agreement that the article should be taken back if the purchaser should die, and a note executed for the payment of the article, where the purchaser was living when the note matured he could not rely upon the agreement to defeat recovery, where he made no claim that a bank which discounted the note had notice of the parol agreement that he was only to pay for the article as delivered.

Gourley & Roberts, John J. McHenry and T. B. Blakey for appellant.

S. P. Stamper and O. H. Pollard for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the Beattyville Bank of Beattyville, Ky., against T. T. Roberts, Ibbey Roberts and the J. W. Slack Co., on a promissory note dated March 25, 1902, payable four months after date, for \$546, the note being signed by T. T. and Ibbey Roberts, and endorsed by J. W. Slack Co. The defendants, T. T. and Ibbey Roberts, in their answer plead that the note was executed by them to their co-defendants, J. W. Slack Co., without consideration, and that the plaintiff was apprised of this fact before it purchased the note. Plaintiff for reply denied that the note was executed without consideration, or that they were apprised of this fact before its purchase by them, or that there was no consideration to support it. A jury trial resulted in a verdict and judgment for the defendants, and plaintiff has appealed.

The facts developed by the testimony are as follows: "On the 22d of November, 1901, T. T. Roberts and Ibbey Roberts, executed and delivered to the J. W. Slack Co., of Louisville, Ky., the following promissory note:

"\$686.

Beattyville, Ky., Nov. 22, 1901.

"Four months after date we promise to pay to the order of the John W. Slack Co., distillers, of Louisville, Ky., \$686, without defalcation, value received, negotiable and payable at the Beattyville Bank, Beattyville, Ky.

(Signed) "T. T. ROBERTS,
"IBBEY ROBERTS."

Simultaneously with the execution of this note the J. W. Slack Co. executed and delivered to T. T. Roberts the following written agreement:

"We have this day sold to T. T. Roberts fifteen barrels of ninety-eight whisky, and twenty barrels new, for which he gives me his four months' note, dated November 22, 1901, for \$686. If Mr. Roberts should die, we agree to take back the whisky at what it was sold to him.

"J. W. SLACK CO.,

"By J. W. SLACK, President."

Before the maturity of this note the J. W. Slack Co., by J. W. Slack, endorsed and delivered it for value to the appellant, the Beattyville Bank, of Beattyville, Ky. At the maturity of the note the bank gave notice thereof and demanded its payment both from appellees and the J. W. Slack Co.

Upon the trial T. T. Roberts testified that he did not know that the bank held the note until he received this notice; and that he immediately went to the bank and notified R. N. Goodloe, its cashier, that he had a contemporan-

eous parol agreement with the J. W. Slack Co. that he was only to pay for the whisky as it was delivered to him; and that he had already paid to them \$140 for whisky delivered, which should be credited upon the obligation; and that he directed him to return the note to the J. W. Slack Co., and not to purchase any more of his notes executed to the company, and at the same time explained to him the conditions of the written agreement of the Slack Co. to him; that a few days after his conversation with Goodloe he received a letter from the Slack Co. enclosing the \$686 note, dated November 22, 1901, and the note sued on for \$546, which he executed in renewal of the balance due upon his original obligation, which reads as follows:

"\$546.

Beattyville, Ky., March 25, 1902.

"Four months after date we promise to pay to the order of John W. Slack Co., inc. distillers, of Louisville, Ky., \$546, without defalcation, value received, negotiable and payable at the Beattyville Bank, Beattyville, Ky.

"T. T. ROBERTS, and

"MRS. IBBY ROBERTS."

That after the execution of the last-named note the Slack Co. failed in business, and that he never received any more of the whisky from them; that Slack represented at the date of the execution of the note that the whisky was in bond in his warehouse in Louisville, but that he did not give him any warehouse receipt therefor; that he simply took his word that the whisky was there; that he usually ordered two barrels at a time and paid for it when it came; that he was induced to buy thirty-five barrels by the Slack Co. agreeing to abate from the price 25 cents a gallon below their ordinary charges. Both the vice-president of the bank and the cashier testified that the bank acquired the original note for \$686 in due course of business for value without notice of any lack of consideration for its execution; and that when it fell due both Roberts and the Slack Co. were notified thereof by mail; that a day or two afterwards he met T. T. Roberts on the bridge, and Roberts requested him to send the note to the Slack Co., and offered to show him the written contract executed by the Slack Co. to him; that he did not read it, but Roberts explained its contents; that he sent the note to the Slack Co. and shortly thereafter he received a check for \$140 and the note sued on in renewal of the balance of the original note. He denied that Roberts notified him not to take any more of his notes, or informed him that they were executed without consideration at the date of his conversation on the bridge with reference to the original note, but said that the first time he ever heard of this claim was after the publication in a paper that Slack & Co. was broke, when Roberts came to the bank for the first time, claiming that he had notified him when the first note fell due not to buy any more of his notes.

The partial or total failure of consideration, or fraud in the execution of a note, made payable and negotiable at an incorporated bank, which has been discounted before maturity by a bank of this Commonwealth, or organized under the laws of the United States, is not available as a defense to it if purchased in good faith by the bank without notice of such infirmity. (Section 483, Kentucky Statutes; Kelley v. Smith, 58 Ky., 312; Hargis v. Louisville Trust Co., 17 Ky. Law Rep., 218; Moreland's Ass'ee v. Citizens Savings Bank, 92 Ky., 211; Clark v. Tanner, 100 Ky., 275.)

There is nothing in the written contract relied on by appellee which suggests any lack of consideration for the execution of the original note; it was simply an agreement on the part of the Slack Co. to buy back the whisky in the event of the death of appellee. As he was alive at the date of the maturity of the note, he certainly could not rely upon this agreement to defeat recovery, and there was no claim by appellee that appellants had notice of his alleged contemporaneous parol agreement with the Slack Co. that he was only to pay for the whisky as delivered previous to or at the time of the purchase by them of the original obligation of November 22, 1901. The law presumes a consideration for the execution of bills of exchange and negotiable notes placed upon the footing of bills of exchange by the statute for the benefit of the holder in an action against the maker or endorser of such paper. Besides, it was not competent for appellee to impeach his written contract by testimony of a contemporaneous parol agreement providing for a different time and manner of payment. The note sued on was simply the renewal of the balance due upon the original obligation, which appellant had purchased in due course of business without notice. It was not a new transaction. Even if it be conceded that appellee notified appellant's cashier, at the time he was called upon to pay the original obligation, of his parol agreement with the Slack Co. that he was only to pay for the whisky as it was delivered, and that the original note was without consideration, this would not have been sufficient to impeach the consideration of a note subsequently executed by him to Slack Co. for the balance due in the hands of an innocent purchaser for value.

We have reached the conclusion that there was no competent testimony to support the plea of no consideration relied on to defeat recovery; and that the trial court should have given the jury a peremptory instruction to find for the plaintiff. The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

ROW v. JOHNSON, &c.

(Filed February 24, 1904—Not to be reported.)

Lands—Liens—Conveyances—Where Johnston conveyed a tract of land to his son, and the son died without paying anything on the land, when the father qualified as his administrator and in order to enforce his lien had his lawyer to assign the notes to Row, his son-in-law, instituted a suit in Row's name for the sale of the land, obtained judgment, attended the sale and bid the land in in Row's name. The sale was confirmed, deed executed to Row, which was approved by the court and delivered by the circuit clerk to the county clerk who placed it in a box, but did not record it because the tax was not paid. Row took no part in the suit, was not at the sale and did not know the deeds were made to him. Upon Johnson's death Row discovered that the deed was made to him and claimed the land. Held—A judgment in an action by the heirs-at law of Johnson adjudging the land to be their property was proper.

W. L. Reeves for appellant.

Perkins & Trimble and S. Y. Trimble for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hobson.

On September 15, 1885, B. H. Johnson conveyed to his son, Jake M. Johnson, a track of land known as his river farm in consideration of \$1,500 to be paid in one, two and three years. Jake M. Johnson died in the year 1888 without having paid anything on the land. His father, B. H. Johnson, qualified as his administrator. When he consulted an attorney as to bringing a suit to foreclose his lien on the land for the purchase money he was advised by the attorney that he had better not bring the suit in his own name as he was the administrator of his son and would thus be both plaintiff and defendant. He replied that he would transfer the notes then to his son-in-law, John H. Row, and requested the attorney to write the transfer, which he did. Johnson thereupon signed the transfer endorsed on the back of the notes and delivered them to the attorney with directions to institute the suit and subject the land to the payment of the notes. This the attorney did; he had no communication with Row, was not acquainted with him. Judgment was obtained for the sale of the land. Johnson attended the sale and bid in the land in the name of Row. The sale was confirmed and the commissioner executed a deed to the purchaser, which was approved by the court and ordered to the proper office for record. The deed was delivered by the circuit clerk to the county clerk, who placed it in a box and did not record it as the tax was not paid. Row took no part in the suit, was not present at the sale, and seems not to have known that the deed was made to him. This was in the year 1889. B. H. Johnson took possession of the land and held and used it from that time until his death, on April 24, 1900. He used and claimed it as his own, built a barn on it, had a dispute with a neighbor about one of the lines, his home place was adjoining and he held the whole boundary alike, shifting the fences as he pleased, and treating it all as one farm. Row was a man of moderate means, and lived about five miles from Johnson. He was well acquainted with Johnson's holding and use of the land. After Johnson's death Row said at first that Johnson had only asked him to let him sell that land in his name, and he told him all right; that he had not paid a dollar on it, and it was no more his than it was the rest of the heirs; that he had not thought about it from the day he and the old man made the arrangement until them. After this, however, he set up claim to the land as his own, one of Johnson's sons having found the deed lying in the county clerk's office and had it recorded. B. H. Johnson's widow qualified as his administratrix, and on October 19, 1900, filed a suit in equity against Row, alleging these facts, and charging fraud, and praying that if the defendant failed to convey the land to the heirs of B. H. Johnson, then she be adjudged a lien on it for the purchase money. On November 12, 1900, the children and heirs-at-law of Johnson filed a suit against Row, alleging the same facts, and praying that they be adjudged the owners of the land. The two suits were consolidated. On final hearing the court dismissed the action of the administratrix and adjudged the land to be the property of the children and heirs at law of B. H. Johnson. From this judgment Row appeals.

He pleaded the pendency of the first action by the administratrix in abate-

ment of the second action by the children and heirs at law. The plea was properly held bad because the actions were by different parties, and sought the enforcement of entirely different rights. He also relied on the first action as an election to sue for the purchase money, and insists that after this election was made the heirs could not sue for the land. But the administratrix who represented only the personal estate could not, by any action of hers, prejudice the rights of the real representatives. Besides, the second action was brought very soon after the first, and before Row was in any way prejudiced by the bringing of the first action. In other words, he was in no worse position than if that action had not been brought. He was misled in no way, and lost no right which he would otherwise have had. There is, therefore, no substance in either of these objections.

It is also insisted that the deed to Row as long as it stands is an insuperable barrier to the recovery of the land by the heirs of Johnson, and that there can be no recovery on the oral contract or relief on the ground of fraud under sections 2515 and 2519, Kentucky Statutes, providing that an action for relief on the ground of fraud or mistake must be commenced within five years next after the cause of action accrues; that the cause of action shall not be deemed to have accrued until the fraud or mistake is discovered; but that no action shall be brought ten years after the time of the making of the contract or the perpetration of the fraud. No title passes by a deed until it is delivered. There is no delivery without an acceptance. Row did not know that the deed was made, or know that it was in the county clerk's office until after Johnson's death. No liability could be imposed upon him by reason of this deed until he accepted it, and no rights can accrue to him without an acceptance of it. Besides, if the deed was made to him in trust for Johnson, and he in fact held the title in trust for him, this trust may be established by parol, and may be enforced. Row's whole conduct, as well as his declarations, indicate that he had not accepted the deed, and that he recognized that such title as he had was held by him in trust for Johnson. By a long line of cases it has been held that a trust of this sort may be established by parol. (*Williams v. Williams*, 8 Bush, 241; *Webb v. Foley*, 20 Ky. Law Rep., 1207; *Butler v. Prewitt*, 21 Ky. Law Rep., 814; *Brothers v. Porter*, 7 B. Monroe, 109; *Farris v. Dunn*, 7 Bush, 278; *Miller v. Antle*, 2 Bush, 408; *Green v. Ball*, 4 Bush, 586; *Martin v. Martin*, 16 B. Monroe, 8.)

The statute of limitations is equally inapplicable. Row was never in possession of the land. Johnson took possession after the commissioner's sale and continued in undisputed possession until his death, more than eleven years afterwards, Row acquiescing all this time in Johnson's ownership of the land. The title of the trustee can not ripen into a perfect title in him simply because he stands by without claim to the property and permits the real owner to enjoy for over ten years. To so hold would be to make the statute of limitations a sword and not a shield, and to adjudge that long acquiescence in their claims to the property was a sure means in the hands of the crafty to bar the true owners of their rights. In *Burt & Brabb Lumbe Co. v. Bailey*, 22 Ky. Law Rep., 1264, a man obtained from two ignorant old people, who could not read or write, a deed for four thousand acres of land, telling them it was a different kind of paper. They remained in possession of the land and did not learn of the fraud for ten years, when they brought

an action to enjoin him from cutting their timber or disturbing them in the possession of the land. He relied on limitation of ten years, but it was held that the statute was not applicable as he was never in possession of the land. This case was followed and approved in *Sewell v. Nelson*, 23 Ky. Law Rep., 2488, where the court said, speaking of the plea of limitations: "The argument is a novel one. It is that one out of possession under a fraudulent and void conveyance, it may be, can have such conveyance ripened by time into a perfect one; that it may sustain an action of ejectment against one originally having the better title and in possession. The position is fallacious. The statutes of limitation do not apply (as respects property) to any one not in possession."

These cases were followed in *Potter v. Benge*, 24 Ky. Law Rep., 24. The proof in the case clearly establishes the facts above stated, and leaves no room for doubt of the correctness of the chancellor's judgment.

The judgment is, therefore, affirmed.

BINION, &c. v. WOOLERY, &c.

(Filed February 24, 1904—Not to be reported.)

1. Land—Sale for taxes—Where land was sold for taxes and a deed made to the purchaser, who sold the land to W., in an action by him to enforce lien for taxes paid a judgment in his favor will not be disturbed where the sale was confirmed without objection.

2. Clerical misprision—Where a judgment claims relief not sought in the pleading, it is a clerical misprision which may be corrected on motion.

J. R. Botts and Hazelrigg & Chenault for appellants.

R. D. Davis for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Hobson.

John Nemezwski owned a tract of land in Carter county. He failed to pay the taxes for the year 1882, and in January, 1883, the land was sold for the taxes, amounting to \$8.37, and was bought by John Rice. Nemezwski did not redeem the land and the sheriff made Rice a deed. Rice after this paid the taxes on the land as his own. In the year 1894 Nemezwski claimed the land, and Rice agreed to give it up to him if he would pay him back his money. They had a conference as to how much was coming to Rice and finally agreed on \$100 as the amount; but Nemezwski failed to pay the money. After this Rice sold the land to Daniel H. Woolery. Previous to this, however, Nemezwski had filed suit for the land. Rice died and Woolery defended the suit.

Judgment was entered in that case in favor of the plaintiff for thirteen-fifteenths of the land, and Woolery was adjudged lien on it for the amount of the taxes paid. Jones & Davis, who were attorneys for the plaintiff, asserted a lien on the recovery for their reasonable attorney's fee of \$300. On June 29, 1897, Woolery brought this action, alleging these facts and that the taxes paid on the land amounted to \$173.98; he prayed judgment enforcing the lien adjudged him in the former case. Jones & Davis, on their petition,

were made defendants, and asserted their lien for \$300. On final hearing the court adjudged Woolery \$100, with interest, also adjudged Jones & Davis \$300, subject to Woolery's lien, and ordered a sale of the land, which was had. Woolery bought the land for the amount of his debt, interest and costs, and the sale was confirmed without objection.

The tax lien was on the entire tract, and the court, therefore, properly ordered the whole tract sold on Woolery's claim. The proof is very indefinite as to the amount of the taxes paid by Rice owing to the fact that he is dead, and that all the tax receipts can not be found. From those that are produced, however, it would appear that the taxes on the land were about \$6.60 per year, and nobody but Rice seems to have paid any taxes after the year 1882. Rice and Neinezewski agreed on \$100 as the proper amount coming to Rice on account of the taxes which had been paid, and this agreement of the parties is the best evidence in the record on the subject. After so many years the death of Rice and the loss of the tax receipts, the court properly followed the agreement and gave judgment in favor of Woolery for the amount so agreed on.

Appellants can not raise the question that the land did not belong to Rice when he sold it to Woolery on the ground that it had been forfeited to the Commonwealth for the nonpayment of taxes by Rice. Woolery was adjudged a lien on the land in the former suit, and that judgment is conclusive. Besides, the forfeiture took place after Rice's death, and there is nothing here to show the regularity of those proceedings. It is true Jones & Davis had only a lien on thirteen-fifteenths of the land, and that a sale should have been ordered of only what they had a lien on for the payment of their debt. But this was perhaps a clerical misprision in entering the judgment. They only asserted a lien on the land they recovered, and in so far as the judgment grants relief not sought in the pleading or claimed in any way, for which no foundation is laid, it is perhaps a clerical misprision which may be corrected on motion (*Martin v. McKinney*, 4 Ky Law Rep., 452; *Emerson v. Walker*, 17 Ky. Law Rep., 288; *Long v. Elfort*, 80 Ky., 152), it being patent that it was only so entered by inadvertance. But in any event the land when sold brought only Woolery's debt, Jones & Davis getting nothing. Appellants have not, therefore, been prejudiced.

Judgment affirmed.

PRICE v. PRICE.

(Filed February 24, 1904—Not to be reported.)

1. Divorce and alimony—Contracts—After the separation of appellant and his wife, but before they were divorced, they entered into a contract by which, in lieu of all rights of maintenance and alimony and all rights in real estate and other property, the wife should be paid \$1,500, and have one-half of the household and kitchen furniture, such contract did not relieve the husband of the payment of a note that he had previously executed to the wife for money derived from her father's estate.

2. Husband and wife—Under the married woman's act of 1894 the husband may become indebted to the wife and execute to her an enforceible obligation.

J. F. Gordon and C. J. Waddill for appellant.

Baker & Baker and Lockett & Lockett for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, C. S. Price, was formerly the husband of the appellee, but the bonds of matrimony had been dissolved. After the separation took place, but before they were divorced, they entered into a contract which reads as follows: * * * "Now we, for the purpose of settling our respective property rights, and in order to effect a fair and equal division of the property of whatsoever possessed by the party of the second part, do hereby covenant and agree as follows: The party of the first part agrees to accept in lieu of all rights to and interest in all real estate, personal property and cash possessed by the party of the second part, all rights of maintenance and alimony, the sum of \$1,500 and one-half of the household and kitchen furniture now on hand, said sum of \$1,500 and one-half interest of said household and kitchen furniture has this day been paid, and receipt of same is hereby acknowledged by the party of the first part, in full of all rights above mentioned, and the party of the first part does hereby relinquish to the party of the second part all rights of dower, homestead and other rights to and interest in all property of which party of the second part is now possessed or that he may hereafter acquire." * * *

At the time this contract was executed the appellee held the appellant's note for \$574.88, which had been previously executed for money which she derived from her father's estate. After the divorce was granted the appellee instituted this action on the note against the appellant and recovered a judgment therefor with interest. This action of the court is here for review. The writing in clear and explicit terms shows the parties were contracting with reference to the wife's interest in the husband's estate, and that they were dividing the property possessed by him. The relinquishment which she made was "to right of dower, homestead and other rights to and interest in all property of which the party of the second part is possessed or that he may hereafter acquire." The contract does not purport to have reference to any other property save that of the appellant. There is no ambiguity in the writing and neither fraud nor mistake has been shown in its execution. The record shows that the appellant was indebted to the appellee in the sum evidenced by the note. He so became indebted since the act of 1894. Under that act a husband can become indebted to a wife, and execute to her an enforceable obligation.

The judgment is affirmed.

SIMMONS v. REINHARDT.

(Filed February 24, 1904—Not to be reported.)

1. Mortgage—Husband and wife—In a mortgage by the husband on his real property in which the wife joined, conveying all their interest in a house and lot, the expression "all their interest" conveys everything, and the fact that the word "interest" is singular instead of plural in nowise militates against this conclusion.

2. Same—The imperative language of a mortgage must control, and in an action to enforce the lien created by it one who signed it can not be heard to

say that he did not intend it should accomplish what the language of the instrument clearly embraces.

Sweeney, Ellis & Sweeney and W. S. Pryor for appellant.

Miller & Todd and L. P. Little for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The appellees were the sureties on the official bond of A. M. C. Simmons, tax collector of the city of Owensboro. This officer having become short in his accounts to the extent of \$2,220, which he was unable to pay, this sum was paid by his sureties; whereupon, in order to indemnify them against loss, he and his wife, the appellant, executed and delivered to the appellees the following mortgage:

"This indenture witnesseth:

"That in in consideration of \$2,220, A. M. C. Simmons and Lucy M. Simmons hereby convey to John G. Delker, Louis H. Reinhardt and L. P. Little all their interest in the house and lot in Owensboro, Kentucky, on the west side of Frederica street, bounded on the north by the lot of R. J. Fryser; on the south by the lot of J. D. Brashear, and on the west by the lot of W. H. Clark. Also the one-half interest in the vacant lot north of Seventh and Center streets owned jointly by A. M. C. Simmons and John Wandling, and being the same property conveyed to them by T. L. Hall.

"The purpose of this conveyance is to secure said Delker, Reinhardt and Little in the said \$2,220 four months from this date; should the said Simmons pay, or cause to be paid, the above mentioned indenture, then, in that event, this mortgage shall be null and void; otherwise it remains in full force and effect.

"This May 1, 1896.

"A. M. C. SIMMONS.

"LUCY M. SIMMONS."

After the execution of this mortgage A. M. C. Simmons died, and W. E. Aud was appointed administrator of his estate. The debt which the mortgage was executed to secure not having been paid, this action was instituted by the appellees for personal judgment against the administrator and an enforcement of their lien against the land described. To this action Lucy M. Simmons was made a defendant. To the petition of appellees she filed an answer, pleading, first, that she joined in the mortgage only for the purpose of giving a lien upon the interest of her husband, A. M. C. Simmons; that he only had a life estate therein, and after his death she had a life estate, which was not embraced, and not intended to be embraced, in the mortgage in question; second, that at the time of the execution of the mortgage her husband was mentally unsound to a degree which incapacitated him from contracting; that, therefore, his act was void, and he not having joined with her, her act was void; and, third, that the execution of the mortgage was procured by fraud.

The affirmative allegations of this answer were placed in issue, and the case coming on for trial on the merits, the chancellor rendered a judgment in favor of appellees, enforcing their lien upon the life estate of the appellant, Lucy M. Simmons, from which judgment she has appealed. Although the

appellees, at the time they took the mortgage to secure their debt, believed that the whole title of the property was in A. M. C. Simmons, the undisputed fact is that he had only a life estate therein, and that at his death, his wife surviving him, she had a life estate; and the first question that arises is whether or not Mrs. Simmons mortgaged her life estate by the instrument which she signed. On this question we do not think there can be two opinions. The language of the mortgage precludes the existence of any estate in the land owned by A. M. C. Simmons or Lucy M. Simmons which was not mortgaged to appellees. The expression "all their interest" conveys everything, and the fact that the word "Interest" is singular, instead of plural, in no wise militates against this conclusion. The imperative language of the mortgage must control, and appellant having signed it, can not now be heard to say that she did not intend it should have accomplished what the language of the instrument clearly embraces. While the appellees did not know the exact condition of the title, as between Simmons and his wife, they did understand that they were getting all the title that they had, and this, we think, they are entitled to.

The allegation of the unsoundness of mind of the husband is not sustained by a preponderance of the evidence. We doubt if the evidence of appellant alone on this subject would sustain her position; but, when taken in connection with all the evidence, we think that the soundness of mind of the husband, at the time he executed the instrument in controversy, is clearly established.

The issue of fraud or overreaching was not even pretended to be established, and the uncontroverted testimony shows that, so far from appellees' attempting to defraud or overreach A. M. C. Simmons, they had not even asked him to execute the mortgage in question; on the contrary, however, he approached F. G. Delker, and told him that he desired to secure his sureties, asking him to come to his (Simmons') house that night for the purpose of receiving the mortgage, the other sureties not knowing, until after the instrument was executed, anything of the transaction. Delker and appellant alone testify as to what took place when the mortgage was executed and delivered, and while she makes a feeble attempt to show that he represented to her that she was only conveying her husband's interest, he testifies that he made no representation to her whatever, and the burden is on her.

We fully appreciate the hardship of this case upon appellant, and the pathos of her position, in being left aged, penniless and widowed, deeply affects us; as to this aspect of the case we can make no better answer than is contained in the opinion of the learned chancellor below: "I have gone over the whole case, the pleading, evidence and suggestions of counsel, two or three times, and reflected over it, with unusual care and deliberation, because of the fact that the defendant is an old woman, and the property involved is her last bit of earthly estate, and when deprived of it she will be left houseless. These are considerations that have compelled me to anxiously consider every fact and interpret every doubtful fact more favorably toward the defendant, and this much a chancellor is warranted in doing, but he is not warranted by such considerations in disregarding well-established rules, and giving to language an interpretation contrary to its plain grammatical import. Nor may he, in considering the right and credibility of tes-

timony, discard the logical effect of overwhelming preponderance of the evidence on the one side or the other, if it exists."

Judgment affirmed.

CUMBERLAND VALLEY BANK'S ASS'EE V. CITIZENS NATIONAL BANK.

(Filed February 24, 1904—Not to be reported.)

Contracts—A writing executed by the assignee of a lumber company and one to whom it had executed notes, and banks to which the notes were indorsed, that the one to whom the notes were executed could sell certain lumber and distribute the proceeds pro rata between the banks, was a valid contract, the parties being capable of making the agreement and the lumber being properly subject to such agreement.

Hazelrigg & Chenault and S. B. Dishman for appellant.

Robt. T. Quisenberry for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

The petition as amended, to which a demurrer was sustained, contains averments to the effect as follows: The Stone-Heines Lumber Co., of Cincinnati, Ohio, executed to John W. Faulkner its several notes, aggregating over \$33,000, which he endorsed and sold to various banks. One of the notes for \$7,987.40 was endorsed and sold to the Cumberland Valley Bank and one to the appellee for \$3,150. In July, 1890, the Stone-Heines Lumber Co. made an assignment to Granger for the benefit of its creditors. On August 2, 1890, Faulkner, the banks to which he had endorsed and sold the notes (including the Cumberland Valley Bank and appellee) and Granger, as assignee, entered into a writing by which all the parties to the contract agreed that Faulkner should sell certain lumber which he owned, and after deducting the expense of making the sales and delivery of the lumber turn over the proceeds to the Cumberland Valley Bank, who was to distribute it pro rata to the banks on the notes which they held. Faulkner shipped some car loads of lumber to Cincinnati, O., for sale, and on March 6, 1891, the appellee sued out an attachment in a court in that city, and had it levied on the lumber which had been sent there by Faulkner, and was sold in satisfaction of its debt, but only realized \$1,920. Just before the appellee instituted the action in Ohio the Cumberland Valley Bank instituted one in Kentucky, and attached the lumber which was the subject in part of the agreement referred to. It was averred in the petition, as amended, that the action was for the benefit of all the banks which entered into the agreement.

To sustain the judgment of the court below it is urged, first, that the instrument was a nudum pactum; second, that it was a preferential act and operated as an assignment of Faulkner's property for the benefit of his creditors; third, that the Cumberland Valley Bank violated the agreement by bringing the suit, thereby releasing all other parties from its terms. We are unable to see that it was a nudum pactum. The parties were capable of making the agreement. The lumber could be the subject of such an agreement. The owner placed it in trust so that the net proceeds might be ap-

plied to the payment of his debts. The petition does not disclose that Faulkner was insolvent when he entered into the contract, and that he entered into it with the design to prefer the contracting creditors to his other creditors. It is averred in the petition that the Cumberland Valley Bank prosecuted the action in which it obtained an attachment against the property for the benefit of all the banks; that this fact was known to the appellee, and its attorney co-operated in the prosecution of the action. The facts averred do not raise the question discussed by counsel, that the Cumberland Valley Bank violated the agreement in bringing the action.

Counsel for appellee argues the case as if the petition contained an averment that the Cumberland Valley Bank instituted the action for its own benefit, and in disregard of the terms of the agreement. When this state of facts is shown by the record the question will arise whether or not the institution of the action by the Cumberland Valley Bank for its own benefit had the effect of releasing all the parties from the terms of the contract.

The judgment is reversed for proceedings consistent with this opinion.

HILTON, &c. v. COLVIN.

(Filed February 24, 1904—Not to be reported.)

1. Damages—Title to land—In an action for damages from cutting timber, where the plaintiff, by record evidence, traced his title to the Commonwealth and proved actual possession, a verdict for damages will not be disturbed on the ground that he was not the owner of the land.

2. Pleading—Estoppel—In admissions to one about the title to land, and that he might go ahead and buy, such admissions not being pleaded as an estoppel in pais, testimony on that point is incompetent.

D. D. Sublett for appellants.

John W. Rodman for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee brought this action against the appellants for damages for having entered upon his boundary of land, and cut and converted to his own use certain valuable timber trees growing thereon. Appellants answered, denying that plaintiff was the owner or in possession of the land from which the trees were taken, and alleged that they were the owners and in possession of the tract. A trial before a jury resulted in a verdict and judgment for plaintiff for \$60. Defendant's motion for a new trial having been overruled, they have appealed and ask a reversal on two grounds: First, because the verdict is palpably against the weight of the evidence; and, second, because the plaintiff was estopped by admissions and representations made by him to them previous to their alleged purchase of the land in dispute from one S. W. Brown from the prosecution of this suit.

Upon the trial the plaintiff introduced record evidence tracing his title back to the Commonwealth to the land from which the trees were taken, and proved actual possession thereof by a number of witnesses. And we are inclined to the opinion that the verdict of the jury is sustained by the weight

of the evidence. Both of the defendants testified that a short time previous to their purchase of the land in controversy from S. W. Brown that they had a conversation with plaintiff about the title thereto; and that the plaintiff represented to them that the title was all right, and advised them to go ahead and buy the land. Their testimony on this point is also corroborated by several other witnesses, but denied by plaintiff. Whilst this testimony was admitted without objection, in fact the record fails to show that a single exception was reserved by either party during the course of the trial, it is a well settled rule of pleading that estoppels must be specifically plead, with great particularity and precision, leaving nothing to intendment. This rule proceeds upon the theory that an estoppel precludes a party from asserting the truth, and all things essential to give the right to shut out the truth should be affirmatively plead. (Bliss on Code Pleading, section 364; 8 En. of Pl. & Pr., 7; Farris and Wife v. Dunn, &c., 70 Ky, 276.) As the defendants did not plead the representations and admissions of the plaintiff with regard to the title to the land in controversy as an estoppel in pais, the testimony on this point was incompetent, and could not have been made the basis of a judgment. Besides, no instruction on this point was asked or given by the trial court.

For reasons indicated the judgment is affirmed.

DEERING & CO. v. VEAL.

(Filed February 24, 1904—Not to be reported.)

1. Married women—Sureties—A married woman who signed a note at the request of her husband and gave it to him, made him her agent to deliver it, and she is bound by the representations he made as her agent.

2. Same—Where the wife, who was surety upon notes of the husband, executed a note in lieu of the former notes, a plea of no consideration could not be maintained because the relinquishment of the cause of action against the husband upon the former notes was a sufficient consideration for the note executed by the wife.

N. B. Hays for appellants.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hobson.

Appellant brought this suit against appellee on the following note:

"\$826.14.

October 3, 1888.

"On or before the 1st day of March, 1889, for value received, I, the undersigned, of section —, township —, State of Kentucky, promise to pay William Deering & Co., or order, \$826.14, with interest at 6 per cent. per annum from date until paid.

"The endorsers, signers, sureties and guarantors severally waive presentment for payment, protest and notice of protest and notice of nonpayment of this note and diligence in bringing suit against any party to this note, and agree that time of payment may be extended without notice or other consent and without affecting their liability.

"_____,
 "ELENORA VEAL,
 "_____."

In the first paragraph of her answer she pleaded that the note was executed without any consideration. The second paragraph of her answer is in these words: "Defendant alleges that about two years prior to the date and time when said note is alleged to have been executed by this defendant the plaintiffs did enter into a contract with and sell to one James Veal a self-binder reaper for the amount as stated in said note and plaintiff's petition; that it was for the price of said reaper which was sold and credited to said James Veal for which said note was executed by this defendant; that this defendant never bought said reaper or anything else from plaintiffs, and never had any other transaction with or received any consideration from plaintiffs, but that at the time she signed and executed said note it was understood and agreed by the plaintiffs and this defendant that defendant was only to be surety for said James Veal on said note for the purchase price of a reaper which the said Veal had bought from said plaintiffs and owed them for; that said note became due and payable March 1, 1889; that the defendant is surety to James Veal in the said note sued on, and that the cause of action set forth in plaintiffs' petition did not accrue within seven years before the commencement of this action."

The plaintiff demurred to the answer, and his demurrer being overruled, filed a reply controverting its allegations. The proof for the plaintiff on the trial showed that on September 1, 1886, Elenora Veal and James Veal, who were then residing near Lexington, Ky., executed to William Deering & Co. two notes, each for \$100, due September 1, 1887, and December 1, 1887, respectively; that on September 19, 1887, James Veal and Elenora Veal executed to it another note for \$90, due in one year, and on November 4, 1887, executed a fourth note for \$50, due October 1, 1888; that after the four notes fell due certain sums were paid on them, and on October 8, 1888, the balance due on them aggregated in all \$336.14; that she then executed her individual note sued on for the amount which was accepted by William Deering & Co. in satisfaction of the four old notes, she claiming to be on the point of selling some land, and agreeing to turn over as security for the note a \$900 purchase-money note for the land which she expected to sell, but that this she afterwards failed to do.

The defendant stated on her own behalf on the trial as follows:

"Two gentlemen came down to our place one morning to have me sign a note with Mr. Veal as surety. Mr. Veal did not sign it for some reason. He told me that he wanted me to sign it as surety."

"Q. Where was it that you signed this note?"

"A. I signed it in my own home."

"Q. Where were you living then?"

"A. In Fayette county, Kentucky."

"Q. This note was executed for a self-binder?"

"A. Yes, sir."

"Q. Did you sign any other notes prior to this note?"

"A. No, sir; I had not myself."

"Q. Had you ever signed any other notes that were made to them?"

"A. No, sir."

"Q. Did Mr. Veal when he brought you this note tell you for what it was executed?"

"A. Yes, sir; self-binder."

"Q. You remember the circumstances of your husband having bought a self-binder from William Deering & Co.?"

"A. Yes, sir."

"Q. How long prior to the execution of this note?"

"A. In the summer of that year."

"Q. You had not bought any machinery from them yourself?"

"A. No, sir."

"Q. Any other property?"

"A. No, sir."

"Q. Ever obtain anything of value from either of this firm?"

"A. No, sir."

"Q. Ever have any business transaction with them other than the one you have just stated?"

"A. None at all—never was in their office."

On cross-examination her attention was called to the form of the note, and she said:

"A. The note was drawn up for Mr. Veal—he was to be the undersigner."

"Q. Mr. Veal did not sign it?"

"A. I suppose that is his neglect."

"Q. There is no one's name but your own."

"A. I signed it where it should be, in the proper place."

"Q. Any one sign it but yourself?"

"A. I supposed my husband would sign it when he took it back to the men."

She denied that the four old notes were surrendered when the note in suit was given, or that she agreed to give as collateral the purchase-money note of \$900 for the land, but said her husband purchased a self-binder, and that the note in suit was given for it, and was the only note she signed.

On this evidence the court refused to instruct the jury peremptorily to find for the plaintiff, and instructed them as follows:

"1st. Gentlemen of the jury, if you believe from the evidence the note described and mentioned in plaintiffs' petition as having been executed and delivered by the defendant to the plaintiff, was executed without consideration, you will find for the defendant.

"2d. If, however, you believe from the evidence in this case that the defendant signed this note as surety, and with the understanding that that was the proper place to sign on the first line above as it appears, and that she did sign the same as surety only and not as her personal obligation; that more than seven years have elapsed since the maturity of this note before the institution of this action, you will find for the defendant.

"3d. unless you so believe you will find, as stated in instruction No. 1, for the plaintiff the amount of note sued on."

To constitute a sufficient consideration for a contract it is not necessary that the promissor receive a benefit from it. A consideration may be something beneficial to the promissor or disadvantageous to the promisee. A release of a legal right by the promisee is a sufficient consideration to support a contract. (Bishop on Contracts, sections 61-68.) If the four old notes were settled by the note in suit, or if no notes had been given for the binder, and the note in suit was executed therefor, it is not without consideration,

For if the next day Deering & Co. had sued James Veal for the price of the binder, he could have answered that the plaintiff had accepted the note of Elenora Veal, due the following March, for the debt, and this would have defeated the action. The relinquishment of the cause of action against James Veal was a sufficient consideration to support the defendant's promise. On the undisputed facts, therefore, the note was not without consideration.

By section 2514, Kentucky Statutes, an action on a written obligation for the payment of money must be commenced within fifteen years after the cause of action accrues. By section 2551 a surety in such an obligation shall be discharged from all liability thereon when seven years have elapsed without suit after the cause of action accrues. A surety is one who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it, or, as it has otherwise been expressed, a surety is a person who being liable to pay a debt is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was himself compelled to do so. (Brant on Sureties, section 1; Addison on Contracts, 618, 8th edition; *Wendlandt v. Sohre*, 37 Minn., 163.) Appellee was not surety for anyone on the debt sued for. It was her debt. In *Short v. Bryant*, 49 Ky., 10, Short executed a note with Withers, who was an infant. When they were sued on the note Withers pleaded infancy; judgment was rendered for him on that plea, and a judgment for the debt was rendered against Short alone. After the lapse of more than seven years execution was issued on the judgment, and Short relied on limitation. The plea was held bad. The court said: "Short's liability on the judgment was not as surety in the judgment, nor in the original note, but as the only person ever bound by the note; he, therefore, does not come within the fair interpretation of the terms of the statute, and as he had no right against the original co-party which might be affected by the conduct of the creditor in the enforcement of the judgment, he does not come within the reason or principle on which the statute makes the delay of execution a discharge of the surety."

In *Gaines v. Poor*, 60 Ky., 504, Poor bound himself by a writing to save Gaines, his heirs and representatives, free from any claim of Mrs. Gaines for dower in his estate, and suit was not brought on the contract until seven years after the cause of action accrued. Mrs. Gaines did not sign the contract, but it was held that if she had signed it as principal, and Poor as her surety, the contract would have been void as to her, as she was a married woman, and Poor would not have been her surety within the meaning of the statute. These cases control here, for no one else was bound to William Deering & Co. for the debt except appellee after the note in suit was accepted. By the statute now in force a married woman can not bind her estate for the debt of another unless it has been set apart for that purpose by a mortgage or conveyance. (Kentucky Statutes, section 2127.) But the note in suit was given before this statute was passed. The defendant did not plead her coverture.

If a surety signs a note and places it in the possession of the principal under his promise to procure another to sign it before its delivery, and he in violation of his promise delivers the note to the payee, who is ignorant of

the arrangement, the surety is bound notwithstanding the fraud of the principal. (Smith v. Moberly, 49 Ky., 268; Whittaker v. Crutcher, 68 Ky., 622.) But the surety so signing is not bound if the agreement between the principal and surety is known to the payee when he accepts the note. (Coffman v. Wilson, 59 Ky., 542; Bivins v. Hensley, 61 Ky., 78.) When appellee signed the note at the request of her husband, and gave it to him, she made him her agent to deliver the note, and she is bound by the representations which he made as her agent. (Tompkins v. Triplett, 28 Ky. Law Rep., 805.) The fact that her name appeared on the second line, and not on the first line for signatures to the note, was not sufficient to put appellant on notice of any infirmity in the paper, for notes and contracts are often signed in this way. But this defense also was not pleaded. The court, therefore, erred in refusing to instruct the jury peremptorily to find for the plaintiff.

Judgment reversed and cause remanded for further proceedings consistent herewith.

CHINN v. SHACKELFORD.

(Filed February 24, 1904.)

1. Fees—Clerk of Court of Appeals—Section 44 of the act of June 15, 1893, relating to the collection of fees, does not apply to the clerk of the Court of Appeals, but applies only to those officers who are required monthly to report the amounts in their hands and pay it into the State treasury and are then allowed to draw back for salaries and expenses 75 per cent. of the amount so paid in.

2. Same—Where there is a change in the office of the clerk of the Court of Appeals, the incoming officer takes up the work where the former put it down, and he may properly collect any fees due the office and apply it to the conduct of the office just as the former might have done had he continued in office.

R. L. Greene for appellant.

N. B. Hays for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

The term of S. J. Shackelford, as clerk of this court, expired on the first Monday in January, 1904. He was succeeded by J. Morgan Chinn. At the expiration of the term there were a number of fee bills, outstanding and unpaid, due the clerk of this court for services rendered. This agreed case between Shackelford, Chinn and the auditor of the State was filed to determine what should be done with these fee bills. The question turns on the construction of the provisions of the sections 38-54 of the act "relating to fees," approved June 15, 1893, which, with some amendments, now constitute sections 1761-1777, Kentucky Statutes. As the question before us turns on the construction of the original act, we will refer to the sections of it. Section 38 is in these words: "The clerk of the circuit court, the clerk of the county court, commissioners, receivers, examiners and the sheriff of each county having a population of 75,000 or over, shall, after the terms of the present incumbents, respectively, expire, and on the first day of each month,

severally send to the auditor of public accounts a statement, subscribed and sworn to by each of them, showing the amount of money received or collected by or for each of them the preceding month as fees or compensation for official duties, and shall, with such statement, send to the auditor the amount so collected or received."

Section 39 provides that each of the officers mentioned above shall receive an annual salary of \$5,000, and that the number of deputies, their compensation and the necessary expenses of the office shall be fixed by an order of court, which shall be forwarded to the auditor. Section 40 provides that the chief deputy shall receive a salary of \$2,000, and the other deputies not exceeding \$1,500 each. Section 41 provides that the salary of each officer, and his deputies and the expenses of the office, shall be paid monthly by the treasurer of the State upon the warrant of the auditor, if 75 per cent. of the amount paid into the treasury during the month is sufficient to pay them, and that if there is a deficit for any month it may be made up out of the amount paid in any succeeding month. Section 42 provides a penalty if the officer fails to make the report or pay the money any month. Section 43 makes it a felony if the officer knowingly makes a false report. Then follows section 44, which is in these words: "When the term of any chief officer shall expire, or he shall die or resign, or be removed from office, he or his personal representative, trustee or committee, as the case may be, shall at once deliver to his successor in office all accounts, claims and fees due to such officer in his official capacity; and it shall be the duty of such successor to have such fees, claims and accounts collected, or the auditor may, in his discretion, when said accounts, fees and claims are so delivered to the successor, appoint some person to collect them, and if he does, the successor shall at once, or at any time when demanded by such person, deliver to him all accounts, fees and claims uncollected. The successor or the person appointed by the auditor, as the case may be, shall, every sixty days after receiving such accounts, fees and claims, report to the auditor, under oath, the amount collected thereon, and at the same time pay to the auditor the amount so collected, and shall continue to so report for three years, unless the accounts, fees and claims are sooner collected."

Section 45 directs that the auditor shall draw his warrant on the treasurer in favor of the person collecting for an amount equal to 20 per cent. of the sums so paid into the treasury, and that this shall be in full of the compensation allowed to collector. Section 46 provides that if the amount paid to any officer during his term shall not have been sufficient to pay the salaries and expenses of the office, the auditor shall, out of the money so collected, pay to the person entitled thereto an amount sufficient to supply the deficit due for salaries and expenses, but that he must not so pay exceeding 75 per cent. of the amount of fees which accrued during the term and were collected and paid into the treasury. Section 47 and section 48 provide penalties for the violation of the above provisions. Sections 49, 50, 51 and 52 make similar provisions as to the jailer in counties having a population of 75,000 or over, the principal difference being that the jailer is required to report monthly not only his collections, but also all sums due him, money due from the State being treated as paid. Section 53 regulates the jailer, county clerk, circuit clerk, commissioners, receivers, examiners and sheriff in a

county having a population of over 40,000 and under 75,000. These are required to make annual reports and to pay over annually the balance in their hands. Then follows section 54, which is the only one in which the clerk of the Court of Appeals is mentioned. So far as material it, as originally enacted, reads as follows: "The clerk of the Court of Appeals and each assessor in a county having a population of over 75,000 shall annually, in the month of January, report to the auditor under oath the amount received by him on account of his official duties or position, from all sources during the preceding year; as well as the amount paid out by him for deputies or assistants, giving the amount paid to each and for expenses of his office; and if it shall appear from such statement that any such officer received as compensation on account of his office from all sources more than \$4,000 after the payment of his deputies or assistants and all the expenses of his office, such officer shall, with such statement, pay to the auditor the amount so received in excess of \$4,000. * * *

"The salaries of the deputies of the clerk of the Court of Appeals shall be fixed by an order of the Court of Appeals, a copy of which order shall be filed with the auditor by the clerk of said court when made."

By an act approved March 4, 1898, the following words were added to this section: "If it shall appear from the reports required to be made to the auditor by the clerk of the Court of Appeals under this section that the amount earned and received by said clerk, on account of his office, is not sufficient to pay him \$4,000, together with the salaries of his deputies or assistants and the other legitimate expenses of his office in any year, then said officer may retain out of money earned or received by him, on account of his official duties in said office during the year or years following, enough to make up such deficit."

Another amendment to the act was made by the act of March 21, 1900, but it refers only to commissioners and receivers in counties having a population of 75,000 or over, being an amendment to section 38 above quoted, and is, therefore, not material here. The case before us turns on the question whether section 44, above quoted, applies to the clerk of the Court of Appeals. If it does not, the fees due at the end of Shackelford's term being due the office, may be collected by the incumbent of the office. But if this section applies, these fees, whether collected by Chinn or by a person appointed by the auditor, must be paid into the treasury, and are not available for the payment of the salaries or expenses of the office under section 54.

It will be observed that section 38 refers only to the clerk of the circuit court, the clerk of the county court, commissioners, receivers, examiners and the sheriff of each county having a population of 75,000 or over. After the amount of the salaries of the officers and their deputies and the necessary expenses of the office are regulated in sections 39 and 40, it is provided in section 41 that 75 per cent. of the amount paid in by them monthly may be used to pay these salaries and expenses. In other words, the officers named are required to make monthly payments and monthly reports to the auditor and are allowed to draw back 75 per cent. of the amount so paid in. Then follow two sections relating to penalties, and then comes section 44, on which the case turns. At first blush it must strike any one that this section refers to the officers above mentioned, and that the reason why the fees must

be collected and paid into the treasury is that the salaries and expenses of the officers may be paid out of the treasury as provided in section 41; and that this is the meaning is shown by section 46, which provides that out of the money so collected the auditor shall pay any deficit due for salaries and expenses not exceeding 75 per cent. of the amount paid into the treasury, which is the same provision as to the per cent. as contained in section 41, which by its express terms applies only to the officers named in section 38. The clerk of the Court of Appeals is not so limited to 75 per cent. of the fees collected by him.

The next four sections of the act, 49-52, apply only to the jailer in counties having a population of 75,000 or over. Section 53 applies to officers in a county having a population of over 40,000 and under 75,000. Section 54 applies to the assessor in counties having a population of over 75,000 and the clerk of the Court of Appeals. It will thus be seen that by the act the officers are divided into four classes: First, the clerk of the circuit court, clerk of the county court, commissioners, receivers, examiners and the sheriff in counties having a population of 75,000 or over; second, the jailer in counties having a population of 75,000 or over; third, the jailer, county clerk, circuit clerk, commissioners, receivers, examiners and the sheriff in counties having a population over 40,000 and under 75,000; fourth, the clerk of the Court of Appeals and assessors in counties having a population of over 75,000.

In classes 1 and 2 the money must be paid into the treasury by the officer and only 75 per cent. of the amount so paid in can be paid back on account of salaries or expenses of the office. In these classes also monthly reports are made and monthly payments. In classes 3 and 4 the officer pays the salaries and expenses out of his receipts and pays into the treasury the balance in his hands. Annual reports are made and an annual payment of the balance in the hands of the officer. As to classes 3 and 4 there is no provision of law for any money which is paid into the treasury being paid back to the officer in any event on account of salaries or the expenses of the office; and if section 44 were held applicable to the clerk of the Court of Appeals, it would follow that if the clerk should die or resign, all fees due the office would have to be collected and paid into the treasury, and only 75 per cent. of the money could be withdrawn to pay the salaries and expenses of the office; although if the clerk had lived or had not resigned, the whole fund might have been used for this purpose. In carefully thus classifying the different offices and making essentially different provisions as to them the legislature showed a clear purpose not to put the clerk of this court under the provision enacted for certain offices in counties having a population over 75,000, the reason being, no doubt, that litigation in this court varies, and it was deemed uncertain what, if any, surplus would be left to the State after paying the expenses of the office; so it was deemed unwise to place such restriction as might cripple the public service.

For these reasons we conclude that section 44 does not apply to the clerk of this court; but that as shown by section 46 and the context it applies only to those officers who are required monthly to report the amount in their hands and pay it into the State treasury, and are allowed to draw back from the treasury for salaries and expenses not exceeding 75 per cent. of the amount so paid in; that it is intended to carry out this plan in case of the

death or resignation of these officers or the expiration of their term, for without it there would be no way of paying the salaries and expenses of the office unpaid at the death of the occupant or the expiration of his term, the plan being that if the officer lives or continues in office he shall collect the fees and pay the money into the treasury, and if he dies or his term expires another shall do so. But as to the clerk of this court a different scheme is made. He collects his fees, pays the salaries and expenses of his office, and at the end of the year pays the balance in his hands into the treasury. There is no reason under this plan that there should be a change at the end of the term of the clerk, or when he dies or resigns. When Shackelford's term expired and Chinn succeeded him, the incumbent of the office only being changed, the latter took up the work where the former put it down, and might properly collect any outstanding fees due the office and apply the money to the conduct of the office, just as the former might have done had he continued as clerk. In order that a proper settlement may be had by the auditor with each of them, a list of these unpaid fees should be made out, and Chinn should receipt to Shackelford for them. Then the records of the office will show just what each received, and proper settlements can be made.

Judgment reversed and cause remanded for a judgment as herein indicated.

CITY OF LEXINGTON v. WOOLFOLK.

SAME v. HAYMAN.

(Filed February 25, 1904.)

1. Street construction—Collection of assessment—Where the general council of a city ordained that certain streets be improved by brick paving, having been petitioned by the owners of a majority of the front property abutting the proposed improvement, and the work was completed and accepted, and the general council ordained that the assessment for these improvements be paid July 1, 1895, and annually thereafter for ten years, the abutting lots were a lien to the city for these assessments; but where the city bought the tax bills it acquired no greater lien than it had before and the provision for a year for redemption does not, therefore, apply, and after the assessment became delinquent the circuit court had jurisdiction at any time to enforce its collection.

2. Same—Construction of statutes—Section 8'01, Kentucky Statutes, making provision for street improvement and as to offering the tax bill for sale is merely cumulative, enabling the city to realize the money earlier than by suit.

3. Same—Pleading—In an action to enforce a lien on abutting property for street improvements the allegation in the petition that the ordinance requiring certain streets to be paved with brick was duly passed; that the engineer made and filed plans and specifications, and pleading in substance the contract by which the lowest bid was accepted, was sufficient.

Allen & Duncan for city of Lexington.

Morton, Webb & Wilson for appellee Woolfolk.

L. J. Moore for J. Q. A. Hayman, appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

The city of Lexington is attempting by these suits to enforce liens on appellees' lots abutting certain of its streets for the cost of reconstructing the streets with brick at those points.

The circuit court dismissed the city's petitions on demurrers. Under section 8096, Kentucky Statutes, the general council of cities of the second class may, by ordinance, provide for the reconstruction of its streets, upon the petition of the owners of a majority of the property abutting the street to be improved, or by a two-thirds majority vote of all the members elected to each board of the general council. The cost of such reconstruction is one-half chargeable to the abutting property, pro rata per the front foot, and the other half to be paid by the city. By section 8101 it is provided that the general council may provide that any such reconstruction shall be made on the ten-year plan. In that event, upon public notification, the property owners who are charged with half the cost of the improvement are required to pay their respective portions of the assessment in cash at a time fixed in the notice. Upon default of such payment the general council is authorized to borrow money to discharge the cost of the improvement, and to issue the city's bonds therefor payable in equal installments through ten years, and bearing interest. The abutting owners, who have not paid in cash their assessments, are required to pay one-tenth of such assessment, and 5 per cent. per annum interest thereon, and 5 per cent. per annum interest on the remaining assessment unpaid, annually at such time as shall be specified in the assessing ordinance. The manner of collecting the annual installments, and indeed of collecting the whole assessment, is the main point in controversy in these suits.

By section 8096 it is provided: "There shall be a lien upon such lots or parcels of real estate for the part of the cost of such improvement so assessed thereon, and the same shall bear interest from the time of the assessment. All such liens may be enforced by action."

In section 8101, speaking of the default in paying the annual installments discussed above, it is provided: "In default of such payment at such times, the same penalty shall attach on the amount so payable as attaches to the nonpayment of other municipal taxes, and shall be collected, together with the amount so due from the owner or owners of such lot or parcel of land, in the same manner as other city taxes and penalties are collected for municipal purposes, and such assessments and penalty shall be and remain a lien upon such lot or parcel of land until the same has been fully paid and satisfied."

The general council of Lexington ordained that the streets in question be improved by brick paving, having been petitioned by the owners of a majority of the front foot property abutting the proposed improvement. The work was completed, inspected and accepted, and the general council ordained that the assessment for these improvements be paid on July 1, 1895, and annually thereafter for ten years. Appellees failed to pay their assessments in cash. In May, 1903, the city caused the tax bills, including the assessments and penalties and interest for each of the years 1895, 1896, 1897, 1898, 1899, 1900, 1901 and 1902 to be offered for sale at public outcry. There being no other bidder, they were bid in by the city. This proceeding was

taken by the city under section 8187, Kentucky Statutes, governing the method of collecting "other city taxes and penalties."

Section 8187 requires the delinquent tax bills to be advertised by the auditor and sold by the treasurer "on the first Monday in the next month" after they shall have come to his hands as such. The sale must be for cash "at public auction to the highest bidder." The auditor then returns the bills to the treasurer, who, on said day, offers them for sale as advertised, if then unpaid. "If no one will offer the face of said bills for them, he shall buy them in for the city."

The section continues: "The owner or owners of any lot, the tax bill on which has been sold, shall have the privilege of redeeming the same within one year of the day of sale by paying to the treasurer the said bill, with all penalties and interests as herein provided to the day of payment."

It is the contention of appellees that the taxpayers, in these cases the lot owners, have one year from the date of the sale of the delinquent assessments or tax bills in which to pay the amount before a suit can be brought by the city to enforce the lien on the lots. The complication in the application of this provision is doubtless due to the fact that it is particularly applicable in all its features to the collection of ordinary tax bills alone. There is no provision in the chapter governing cities of the second class other than in this section for a lien upon specific property of the taxpayer to secure his city taxes. This lien is made to attach upon the sale of the tax bill as above provided. The purchaser of the tax bill at such sale acquires a lien on the lot described in the tax bill, but which he can not enforce for one year from the date of sale. The section, contemplating that the city might buy in the bills, provides in that event: "When the city shall buy in the tax bills the city solicitor shall, by proper proceedings in the name of the city in the circuit court, enforce the lien on the property for the city."

There is no express reference in the section or elsewhere to a time for redemption from the sale to the city. It is argued that the legislature could not have intended that the taxpayer should have one year in which to redeem from the sale if the bill was sold to any other person, while if it was sold to the city there would be no time for redemption. The argument proceeds upon the theory that the legislature was looking alone to the interests of the delinquent taxpayer. This supposition is erroneous. The first thing in view in enacting the section was to provide a sure and speedy method of collecting the city's revenues, so essential for the maintenance of its government. The rights of the taxpayer were regarded merely incidentally, and must be secondary to the right of the city to subsist. There could be no good reason for putting the delinquent taxpayers' interest first. After having been afforded a fair chance, and reasonable time within which to meet his tax obligation, further indulgence by way of encouragement to more protracted delinquency, and to further postpone the collection of the city's revenues, would be contrary to the purpose of the statute; that the city was not to be put off longer is reasonably certain from the whole section. Note that the sale of the tax bill was to be by summary proceeding and for cash in hand. The purchaser was given a liberal interest in the way of percentage and penalties to justify his investing his money, so as to encourage his bidding. This was an inducement to insure the city's getting

the money due it quickly, and not as a punishment to the delinquent. True, the latter is given a year in which to redeem from that sale. A shorter time would scarcely have afforded enough of interest to justify an outsider's buying in such claims. Yet to give the whole of an adequate penalty to such purchaser at once might be very harsh treatment of the taxpayer; so that by giving the purchaser a good bargain to tempt him to buy and part with his money, and by giving the delinquent a whole year in which to redeem from that sale, something of an equitable arrangement is made, and the city is relieved. But none of these reasons apply where the city is the "purchaser" of the tax bill. The delinquent taxpayer has already been given his full time, the same as given all others, to pay the tax. Under the law the city can not levy more than enough to pay its current and fixed expenses, consequently it can not have a surplus of ready money to meet deficits. The city's administration of its government, as well as its credit, depend on its ability to promptly collect the taxes due it, the principal and practically the sole source of its income. When no one else will offer to buy the tax bill at the sale the city has exhausted all efforts save one to collect the tax. It already has a lien on the property. The penalties have been added already, not as a matter of speculation or gain to the city, but as an incentive to the taxpayer to pay promptly so as to avoid them. They have been unavailing, though. Why should the city be compelled to wait another year before taking the only remaining and efficient step to get its money? No other consideration could be advanced than a sentimental regard for the delinquent who has been deaf to every call and impervious to every claim that he should meet his obligation. In the absence of express declaration that such was the legislative intent, we can not reasonably adopt it, it is so obviously at war with the whole purpose of the section being interpreted. Furthermore, the section does not in terms give the right of extended redemption when the city buys in the bill, as it does where another buys it.

It is argued that the statute must be construed strictly against the city and in favor of the taxpayer; that all laws must be construed strictly against the taxing power. When the inquiry is, has the power to tax been granted, has it been exercised, or is its object a governmental purpose, such construction would doubtless be followed. But when the power exists, and has been exercised in aid of a governmental function, why should the statute regulating the manner of collecting the tax be strictly construed? It is true taxes are not debts. Yet they are obligations of the very highest nature, imposing at least a patriotic duty on the citizen to pay them. The sustenance of government, and consequently the enjoyment of all its privileges, depend upon the prompt collection of its revenues. Statutes imposing and providing for the collection of taxes are to be construed fairly with regard to their purpose, the office of construction being to help do what the legislature intended should be done in enacting the law. In applying and enforcing such statutes we are not yielding the stubborn submission of unwilling subjects, but are applying those reasonable and necessary provisions for the maintenance of an orderly social compact among a self-governing people. A rule of strict construction that thwarts the purpose of the legislature, and makes unduly difficult the thing that was intended to be made simple, direct and easy, will be rejected. The rule of interpretation here

adopted is in harmony with the legislative direction in this respect. Section 3100, Kentucky Statutes, expressly provides against errors in the proceedings of the general council invalidating the taxpayer's obligation after the work has been done. But it is stated that "the general council or the courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned." This was intended to avoid that line of strict construction adopted with reference to such proceedings, and to place them on the same footing in the courts as other claims of liens sought to be enforced.

From these sections we conclude that the abutting lots were in lien to the city for these assessments, which were due in installments on July 1, annually, beginning with the year 1895; but not including the penalties and compound interest to be imposed where the sale of the tax bill by the treasurer was to another than the city; that the city by buying in the tax bills got no new or greater lien than it had before; and that the provision for a year for redemption does not apply where the city "buys in the bill," that is, fails to sell it. We are also of opinion that the circuit court had the jurisdiction to entertain these suits at any time after the assessments became finally delinquent.

Appellees contend that as the sale of the tax bills did not take place, nor were they advertised to take place, on the first Monday in the month after they had been listed with the treasurer, the city has acquired no rights by the sales, and that they were invalid. Authorities are cited to the effect that when a tax sale is required to be had on a day named, a sale on any other day is void. But none of those authorities hold that for that reason the tax assessment is void, or that the lien is extinguished or lessened. The argument followed out would mean that these assessments can never be collected; for the first Monday of the first month after they became delinquent having passed without an advertisement or sale of the bills, they can never be legally offered, and, therefore, no right to sue to enforce the lien given by them can ever accrue to any one. If the sales had been made in fact, and some one had bought the tax bills, then this defense might be pertinent. But here there was no sale. There was merely an offer of sale. This section, wherein the city is permitted to sell the delinquent tax bills, is manifestly for the benefit of the city. Before another than the city could have the right to maintain a suit to enforce a lien on the lot the statute giving such right must be shown to have been substantially complied with. If the city failed to offer the tax bill for public sale the lot owner has no ground of complaint. He still owes the assessment; it is past due, and delinquent in every sense of the word. Section 3096 gave the lien and the right of the city to sue in the circuit court to enforce it. The provision of section 3101 as to offering the tax bill for sale is merely cumulative, enabling the city to realize the money due it quicker possibly than by suit.

Very earnest complaint is made by appellees of the form and sufficiency of the petitions. It is argued that the general demurrers were properly sustained on this ground, if no other. The pleader in setting out the various ordinances and steps by which the city obtained the lien on appellees' lots for the cost of the improvement of the abutting ways did not plead the ordinance at length. The following from one of the petitions will serve to

illustrate the matter complained of: "High street * * * is one of the public streets of the plaintiff; that the owners of a majority of the front or abutting feet of the real estate abutting on said street petitioned the general council to provide for the reconstruction of said street with brick; that thereafter the general council, two-thirds of the members elect in each board voting therefor, passed ordinance No. 422, which was duly approved and published in the official newspaper, a copy of said ordinance being filed herewith, marked exhibit 'A,' and made a part hereof, the same as if fully written herein, directing the roadway of the street aforesaid to be constructed by blocks with brick; that the city engineer, in accordance with the directions contained in said ordinance, prepared accurate profiles, plans, specifications and estimates for the reconstruction of said street with brick, which were accepted and approved by the general council by ordinance No. 463, which was approved and published in the official newspaper, a copy of said ordinance being filed herewith," and so on, setting out similarly every essential step required by the statute to be taken to make a valid contract for the improvement. It is insisted that the ordinances are not sufficiently pleaded. We think they are. Good pleading not only does not require, but forbids, the setting out of each step with undue prolixness. Although the copies of ordinances referred to as exhibits are not filed with the petition, the averments are sufficient; that an ordinance to improve a certain street with brick was duly passed is enough to state; that the engineer did make and file plans and specifications, which were adopted by the council, fully apprises the other party and the court that those necessary steps had been taken. So the substance of the contract by which the lowest bid was accepted is enough to be pleaded.

The judgments sustaining the demurrers and dismissing the petitions appear to us to be erroneous, and are for the reasons above stated reversed and the causes are remanded for further proceedings consistent herewith.

RHODES, &c. v. LOWRY & GOEBEL.

(Filed February 25, 1904—Not to be reported.)

T. E. Ward for appellants.

R. H. Cunningham for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

The appellees ask the court to extend its opinion to cover the points made by them on their cross appeal.

At the time this case was under consideration it was not noted on the record that a cross appeal had been granted appellees; but it appears that such an appeal had been granted. It appears that the lower court allowed appellants two credits, one of about \$25, the other about \$50, in addition to credits admitted. Of this action appellees complain. Under the evidence as appears of record, and giving some weight to the opinion of the chancellor, we do not feel authorized to disturb his finding.

For these reasons the judgment of the lower court on the cross appeal is also affirmed.

MAYER v. MAYER.

(Filed February 25, 1904—Not to be reported.)

Wills—Homestead—Where a testator provided in his will that his wife, if she chooses, may occupy the dwelling house on a certain street, named in the will, or such other homestead as he may own at his death, the purpose of the will was to provide a home for his wife, and there being no provision that contemplates a forfeiture of it, the wife, if she chooses, may either occupy the house or rent it out and appropriate the rent; as she sees fit.

Montgomery Merritt for appellant.

Clay & Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The last will and testament of Jacob F. Mayer, deceased, was duly probated in the Henderson County Court on the 24th day of June, 1890. He had been twice married. He left surviving him a widow and three children, the issue of his last marriage, and three children by a former wife. After making certain provisions for his wife, he directed that all the residue of his estate should be held in trust by his executor for the use and benefit of all of his children. For several years after the death of testator his surviving widow and her infant children occupied the family residence, but more than five years before the institution of this suit she moved with her children to the State of New Jersey, where she has since resided. This suit was instituted by appellee, Harry Mayer, who belonged to the older set of children, against the widow, asking a construction of the fourth clause of the will of his father, which is as follows: "It is my desire that my wife, while a widow, may, if she chooses, use and occupy the dwelling house on the corner of Green and Clay streets in the city of Henderson, Ky., or such other homestead as I may own at the time of my decease."

It is insisted that by the permanent abandonment of the dwelling house as a residence the widow had forfeited all right to use it; and that under the terms of the will it became a part of the general estate, which his executors were directed to hold in trust for the benefit of all the children, and asked that it might be so adjudged; and that appellant, Martha W. Mayer, be required to pay over to the executor the reasonable rents thereof since the date of her abandonment of the premises as a residence. The circuit judge so held, and the widow has appealed.

In Jarmon on Wills, 5th edition, section 798, the author says: "A devise of the 'free use,' or 'use and occupation,' of land passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use and occupation of the property unless the context clearly calls for a more limited construction."

This rule is approved in 29 A. & E. Ency. of Law, 1st edition, 403, and the editor has collated in the note quite a number of decisions from the courts of various States who have also adopted and approved the rule. But it is the contention of appellee that the entire context of the fourth clause in this case clearly indicates a purpose on the part of testator to make the devise of the use of the dwelling house to his wife conditional upon its occupancy by her as a home, and that the words "may, if she chooses, use and occupy the dwelling house" have an entirely distinct meaning from the words "use

and occupation." In our opinion the distinction attempted to be made is too fine spun. It is perfectly clear that testator had no particular affection for the house on the corner of Green and Clay streets, for he provides that if at the time of his death he was occupying another homestead, that she should have the use and occupancy of that dwelling house. The predominant idea in the devise was evidently to provide a home for the use and occupation of his wife during her widowhood. There is no intimation in the will which contemplates a forfeiture of this provision for her. We, therefore, conclude that appellants may, if she chooses, actually occupy the dwelling house at the corner of Green and Clay streets, or she may, if she sees fit, rent it out, and appropriate the rents for her own use.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent herewith.

HIGGINS, &c. v. HIGGINS.

(Filed February 26, 1904.)

1. Dower—Homestead—Rights of widow—Where the evidence fails to show that the husband had the right to the homestead in the property when he died, it was error for the lower court to hold that the widow had a right to homestead in the property instead of dower therein

2. Same—Where the husband never occupied a house and lot with his family as a homestead, he never acquired a right to a homestead therein.

Matt O'Doherty for appellants.

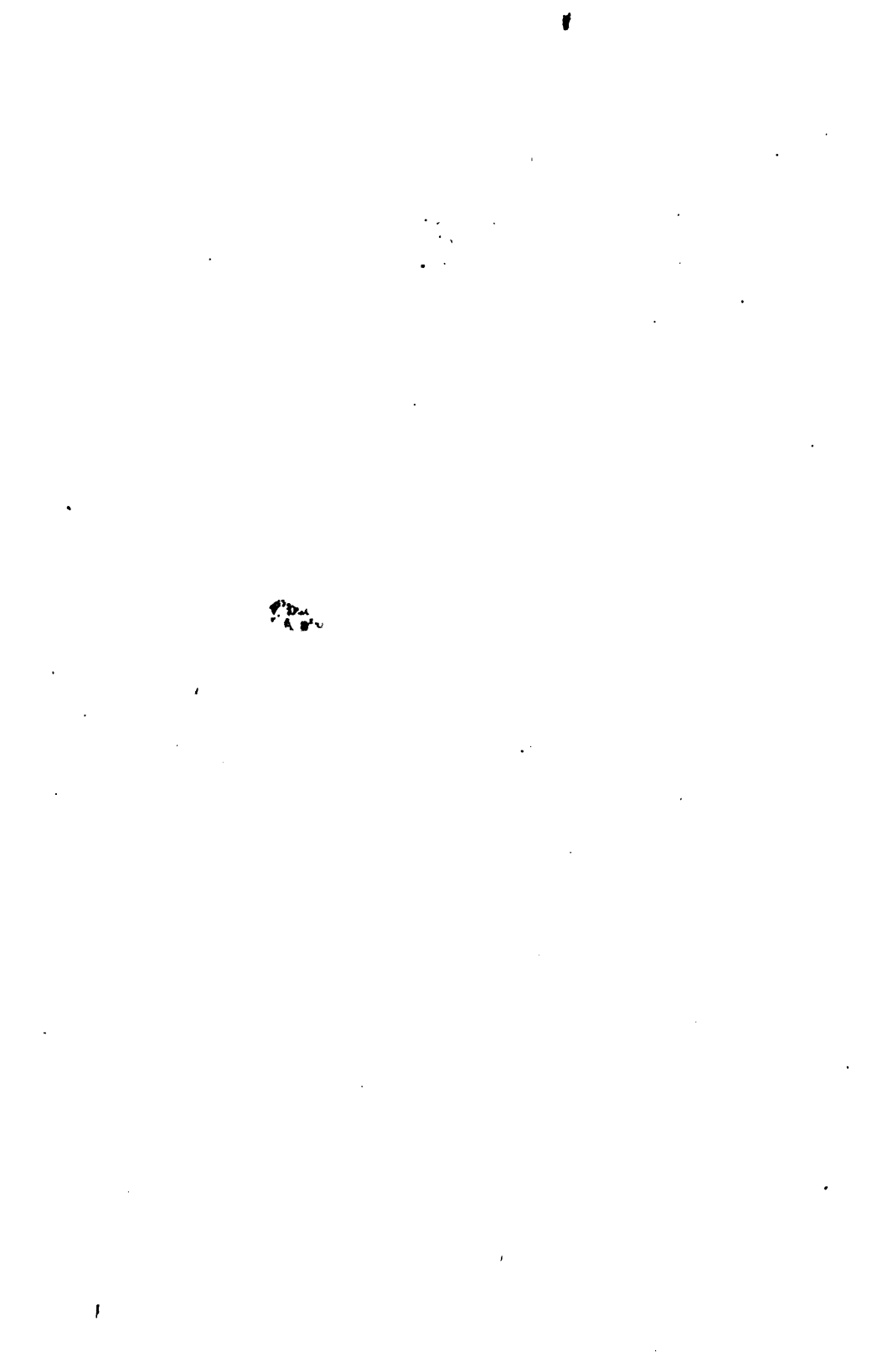
Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

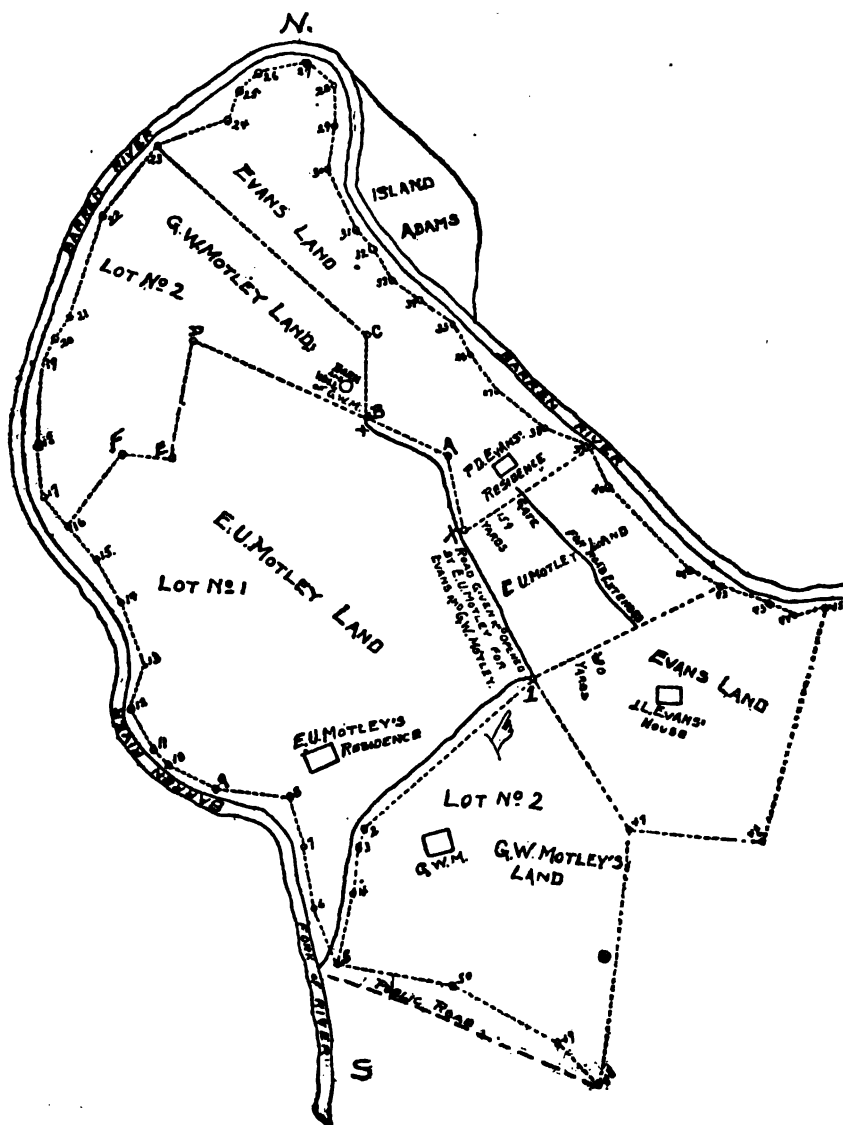
Opinion of the court by Judge Paynter.

Bartholomew Higgins died, leaving as his widow Honora Higgins, and two children, Mary and Dennis. Mary is dead, and Dennis is over twenty-one years of age. The question for determination on this appeal is whether the widow has a homestead or dower in a house and lot in the city of Louisville, of which Bartholomew Higgins died seized.

The evidence tends to show that at one time after the death of her husband the widow occupied the house with the children, but for how long is not disclosed. The evidence fails to show when the husband died, or where he then lived, or that he ever occupied the house with his family, or at all, as a homestead. If he never occupied it with his family as a homestead, he never acquired a right to a homestead therein. An unexecuted intention to occupy it did not create the right. (*Fant v. Talbot, &c.*, 81 Ky., 25; *Hansford v. Holdam*, 14 Bush, 210.) As the evidence fails to show that the husband had the right to the homestead in the property when he died, it is not shown that the widow did have such right. Section 1702, Kentucky Statutes states the conditions upon which one has a homestead in real property. Section 1707, provides that the homestead shall be for the use of the widow so long as she occupies it, and the unmarried infant children of the husband are entitled to a joint occupancy with her. The language used shows the widow's right to a homestead is predicated upon the pre-existing right of the husband to it. The court erred in holding that the widow had a right to homestead in the property instead of the right to dower therein. The fact that the widow is now insane and confined in an asylum does not have any bearing upon the question as to whether she took a homestead or dower interest in the property.

The judgment is reversed for proceedings consistent with this opinion.





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KENTUCKY COURT OF APPEALS.

EVANS v. MOTLEY.

(Filed February 18, 1904—Not to be reported.)

Wills—Passways—Were decedent divided his land among his two sons and the children of a deceased daughter, a passway over the land which was used almost solely by him for his own convenience was not such a passway as to be held by them, or one of them, by prescription, and where he announced his purpose to his sons of providing a passway over the lands for the use of one that should have a certain part, the one who took the part charged with a suitable and proper passway must maintain one, and could not convey such passway with the provision that it must be kept closed or the deed to it should be void.

B. W. Bradburn and Goad & Carpenter for appellant.

John M. Wilkins for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Burnam.

John A. Motley died a resident of Allen county in the year 1888, the owner of a large boundary of land in what was known as Motley's bend on Barren river. Shortly before his death he divided this tract of land into three parts, and by his will, which was duly proven and recorded after his death, devised these respective pieces to his two sons, George S. and E. U. Motley, and to the children of his dead daughter, Mrs. John L. Evans. The location and division lines of these respective tracts of land are shown in a map made by L. Bowcher, filed with this opinion (see accompanying page):

The lot which he gave to his son, E. U. Motley, embraced the homestead, and ran from the river on the west to the river on the east, and separated the parts devised to G. W. Motley and to the Evans children from the public road. During the life of J. A. Motley he made use of a passway which ran along the eastern side of his boundary of land in order to get from the front of his farm back to the land lying in the bend. This passway, after the division of the entire tract of land, crossed the land devised to E. U. Motley and connected the lands devised to the Evans children, but did not touch

either piece devised to G. W. Motley. It followed a zigzag course through a boundary of heavily timbered land, and did not connect any particular piece, but was simply used by John A. Motley as a matter of convenience.

In making the division of his land among his children testator made no provision for a passway from the back land devised to G. W. Motley and the Evans children to the public road. It appears from the map that the only public road which this boundary of land bordered on was the one from Scottsville, in Allen county, to Bowling Green, in Warren county. At the time of the division of his lands John A. Motley told both his son, G. W. Motley, and his son-in law, Evans, that he intended to provide a passway for the back land to the public road. With the view of carrying out the purpose of his father in this respect E. U. Motley opened a road, beginning at the letter B on the plat along the line between the land of E. U. Motley and the Evans children, but wholly upon his own land to the letter X, and thence across his land to the figure 1, which is the division corner of the southern boundaries of the land between G. W. Motley and the Evans children, from this point out to the public road at figure 5, and at the same time executed a deed to the passway twenty feet wide to G. W. Motley and the Evans children, in which the true location of the passway is described by courses and distances.

In this deed E. U. Motley reserved the right to put gates across the passway, and stipulated that the second parties were to keep them closed, and in the event of their failure to do so that the deed to the passway should become null and void. The appellant, P. D. Evans, one of the children of J. L. Evans, refused to accept this passway, and instituted this suit against E. U. Motley, asking that he be perpetually enjoined from in anywise obstructing the old passway, which ran parallel to the new road some 250 or 300 feet distant, upon the ground that the new passway was not suitably located for a road, and claiming the old passway by prescription. The issues were made in this proceeding, proof taken and upon final submission the circuit judge dismissed plaintiff's position, and he has appealed. We think the evidence in this case entirely fails to establish any prescriptive right in appellant to the use of the old passway. It was established by John A. Motley over his own land, and solely for his own convenience, and was rarely used by any one else.

The evidence also fails to support the contention that the new passway dedicated by appellee is not a convenient or suitable one. In fact it is quite apparent from an inspection of the plat that it affords a much more convenient outlet to the public road from the back land of G. W. Motley and the appellant than the old road; and that the trial court properly refused the injunction sought. However, appellee took the land devised to him by his father charged with the burden of providing a suitable and convenient passway, having regard to the pecuniary rights of all the parties, from the back land of appellant to the public road; and that he had no right to stipulate that this passway should be forfeited by a failure on the part of appellant or G. W. Motley to keep gates, that he might erect thereon, closed.

For any violation of his rights in this respect the law affords an adequate remedy. For this reason alone the judgment is reversed and cause remanded, with instructions that the trial court enter a judgment establish-

ing the passway for the back lands of the Evans children and G. W. Motley, along the line indicated in the deed from E. U. Motley and wife to G. W. Motley, reserving to E. U. Motley the right to establish gates thereon at convenient places, and for other proceedings consistent with this opinion.

FIDELITY TRUST CO., TRUSTEE, &c. v. LLOYD, &c.

(Filed February 24, 1904—Not to be reported.)

1. Wills—Trusts—Where a testator provided by his will that his executors should have a period of forty years in which to administer their trust, such trust attempted to be created was obnoxious to the rule against perpetuities and to section 2360 of the Kentucky Statutes, for the reason that it unlawfully suspends the power of alienation for a longer period than the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter, the will plainly providing that his real estate shall remain in the hands of his executors for such period of forty years without reference to any life or lives in being.

2. Same—Construction of devise—Where a will creating a trust postpones the vesting of the estate beyond the statutory period of limitation, the trust created is void, and the estate devised must be treated and administered as intestate property.

Humphrey, Burnett & Humphrey, R. C. Kinkad and H. H. Nettleroth for appellants.

Joyes & Jarvis for Fidelity Trust Co., trustee, &c.

Bodley, Baskin & Flexner for Alice Drummond, &c.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The will of Edwin V. Thompson, Sr., was probated without objection in the Jefferson County Court on the 10th of June, 1893. He left eight children and numerous grandchildren, some of whom were alive and some have been born since the probate of the will. The will disposed of a large estate, consisting of land in Jefferson county, Ky., outside of the city of Louisville, real estate in the city, and lands and personalty in Iowa and Kansas. On the 1st of July, 1902, four of testator's daughters, the husbands of two of them uniting, brought this action against the other children of testator, his grandchildren, the Fidelity Trust Co., as trustee under the will an statutory guardian of some of the infant grandchildren, and the National Trust Co., receiver, asking a construction of each clause of the will; and that the 1st, 3d, 4th, 7th and 8th clauses be declared void as contrary to and in violation of section 2360 of the Kentucky Statutes, prohibiting restraint upon the power of alienation for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. In an exhaustive opinion the chancellor upheld the contention of plaintiffs, and adjudged that E. V. Thompson, Sr., died intestate as to all the real estate owned by him, or in which he had any interest at the time of his death; and that it descended in equal shares to his eight children; that none of the grandchildren of testator, nor any of the proposed beneficiaries living at the expiration of forty years from testator's death,

took any interest in any of the real estate which E. V. Thompson owned at the time of his death, or in which he had any interest. Defendants have appealed, and ask a reversal.

The clauses of the will involved upon the appeal are as follows:

"1st. I will that the house I now live in with four acres of ground attached, together with the outbuildings and appurtenances to said home, and all the personal property pertaining to said home, including animals, vehicles, implements, furniture, etc., shall be kept as a home by my wife, Jane L. Thompson, so long as she lives or so desires. And after her death, or otherwise giving it up as a home, it shall be so kept as long as any of my unmarried daughters may choose to occupy said place as a home. When the said place shall cease to be so used as a home the realty and personalty is to be disposed of according to other portions of this will.

"2d. My executors shall place the entire amount of my stocks and bonds and other securities for money, which are in the State of Kentucky, in charge of the Fidelity Trust and Safety Vault Co., to be by it held as follows: Said company shall make collections of debts, interest, dividends, etc., and make investment and reinvestments, and pay of the entire amount of the net income so derived to my wife, Jane L. Thompson, so long as she lives. After her death said net income is to be paid over to my children and grandchildren as follows: Said income shall be paid to my children who are then living in equal shares, and if any one of said children should not be living his or her share shall go to his or her children, with this provision, however, that in making said division all of my grandchildren shall take shares equal with one another.

"This trust is to continue for twenty years after my death. At the end of said twenty years the said personalty so held by said company, or its successor, shall be divided among my children and grandchildren in the same manner as the income aforesaid is to be divided among them. If, however, at the end of said twenty years any one of said grandchildren is less than thirty years of age, his or her share shall continue to be held by the said Fidelity Trust and Safety Vault Co., or its successor, until such grandchild attains the age of thirty years, and then be paid over. If my executors should at any time during the above trust all agree that it would be advisable to substitute some other custodian in the place of said Fidelity Trust and Safety Vault Co., they are hereby empowered to do so. Neither said company nor such substitute shall sell for reinvestment any of my stocks, bonds, or other securities it may hold, except with the consent of my executors.

"3d. It is my will that all the real estate I own in the State of Kentucky, outside the city limits of the city of Louisville, shall not be sold or mortgaged or otherwise encumbered for the period of forty years after my death, excepting that such of my lands now lying outside the said city limits which may be taken into the said city limits may be sold by my executors as directed in the next clause of this will. My lands remaining unsold as aforesaid shall be held by my executors and their successors and managed by them for the period mentioned for the benefit of those who may be the heirs of my body. The revenue derived therefrom during said period is to be divided among my children and grandchildren in the same manner as the net in-

come from my personalty is directed to be divided in clause two. And at the expiration of said forty years said real estate shall be divided among those who shall then be the heirs of my body.

"4th. My real estate which is now in the city of Louisville, Ky., and which may hereafter come within its limits, and also my real estate in Iowa, Kansas and Texas, shall be managed by my executors, and the revenues derived therefrom appropriated as directed in clause three, as long as they remain unsold. When my executors so desire they may sell the same, and they are hereby invested with full power to sell and convey the same. If sold, the proceeds shall be invested in good interest-paying securities, or real estate yielding income, and the same shall be held for the same uses and purposes as is directed in clauses two and three.

"7th. All the lands owned by me at the time of my death in the State of Iowa jointly with my son, Edwin, shall be managed by him as at present, for the uses and purposes mentioned in clause three, if the same is agreeable to my said son. If not, then they are to be managed by those named, and in the manner directed, in clause four.

"Codicil—Upon consideration I have determined to make this addition to my will, and make this codicil: At any time after the expiration of ten years from my death, if all my children then living shall agree that it would be desirable to sell any part of my real estate, they, by uniting with my executors, are hereby invested with full power to sell and convey the same, the proceeds of said sales to be invested in securities or other real estate as directed in clause four."

By these clauses in the will of testator his executors were given full power to manage and control the real estate owned by him in the States of Kentucky, Iowa, Kansas and Texas for a period of forty years after his death, for the benefit of those who might be the heirs of his body. The power to sell, mortgage or otherwise incumber for that period being expressly prohibited except as to such lands as might be taken into the city limits during the period, in which contingency he provided that they might be sold and the proceeds invested in good interest bearing securities, or other real estate, to be held upon the same trust as provided in the second and third clauses of his will. During this period of forty years the executors are directed to pay over the net income of the property to his wife during her life, and after her death to his children and grandchildren in equal shares. In our opinion, the trust attempted to be created by this will is obnoxious to the rule against perpetuities and to section 2360 of the Kentucky Statutes, for the reason that it unlawfully suspends the power of alienation for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. Testator plainly provides that his real estate shall remain in the hands of his executors for the gross period of forty years without reference to any life or lives in being. The law permits the vesting of an estate and the power of alienation to be postponed for a life or lives in being and twenty-one years and ten months thereafter. But if the vesting of the estate or interest is postponed, or the power of alienation suspended, for a longer period, it is unlawful, and the devise or grant is void. The estate must necessarily vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period the limitation over

will be void. The statute concerns itself with the vesting of estates, and not with their termination. These principles have been repeatedly announced in numerous decisions of this court. (Coleman v. Coleman, 23 Ky Law Rep., 1476; Stevens v. Stevens, 21 Ky. Law Rep., 1315; Ludwig v. Combs, 58 Ky., 132; Armstrong v. Armstrong, 53 Ky., 845; Birney v. Richardson & Ford, 84 Ky., 427; Luke v. Marshall, 38 Ky., 355; Brashear v. Macy, 26 Ky., 91.)

While the restriction upon the power of alienation imposed by clause three upon the real estate is removed in the event these lands are taken into the city limits, this contingency may not happen during the forty years; and it is also uncertain who may take at the end of forty years, as it is utterly impossible to know who may be alive at that time. We, therefore, hold that the attempted trust, created by the 1st, 3d, 4th and 7th clauses of the will postpones the vesting of the estate beyond the statutory period of limitation, and, therefore, the whole trust is void, and the estate devised by these clauses must be treated and administered as intestate property.

Judgment affirmed.

SHACKELFORD v. COMMONWEALTH.

(Filed February 26, 1904—Not to be reported.)

False swearing—Defective indictment—An indictment for false swearing is defective which does not particularize the game or set out where and when played, about which the accused testified, because it does not apprise the defendant with reasonable certainty of the offense with which he is charged.

W. F. Hall for appellant.

N. B. Hays and Loraine Mix for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Henry Shackelford, was indicted by the grand jury of Harlan county, charged with the offense of false swearing. A general demurrer to the indictment having been overruled, a trial of the case was had, which resulted in his conviction and sentence to the penitentiary, of which he is now complaining.

The first question for adjudication is whether or not the indictment states a cause of action against the appellant. It is alleged that he "did falsely, willfully, knowingly, corruptly and feloniously testify before and to said grand jury 'that he had not engaged in a game of cards in Harlan county within the last five years before that time, upon which there was any money or anything of value bet, won or lost, and that he had not seen any person or persons play, or engage in, any game in Harlan county within the last five years before that time upon which there was any money or other thing of value bet, won or lost.' When in truth and in fact said Henry Shackelford had engaged in games of cards in Harlan county within the last five years before said date, and had seen others engaged in games of cards in Harlan county within the last five years before said date, on which games, and on all of which games, there was money and other things of value bet, won and lost."

Section 122 of the Code provides that "the indictment must contain * * *

a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case."

The indictment in this case is defective, in that it does not apprise the accused of the particular offense upon which he is to be tried. The falsity of his testimony before the grand jury is alleged to consist in the fact that, although he had sworn that he had not seen any games of chance played, nor been engaged in them himself, upon which money or other things of value had been won and lost, in Harlan county, within five years next before the examination, yet in truth and in fact he had been engaged in and had seen games of chance played in Harlan county, wherein money or other things of value had been won and lost, within five years; but the indictment does not particularize what game, and when and where played, the accused had seen, or in which he had been engaged. In order that he may prepare his defense it is necessary that he should be apprised, with reasonable certainty, of the offense with which he stands charged. This is not accomplished by the allegation in the indictment, that within five years next before the date of the examination he had seen games of chance played, and had played at them. Under this allegation the Commonwealth was at liberty to prove any of perhaps a hundred games played at different times and different places in Harlan county within the time mentioned, the accused being, in the meantime, unable to know what game the Commonwealth proposed to show that he had played, or had seen played.

The Commonwealth was not entitled to thus throw a dragnet around the accused, and when he was placed on trial to confront him with evidence which he had not been prepared to anticipate or meet. (Commonwealth v. Still, 88 Ky., 275.)

The accused could not have a fair trial without the opportunity to prepare his defense. This opportunity is not afforded him by the allegations of the indictment, and we are of opinion that the court should have sustained the general demurrer, and dismissed it.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. DICK.

(Filed February 25, 1904—Not to be reported.)

1. Railroads—Damages—Pleading—In an action to recover damages for injuries to one who was struck by a train at a crossing where the particular acts of negligence were not set out in the petition and issue was joined on these allegations of negligence, under this state of pleading the railroad company can not say that it was surprised at proof which tended to show that the train was run carelessly and recklessly upon her, there being sufficient notice that the manner of operating the train would be brought in question on the trial.

2. Same—Married woman—Where a married woman is injured by the negligent act of another, the same criterion of recovery in an action for damages exists as to her as to a man or single woman.

Helm, Bruce & Helm and Benjamin D. Warfield for appellant.

Bennett H. Young, Dayton T. Mitchell and J. L. Dorsey for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

This is the second time this case has been in this court. The decision of the first appeal will be found in 23 Ky. Law Rep., 1068.

In the month of April, 1898, appellee was walking east on Broadway street, in the city of Louisville, and when crossing appellant's track where it intersects Broadway she was struck by one of appellant's northbound trains, and suffered such injury as resulted in an amputation of her foot. Appellant has two tracks about six feet apart, running north and south, crossing Broadway, the railroad coming out of Brent street which intersects Broadway street at this point. The southbound train runs on the western, and the northbound train, the one that injured appellee, on the eastern track. There were gates or poles on each side of the track across Broadway street used by appellant to warn persons of the approach of trains. When the train is expected to approach these poles were let down to keep people from crossing, and when the train had passed, and the danger was over, these poles were raised.

The appellee in her pleadings alleged in substance that appellant's agent in charge of these safety gates was incompetent, negligent and careless in the handling and management of them, and when she arrived at the crossing she found the gates or poles up, and did not know that a train was near, and that by reason of the fact that the gates were up she had the right to assume that it was safe to cross the appellant's track, and started across, and immediately the appellant's agent lowered the gates or poles, and thus hemmed her in and prevented her escape; and that the board crossing, prepared by appellant, whereon pedestriains were expected to cross the tracks, was in a defective, unsafe and dangerous condition, which fact was known by appellant, and by reason thereof, together with the negligent and improper management of the gates at the crossing, she was thrown, or caused to fall, down, and while down and unable to escape appellant's agents in charge of a train ran the train at a reckless, rapid and dangerous rate of speed, and ran it in such a careless, negligent and reckless manner as to run it upon appellee, and so mangled and injured one of her feet that it was necessary to amputate, and her foot was amputated near the ankle.

The answer was a traverse of these allegations, and a plea of contributory negligence, and also was added the following: "Denies that by any negligence or carelessness whatever on its part, or that of its agents or servants, or any or either of them," appellee was caused to suffer, or was damaged, in any sum. The contributory negligence was denied by appellee. A trial was had, which resulted in a verdict and judgment for appellee in the sum of \$5,000, from which the appellant has appealed.

There were many grounds assigned for a new trial, but counsel for appellant only assigns three reasons why this court should reverse the judgment: First, that there was not sufficient evidence to sustain it; second, that the court by its instructions, Nos. 3, 4 and 5, submitted to the jury issues not

raised by the pleadings; third, that the court gave erroneous instructions on contributory negligence and the measure of damages. With reference to the matter of insufficient evidence to sustain the verdict and judgment it is sufficient to say that the evidence on all the questions at issue was very conflicting. If the testimony of appellee's witnesses was true, the agent of appellant who managed the gate or poles was very careless and negligent; likewise the agents whose duties required them to make and keep in repair a reasonably safe crossing over the tracks; and, also, the agents in charge of the train were negligent in the management and operation of the train, and as a result of all these negligent acts combined, or any one of them, the jury was authorized to find for appellee. On the other hand, appellant's testimony, if true, established the fact that the gates and trains were managed and operated with prudence and skill; and the injury of appellee was not caused by any act or negligence of theirs, but was produced by her own negligence; and it was also shown by appellant's testimony that the crossing made for pedestrians over the tracks was in a safe and proper condition.

This court, in the former opinion, said: "We are of the opinion that if the testimony of appellant's (now appellee) witnesses be taken as true, she may recover." The testimony for appellee, as appears of record, is stronger than on the former appeal, and it was the province of the jury to determine the weight and effect of the testimony. The instructions of the court, Nos. 3, 4 and 5, did not, in our opinion, submit to the jury issues not raised or made by the pleadings. These instructions said to the jury in effect that if those in charge of the train saw appellee's peril, or by the exercise of ordinary care could have seen it, in time to have avoided the injury by the exercise of ordinary care, and yet failed to do so, then they should find for appellee.

This injury occurred at a place where it was made the duty of those in charge of the train to keep a lookout for those on or about the crossing. (Pittsburg, &c., R. R. Co. v. Lewis, 18 Ky. Law Rep., 958.) But appellant says the pleadings did not authorize these instructions. It is true that this court has decided repeatedly that it is sufficient to charge negligence in general terms, without specifying the particular acts of negligence, but if the particular acts of negligence are specified in the petition, no other acts of negligence can be submitted to the jury than those specified. The reason for this rule is that to permit a party to state in his petition one cause of action and recover on another cause not stated, would simply entrap the defendant, because the latter is led by the petition to believe that he is to meet one state of case, and then on the trial he is called on to meet a different state of case. We are of the opinion, however, that this rule does not apply to the pleadings in this case. In the pleadings of appellee it is alleged that she received her injury as the result of one of three causes, or by the combination of the three: First, the negligent acts of the keeper of the gate; second, the failure to make and maintain a reasonably safe crossing (these two acts of negligence were particularly specified); third, the negligent, careless and reckless management and operation of the train, whereby she was run over and injured. The particular acts of negligence on the part of those in charge of the train were not specified in the petition. The appellant made an issue with appellee on these allegations of negligence, and also denied that its agents, in the operation of the train, were guilty of any negligence of any

kind or character. Under this state of pleading the appellant can not say that it was entrapped or surprised at any proof which tended to show that the train was run carelessly, negligently, recklessly or unnecessarily upon her. There was sufficient notice to appellant that the method and manner of operating the train would be brought into question on the trial.

The objection of appellant to instructions on contributory negligence is not well taken. It is the usual instruction given on the subject, and often approved by this court. The instruction on the measure of damages is in the usual and proper form, but appellant objects to that part of it which authorizes the jury to allow her anything "for any impairment of her power to earn money caused her thereby," for the reason that she was a married woman, and there was no proof that she ever had earned any money, and for her labor in performing household duties she was not entitled to anything.

In the case of South Covington & Cincinnati Street Railway Co. v. Bolt, &c., 22 Ky. Law Rep., 906, the court said: "Our opinion is that if a married woman is injured by the negligent act of another, she is entitled to maintain an action for damages, and the same criterion of recovery exists as to her as to a man or a single woman."

Perceiving no error prejudicial to the substantial rights of appellant the judgment is affirmed.

SOUTHERN PLANING MILL, &c. v. DOERHOFER'S EX'OR, &c.

(Filed February 25, 1904—Not to be reported.)

Res judicata—Where a contractor had failed and become a bankrupt, and the trustee, by order of the bankrupt court, had completed the contract, and by order of the court the amount due under the contract had been paid to the trustee, in an action by a creditor of the bankrupt against the owner of the house completed by the trustee to recover a sum due by the bankrupt, the judgment of the bankrupt court is *res judicata*, and the action was properly dismissed.

Forcht & Field for appellants.

O'Neil & O'Neil for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

Appellant, Southern Planing Mill and Lumber Co., instituted this action in the lower court to recover of John Doerhoefer and Andrew Peklink \$429.24, alleged to be due it upon account for materials sold to Peklink and used by him in erecting a dwelling for Doerhoefer under contract with the latter, who was alleged to be indebted to Peklink in the amount of appellant's debt.

Appellant also set forth in its petition that it had in the statutory mode obtained a mechanic's lien on Doerhoefer's house and lot to secure the payment of its debt, which lien it sought to enforce. The answer filed by Doerhoefer traversed the averments of the petition, and in addition alleged in substance that though he had employed Peklink to do certain work on the house in question, and to furnish the material for its erection, the latter had, without performing the full work, or furnishing all the material, and after

being almost fully paid for what he had done and furnished, abandoned the contract, and filed his petition in bankruptcy; that one Mueller, trustee in bankruptcy of Peklink, by order of the bankrupt court, completed the work upon Doerhoefer's house left unfinished by Peklink, furnishing the material necessary for that purpose, and upon the further order of the bankrupt court and proof heard it was ascertained that Doerhoefer, upon the completion of his house, was indebted for work done and material used on his house by Peklink, and his trustee in bankruptcy, in the sum of \$1,400, which sum Doerhoefer, by order of the bankrupt court, paid into that court and to the trustee of the bankrupt.

It is also averred in the answer that appellant had, in the meantime, become a party to the bankruptcy proceedings, filed its claim in that court against Peklink, asserted its mechanic's lien as against Doerhoefer, and insisted upon its payment out of the fund of \$1,400 paid to the trustee by Doerhoefer in settlement of the balance he was owing Peklink; and further, that the rights and liens of the parties were thereupon adjudicated and determined by the bankrupt court upon the issues and proof, with the result that appellant's lien debt was fixed at \$866.60, of which it received out of the fund in the hands of the trustee paid him by Doerhoefer \$426.76, leaving \$439.84 of its lien debt unpaid.

The answer of Doerhoefer pleads the foregoing judgment in bar of appellant's claim against him, and this plea of *res judicata* having been sustained, by the lower court, appellant's petition was dismissed. Doerhoefer died during the pendency of the action in the lower court, or after its decision by that court, and it was thereupon revived against the executors of his will. The record before us sustains the averments of the answer, to the effect that Doerhoefer had paid Peklink before he became a bankrupt several thousand dollars of the contract price as the work on the house progressed, and that after its completion by Peklink's trustee, as directed by the bankrupt court, there was found to be due the estate of the bankrupt only \$1,400. This sum Doerhoefer, by order of the court, paid to the trustee of the bankrupt, which payment operated as an acquittance and release to him.

It will not be denied that the bankrupt court had the jurisdiction to determine what amount, if anything, Doerhoefer owed the bankrupt, Peklink, and to require the payment of that sum to his trustee, nor will it be denied that that court had like jurisdiction in the matter of applying the estate of the bankrupt to the payment of his debts; also to determine liens and priorities among creditors, and to that end to require all parties in interest to be made parties to the proceedings in bankruptcy. This being true, it will further be borne in mind that the bankrupt court, after the appellant and other creditors of the bankrupt asserting mechanics' liens, together with Doerhoefer, his debtor, had become parties to the bankruptcy proceedings, directed the trustee of the bankrupt to complete Doerhoefer's house as the bankrupt had contracted to do; otherwise there would have been nothing due the latter's estate from Doerhoefer, and consequently nothing to be paid creditors holding mechanics' liens. After the completion of the house by the trustee the bankrupt court took the necessary steps to ascertain Doerhoefer's indebtedness to the estate of the bankrupt, and after the taking of the neces-

sary proof it was judicially determined that the indebtedness was \$1,400, and that this amount was the whole of it.

It was next adjudged that Doerhoefer pay the above sum to the trustee in bankruptcy, which he at once did. It was then adjudged that appellant's lien debt amounted to \$866.60, but as there were doubtless other lien debts of equal dignity entitled to share pro rata with that of appellant in the \$1,400 paid the trustee by Doerhoefer, appellant was further adjudged to recover only its share of the \$1,400, which was \$426.76, leaving \$429.24 of its debt unpaid. But as between appellant, the other lien creditors and Doerhoefer, under section 2463, Kentucky Statutes, as amended March 21, 1896 (Acts 1896, pages 47-9), Doerhoefer was discharged from liability by the payment to the trustee in bankruptcy, for the benefit of the lien holders, of the \$1,400, especially as the payment was made in obedience to a judgment of court, in a proceeding in which all persons having an interest in the fund to be distributed were made parties. If Doerhoefer did not truly account to the estate of the bankrupt for the full amount of his indebtedness on the building contract, appellant should have advised the bankrupt court of that fact, and itself taken such steps by further litigation, or appeal, as would have compelled a full disclosure from, and an accounting by, Doerhoefer. But having failed to prosecute the matter further in the bankrupt court and accepted the benefits of the judgment there rendered, it is too late for appellant by another action, and in a different forum, to re-open questions that were settled by the former judgment. In other words, the plea of *res judicata* interposed by the answer constitutes a good defense to the appellant's action.

The cases relied on as authority by counsel for appellant can have no application to a case in which, as in the one at bar, the question of the indebtedness of the owner of the property sought to be subjected to the payment of a mechanic's lien created by contract with the builder has been litigated and determined by a court of competent jurisdiction in a previous action between the same parties, especially where the judgment in the former action found such owner indebted to the contractor in a named sum, which, upon being paid by him, was applied by the court to the payment of mechanics' liens against his property.

Judgment affirmed.

SNELL v. PAYNE, &c.

(Filed February 25, 1904—Not to be reported.)

Lands—Trusts—Married women—Under the married woman's act of 1894 all of the estate of a married woman in lands is a separate estate, and where it was the sole discretion of a trustee to sell land, and where land was sold and the proceeds invested in other land which was not held under the will at all, there was no necessity for the appointment of a trustee in place of one resigned in order to invest proceeds of land.

J. D. & G. R. Hunt for appellant.

Morton, Webb & Wilson for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

The question presented for decision by this appeal is as to the nature of the title taken by Mary Powell to a tract of land in Fayette county, Kentucky, which had been conveyed to her in exchange for another tract of land in Nelson county, Kentucky, which was devised to her by her father by the sixth clause of his will. That clause reads as follows: "I will and devise to my friend, Nathaniel Muir, in trust for my daughter, Mary Powell, two hundred acres of land where William Hampton now lives, including the one hundred and forty-nine and one-half acres I sold to the Hamptons and John Wallingford and took back, and enough land from the field directly west and Foster field to make two hundred acres, and enough land continuing west to make, at \$45 per acre, \$935. Said trust is for the use and benefit of my daughter, Mary Powell, all the proceeds or income arising therefrom for the use and benefit of my daughter, Mary Powell; and should my friend, Nathaniel Muir, at any time conclude that it is to her benefit and interest, he is authorized to sell the same and invest in some good securities, the interest of which to be used for the benefit of my said daughter, Mary Powell, she to be made equal out of my estate with all my other children."

In the proceeding in the Nelson Circuit Court to which Mrs. Powell and her husband, and her trustee, Nathaniel Muir, were parties it was alleged and shown that it was to the advantage of the said cestui que trust, Mary Powell, that an exchange be made by the sale of the land obtained under the sixth clause above named for a certain property, designated and described, which lay in Fayette county, Kentucky. The court decreed that the exchange should be made, and it was made. Thereupon Nathaniel Muir, the trustee, was permitted to, and did, resign as trustee, and deed was taken to Mrs. Powell and her children by the consent of herself and her husband, without the trustee, Muir, or any trustee being named as the grantee in the deed.

It is the contention of appellant that the Fayette county land conveyed to Mrs. Powell is in some way affected by the trust created under the will of James R. Hughes, father of Mary Powell, the trust created by the sixth clause of that will. Aside from the discretion vested in the trustee to sell the Nelson county land devised by that clause of the will, if in his judgment it was deemed desirable to do so, and to invest the proceeds in other securities for the benefit of Mary Powell, it appears that the will created only a dry trust. At the time the will of James R. Hughes was written the estates of married women to land in this State were either general or separate. Under the statute as it now is, and has been since 1894, and as it was at the time Mrs. Powell acquired the title to the Fayette county land, all of the estate of married women to lands in this State is a separate estate. It is now not necessary to have a trustee to hold the title of the married woman's separate estate, therefore, it was not material that Mrs. Powell had not a trustee in whom could be vested the title to the Fayette county land, to be held by him for her use under the will of her father. The sole discretion of the trustee, Muir, seems to have been limited to his selling the Nelson county land, and investing it in other securities without the consent of the beneficiary of the trust. After that land had been otherwise sold with the consent of the trustee and of the beneficiary and her husband, and had been invested in other land which was not held under the will at all, there was no

occasion for the appointment of a trustee in the matter, as he had neither duty to perform nor discretion to exercise.

We concur in the judgment of the circuit court that neither the fact that the conveyance to Mrs. Powell of the Fayette county land was not made to her trustee, Nathaniel Muir, nor the fact that said trustee was by the judgment of the Nelson Circuit Court discharged as trustee under the will of Hughes, in any way affects prejudicially the title to the seventy-five acres of Fayette county land conveyed to Mary Powell and her children by R. M. Powell as aforesaid, and that judgment is, therefore, affirmed.

WEST KENTUCKY TELEPHONE CO., &c. v. PHARIS.

(Filed February 25, 1904—Not to be reported.)

1. Damages—In an action by a woman fifty-eight years old for injuries resulting from catching her foot in the loop of a fallen telephone wire in a street, a judgment of \$250 each against the city and telephone company will not be disturbed where the evidence showed the injury resulted without contributory negligence, and that the dangerous obstruction was known by the city and telephone company, or could have by the exercise of ordinary care been known in time to have removed it and prevented the injury.

2. Same—Contributory negligence—Where one saw an obstruction in a public street on a previous occasion to her injury resulting from it, she was not guilty of contributory negligence in coming in contact with it when she was passing the street at 6:30 o'clock in the morning, the day being cloudy and she having her mind on a sick sister with whom she had sat up the night before.

W. J. Webb, Robbins & Thomas and Ed. Crossland for appellants.

W. H. Hester and J. N. Crutchfield for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Tennie Pharis, recovered judgment against the appellants, West Kentucky Telephone Co. and the City of Mayfield, in the Graves Circuit Court, for \$250 each in damages, from which judgments they have appealed.

On the night of January 27, 1902, a heavy and destructive sleet fell in the western part of this State, which broke down much timber and many wires and poles of telephone and telegraph companies throughout that section. The appellant, West Kentucky Telephone Co., lost many of its poles and wires by this sleet in and contiguous to the city of Mayfield. Two of its telephone poles, with their wires, fell and lay across the south end of Main street near its intersection with College street. In that city, Main street being one over which there was much travel. These telephone poles and wires were allowed to remain down and in and across Main street from the night of January 27 to the 10th of February, 1902, on which last-named date the appellee, a woman fifty-eight years of age, while passing along Main street on the way to her employment at a factory in the city, caught her foot in a loop of the telephone wire mentioned, and was thrown violently down upon the street, thereby sustaining the dislocation of her shoulder, and

other serious injuries to her person, for which she recovered of appellants damages as stated. At the time of the accident travel by pedestrians was necessarily confined to a beaten path or track in the street which had been made rough by vehicles and horses, whereby it became less slippery and dangerous than was the sidewalk, which had temporarily been abandoned on account of its extremely slippery condition, and the presence thereon of broken limbs of trees and other debris.

It further appears from the evidence that the telephone wires at the place of the accident were partly submerged by ice and snow, but in places stood up above the ice and snow in loops, which seemed to be especially true of their condition directly in the traveled way which was followed by the appellee. At the time of the accident appellee was carrying in one hand a bucket containing her dinner, and in the other an umbrella to protect her from the snow that was then falling.

We are of opinion that the several elements essential to a recovery have been shown to exist in this case, as the evidence conduced to prove, first, that the presence of the fallen wires in the street rendered travel thereon under the circumstances dangerous to pedestrians; second, that the appellee was injured thereby without any contributory negligence on her part; third, that the dangerous obstruction of the street by the fallen wires was known, or by the exercise of ordinary care could have been known, to the appellants in time for them to have removed the same, and thereby prevented appellee's injuries.

It was primarily the duty of appellant telephone company to use ordinary care to keep its poles and wires in repair, and if they fell in the street to prevent them from remaining therein to the interruption or injury of persons traveling thereon, and if the presence in the street of the wires made travel thereon dangerous, and appellee's injuries were sustained by reason thereof, the telephone company was and is responsible in damages for such injuries, if it knew, or by the exercise of ordinary care could have known, of the presence in the street of the wires in time to have removed them, and thereby prevented appellee's injuries. It was likewise the duty of the city to exercise ordinary care to see that its streets were kept reasonably safe for the use of persons traveling thereon, and though the telephone company may have been negligent in allowing its wires to so obstruct the street as to render it dangerous to the traveling public, and by reason thereof appellee was injured, if the dangerous condition of the street thus caused by the presence of the telephone wires was known, or by the exercise of ordinary care could have been known, to the city in time for it to have removed, or caused the telephone company to remove, the wires before appellee was injured, and it failed to do so, it thereby became equally responsible with the telephone company to appellee for the damages resulting from her injuries.

The law applicable to the case at bar has been repeatedly declared by this court, in the following cases: *City of Covington v. Asman*, 24 Ky. Law Rep., 416; *City of Covington v. Johnson*, 24 Ky. Law Rep., 602; *City of Wickliffe v. Moring*, 24 Ky. Law Rep., 419; *City of Louisville v. Johnson*, 24 Ky. Law Rep., 65; *City of Midway v. Lloyd*, 24 Ky. Law Rep., 2448; *City of Carlisle v. Secrest*, 25 Ky. Law Rep., 386.

It is, however, insisted for appellants that inasmuch as it was admitted

by appellee in her testimony before the jury that the wire over which she fell had been seen by her on a previous occasion, she must be presumed to have known of its presence at the time of the accident, and of the necessity of avoiding contact with it; therefore, in failing to avoid such contact she was guilty of contributory negligence, for which reason the peremptory instruction asked by appellants should have been given by the court. It appears from the evidence that appellee saw the fallen wire four days before receiving her injuries, as she was walking along Main street. The view thus obtained was merely accidental, and at most cursory. According to the authorities, general knowledge of the existence of such an obstruction on the part of one who is injured by contact with it is not of itself sufficient to show contributory negligence, though it is a fact competent to be considered by the jury in determining whether the person injured was or not guilty of such negligence.

It must be borne in mind that the appellee's injuries were received at the early hour of six and a half o'clock on the morning of a cloudy day as she was hurrying to her work through the falling snow, with her mind, as she testified, dwelling upon the serious condition of her sick sister whom she had attended through the greater part of the previous night. Under such circumstances it is not strange that she should have forgotten the presence of the fallen wires, or the danger of catching her foot in one of their loops.

In the Modern Law on Municipal Corporations, section 1202, it is said: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury, hence his traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law." * * *

It is further said in section 1204 of the same work: "Although a person is perfectly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if through forgetfulness he walks into a hole in such walk, and is thereby injured, it is not contributory negligence."

In *City of Carlisle v. Secrest*, 25 Ky. Law Rep., 336, which was an action similar to the one at bar, this court said: "The evidence shows that appellee knew of the defective condition of the sidewalk in question, but momentarily forgot it. The fact that a pedestrian knows generally of the defect in a sidewalk does not make his use thereof negligence per se."

In *City of Mayfield v. Gullfoyle*, 23 Ky. Law Rep., 43, this court also said: "It can not be fairly said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect."

From the foregoing authorities it is clear that the trial court could not have held, as a matter of law, that the appellee was guilty of contributory negligence in the matter of receiving her injuries; consequently the peremptory instruction was properly refused. An examination of the instructions given and refused convinces us that the trial court did not err as to the law of the case. Those given told the jury in substance that in order to authorize a verdict for the appellee they must believe from the evidence, first, that the falling of the telephone wires in the street rendered travel thereon dangerous to pedestrians using the same with ordinary care; second, that appellee was thereby injured while using the street with such care; third, that

the dangerous obstruction of the street by the fallen wires was known, or by the exercise of ordinary care could have been known, to the appellants in time to have enabled them to remove them, and thereby prevent appellee's injuries. We think the finding of the jury in appellee's favor is reasonably sustained by the evidence.

There can be no doubt from the evidence of the seriousness of appellee's injuries. They confined her to bed or room for about six months, during which time she suffered greatly, both physically and mentally, and was incapacitated from doing work of any kind. She, therefore, lost the whole of that time, and incurred a considerable medical bill, to say nothing of the partial permanent disability under which, by reason of her injuries, she must labor for the remainder of her life, whereby her earning capacity has been reduced one-half, for it was shown by the evidence that she was earning \$1 per day in a woolen mill at the time she was injured, whereas her wages since that time have not exceeded 35 cents per day. In view of the character and extent of appellee's injuries we are of opinion that the amount of damages allowed her by the jury was moderate in the extreme.

The record being free from prejudicial error, the judgment is affirmed.

ELLIOTT v. CAMPBELL, &c.

(Filed February 26, 1904.)

Evidence—In an action affecting title to land derived from one since deceased, testimony was incompetent which purported to give the statements of the deceased with reference to the transaction at the time the land was sold.

J. Smith Hays for appellant.

B. B. Golden and James D. Black for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Paynter.

Both appellant and appellee claim to have derived title to the land in controversy from Benjamin Eve. The right to the land depends upon the location of the beginning corner of the tract sold by Eve to appellee Campbell, as appellant bought to the latter's line. Campbell claims the beginning corner is located on what is known in this record as the "reverse line," which was a boundary line to a fifty-acre tract owned by Sol Campbell, while appellant claims the beginning corner is located at a different place in Sol Campbell's line to a tract of land known as the Hiram Campbell land, but then owned by Sol Campbell. The title bond from Eve to appellee calls to begin in Sol Campbell's line "at the nearest point to Young's creek." So one of the litigants claims that "the point" is in a line to one tract of land which belonged to Sol Campbell, while the other claims that it is in a line of another tract of land which then belonged to Sol Campbell. This statement is made to show that the solution of the question at issue depends upon the ascertainment of the location of the beginning corner of the appellee's sur-

vey and to show the importance of his testimony touching the issue, as appellant claims that its admission was highly prejudicial to him.

Benjamin Eve, through whom both claim to have derived title to their respective tracts of land, was dead when the case was tried, as was Sol Campbell and John G. Eve. The appellant was not present when the transaction and conversation took place detailed by the appellee in his evidence. The appellee was introduced as a witness for himself, and over the objection of appellant, testified that at the time he "traded for the land the witness, Benjamin Eve, John G. Eve and Sol Campbell were on the land looking at it. They were on the reverse line near where it crosses the county road, and near this side at a point defendant claims his beginning corner; that in talking about the trade Ben Eve asked Sol Campbell, who was present, if he did not have a survey on top of that ridge, to which Campbell replied that he did; that he, Ben Eve, then said to the defendant that he would make the beginning of the boundary he was selling him on top of that ridge on Sol Campbell's line at the nearest point to Young's creek, and that they agreed on that point as the beginning, and were in sight of it at the time. The old man, Eve, pointed to a large tree on top of the ridge at the place defendant claims as his beginning, and said they would begin right there on Sol's line."

Was it competent for the appellee to testify to the transaction with and statements of Benjamin Eve detailed by him?

Subsection 2, section 606, Civil Code of Practice, reads as follows: * * * "Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done, or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted unless * * * the decedent, or a representative of, or some one interested in, his estate shall have testified against such person with reference thereto." * * *

Counsel for appellee is of the opinion that because Benjamin Eve's estate is not affected by the testimony it is competent. The appellant who claims through Eve is affected by it, and he was not present when the transaction took place and the statements were made. The section of the Code quoted declares that no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done by, one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who, when over fourteen years of age, and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done, unless the decedent or a representative of or some one interested in his estate shall have testified against such person with reference thereto. No such testimony was offered as contemplated by the proviso in the subsection. If Eve's heirs still owned the land claimed by appellant, and had the same controversy with appellee as exists, appellee would not be competent to give the evidence in question, for if he was permitted to do so he might thus induce a verdict for himself, and deprive the heirs of their land. The effect of his evidence is exactly the same

as to the rights of the appellant, as it would have been on the right of the heirs of Eve in the supposed case. His evidence would tend to establish the corner claimed by him in the one case as in the other. The testimony was original in character to the prejudice of appellant, who was claiming under and through the decedent, whose statements and acts are proven. It was incompetent. (*Whalen v. Nisbet*, &c., 95 Ky., 464.) This conclusion is supported by the cases of *Turner v. Mitchell*, &c., 22 Ky. Law Rep., 1784; *Townsend, &c. v. Wilson, &c.*, 24 Ky. Law Rep., 1286.

It is urged that appellant is not entitled to make the question here as to the competency of the evidence, because he moved to exclude all the evidence given by the appellee, some of it being competent. While he made a motion to exclude, he had made his objection to the admission of the evidence when offered, and excepted to the ruling of the court in admitting it. It is recited in the bill of exceptions that "the plaintiff objected to all this evidence when called for, and the court overruled the objection and he excepted, and after it was heard the plaintiff moved the court to exclude it from the jury." So he had preserved the right to have the action of the court reviewed here before he made the unnecessary motion to exclude the evidence. The language of the motion shows he only moved to exclude the part of the evidence objected to as incompetent. But if he had moved to have excluded all the testimony of appellant after objections and exceptions to its admission, he would not have thereby forfeited the right he had previously reserved. Neither the case of *Worthley's Adm'r. &c. v. Hammond*, 76 Ky., 512, or *Williams' Ex'or. &c. v. Williams, &c.*, 90 Ky., 34, hold to the contrary. In neither of these cases had there been any objections to the admission of the evidence, only to the competency of the witness. The appellant's objection should have been sustained to the evidence of appellee which we have quoted.

The judgment is reversed for proceedings consistent with this opinion.

CUMBERLAND TELEPHONE AND TELEGRAPH CO. v. WARNER.

(Filed February 26, 1904—Not to be reported.)

1. Damages—A verdict for \$1,000 damages to one who was injured while driving along a public highway by a telephone pole falling on him as a result of workmen stretching the wires so taut as to cause it to break, the evidence conducing to show that his injuries were permanent.

2. Same—Instructions—An instruction using the word skillful, defining ordinary care and negligence, was not objectionable in an action to recover for injuries sustained by a falling telephone pole, the business of operating a franchise along a highway necessarily requiring a certain amount of skill and prudence.

Willis & Todd and Turner & Turner for appellant.

W. B. Moody and W. O. Jackson for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Barker.

The appellant, at the time the cause of this controversy arose, was operating a franchise, which its name indicates, along the right of way of the

turnpike road leading from Eminence to New Castle, in Henry county, Kentucky. On the 9th day of October, 1902, its employes were engaged in stretching its wires, so as to take the slack out of them, and at the same time appellee was driving a two-horse wagon along the pike in question; when immediately opposite one of the poles of appellee, without any warning, it broke, about seven or eight feet from the ground, under the tension of the wires, which were being drawn taut, and was thrown with great force into the highway, striking appellee upon his head, knocking him off the seat of the wagon into the trace chains of the harness upon which he rested, his foot being caught in one of the wheels, and severely straining and injuring his leg. The gentleness of his team, coupled with the fact that they became entangled in the wires thrown into the highway, perhaps saved appellee from being killed.

To recover damages for the injury received this action was instituted. The issues raised by the pleadings are the negligence of the appellant in maintaining an imperfect and dangerous pole on the highway, and the extent and permanency of appellee's injury. A trial resulted in a verdict in favor of appellee in the sum of \$1,000, of which appellant is now complaining.

The first error alleged is instruction No. 1, given by the court to the jury, defining ordinary care and negligence, which is as follows: "Ordinary care is that degree of care usually exercised by ordinarily prudent and skillful men in like occupations and under circumstances similar to those proved in this case. The failure to exercise such care is negligence."

The objection of appellant to this instruction is to the addition of the word "skillful." We are not deeply impressed with this objection. It may be true that the word is not ordinarily used in the instruction defining ordinary care and negligence, but it does not follow that it is technically incorrect for that reason. The business of operating a franchise along a highway by means of agencies which may endanger the lives or limbs of the traveling public necessarily requires a certain amount of skill, as well as prudence, in carrying forward the business in hand. One may be prudent without being skillful; or skillful without being prudent. It would appear that the operation of a franchise, such as the one under consideration, with due regard to the safety of the public, requires at least an ordinary amount of both prudence and skill, and while the addition of the word "skillful" may be unusual, we are inclined to believe that it is technically correct. This identical instruction was passed upon in the case of the Southern Railway Co. in *Kentucky v. E. V. Otis' Adm'r*, in an opinion of this court, delivered February 9, 1904, in which it is said in regard to the addition of the word "skillful" complained of here: "This word is not commonly used by the courts in the definition of ordinary care, but it is hard to distinguish the difference between the instruction as given by the court and the meaning of the ordinary definition. By this instruction no especial skill was required. Ordinary skill is supposed to be possessed by ordinary men in conducting the business in which they are engaged. The word 'skillful,' as used, did not add a new, distinct or different standard, but only required what should be required of ordinary men in the business in which they are engaged."

The second error complained of is that the court submitted to the jury the question of the permanency of appellee's injury, it being insisted that the

Evidence in the case did not authorize it. The case of Louisville Southern Railway Co. v. Minogue, 90 Ky., 869, is relied on in support of this position. An examination of the opinion shows that the evidence on this subject was merely conjectural. The court said: "While absolute certainty as to the result of an injury should not be required, yet a mere conjecture, or even a probability, does not warrant the giving of damages for future disability, which may never be realized. The future effect of the injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury. This was not done in this case. The evidence shows that the appellee is as likely to entirely recover, and perhaps in a short period of time, as she is to be permanently affected by the injury."

In the case at bar the evidence on the question of the permanency of the injury is contained in the testimony of three physicians. Dr. McGinnis said: "In this case I almost know he will never be as stout as he was formerly. If he ever gets the same kind of twist as he got before, it will throw him back into the same condition. Just the stepping on a cob, and he will have trouble much more easily than if it had not been sprained. * * * I think it will be a long time, if he gets well at all. He may get so that he will be comfortable, and he can now do a right smart work; he is not wholly unable to work, but if he should twist his back again he would suffer the same intense pain."

Dr. Ellison said: "Yes, sir, I am inclined to think Mr. Warner is permanently injured, should he continue his mode of life he is living now as a working man."

Dr. Nutall, who was introduced by appellant, in answer to a question said: "Well, if that pole struck him a severe blow, I take it for granted the tension of the wires is so very great, and there being quite a number of them, the tension must have been very great that broke the pole and pulled it into the middle of the road, and I take it for granted if it struck him any place it knocked him almost into eternity, and might have upset him some; and from the combination of circumstances, if all this be the case, it is liable to injure him permanently. A man fastened in a wagon and struck by a telephone pole might as well be shot by a cannon ball."

This evidence shows, as certainly as the testimony of medical men not possessed of the power of prevision can, that appellee was permanently injured by the accident which happened to him, and was far beyond the evidence which was given on the same subject in the Minogue case. The witnesses, who are denominated by appellant's counsel as experts, it seems to us, fairly qualified themselves on the subject about which they were interrogated, although we are not prepared to admit that their evidence is such as might be denominated expert testimony. The accident which happened was caused by the breaking of a defective pole; that it was defective is shown beyond question. The real issue on this point was whether or not the defect could have been discovered by ordinary diligence. Both of these witnesses saw the pole, and the subject of their testimony was as to the difficulty or ease in discovering the defect; and a careful study of this testimony, as a whole, results in the belief that it was competent for the purpose for which it was introduced.

The remaining error complained of is the permission given by the court to

appellee's counsel to ask one of appellant's witnesses, on cross-examination, as to the relative size of appellant's poles and those of the Home Telephone Co. along the same highway. A comparison of the poles of the two companies, perhaps, did not serve to throw any light upon the issues being tried, but the answer of the witness, if not favorable to appellant, certainly was not detrimental to its interest.

For these reasons the judgment is affirmed.

NORMAN, &c. v. CENTRAL KENTUCKY ASYLUM.

(Filed February 26, 1904—Not to be reported.)

1. Lunatics—Void judgment—Where the inquest of lunacy was void because there was no service of process, as provided by statute, an action by an asylum, where the lunatic was confined, for maintenance can not be maintained, and a judgment against such person was void in such action.

2. Limitation of actions—Where an action was finally commenced by the filing of an amended petition and the issuance of process, the running of the statute of limitation ceased at that time.

Percy N. Booth and S. B. Kirby for appellant.

Holt & Alexander for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

Joanna C. Norman was, on the 15th day of July, 1897, by an inquisition held in the Jefferson Circuit Court, Criminal Branch, adjudged to be insane, and was committed, by judgment of the court, to the keeping of the Central Kentucky Asylum as a pauper lunatic, where she has been confined ever since.

Subsequently she seems to have inherited a small estate, consisting of real property, situated in Louisville, and on the 9th day of April, 1901, the appellee filed its petition in the Jefferson Circuit Court, Chancery Division, where it sought to subject the estate of the lunatic to the payment of her board and maintenance, at the rate of \$200 per year, under the provisions of section 257 of the Kentucky Statutes.

To this proceeding the Louisville Trust Co., which had been appointed, by order of the Jefferson County Court, committee of the lunatic, was made a party, and filed an answer, putting in issue the right of appellee to charge the lunatic at the rate of \$200 per year for her board and maintenance, and contending that \$150 per year was all that could be lawfully charged against her. Subsequently it seems to have been discovered that Joanna C. Norman had not been served with summons in the proceeding by which she was adjudged to be a lunatic, and was not before the court at the time of the adjudication, and that, therefore, under the principle announced in *Steward v. Taylor*, 23 Ky. Law Rep., 577, and *Taylor v. Moore*, Id., 1572, the judgment was void; whereupon the appellee, on the 27th day of January, 1903, filed what it called an amended and supplemental petition, wherein it sets forth all of the facts as herein stated, and alleges that it had supported and maintained the lunatic for six years, caring for and furnishing her with every-

thing necessary for her comfortable support and maintenance; that these things were necessary for the comfort and health of the patient, and that she thereby became indebted to it in the sum of \$150 per annum for her board and maintenance during the period elapsing from the date of her reception by appellee until the filing of the amended and supplemental petition.

Prior to the filing of this pleading the action, so far as appellee was concerned, was based upon the judgment rendered in the inquisition of lunacy; but this was a necessary and complete abandonment of all procedure based upon that judgment, because, being void for want of process, its effect was as if it had not been rendered. On the 29th day of April, 1908, an agreed order was entered, by which all pleadings filed prior to January 27, 1908, were withdrawn, and stricken from the files. The amended pleading, setting up a cause of action based upon the common-law remedy for necessities furnished the lunatic, was, by this order, the beginning of this action. The summons issued upon this pleading was executed by delivering a copy to the Louisville Trust Co., as committee, and a copy to the lunatic in person.

Section 2151 of the Kentucky Statutes is as follows: "A committee shall not be appointed for the idiot, lunatic or person charged to be imbecile or incompetent, who is a resident of this Commonwealth, unless he has been heretofore, or may hereafter be, found to be such by the judgment of the circuit or county court of the county of his residence, upon the inquest of a jury, as provided in this chapter." * * *

Section 53 of the Civil Code of Practice provides that "if the defendant be of unsound mind the summons must be served on him and on one of the following named persons, if residing within the county, viz., on his committee; or if he have no committee, on his father; or if he have no father, on his guardian; or if he have no guardian, on his wife; or if he have no wife, on the person having charge of him." * * *

Both the committee and the guardian ad litem, who have been appointed to defend for the lunatic, filed answers to the amended and supplemental petition; that of the guardian put in issue all of its allegations, and pleaded, affirmatively, the five years' statute of limitation. Upon final hearing the chancellor rendered a judgment in favor of appellee for \$900, being at the rate of \$150 per year for the six years. From this judgment this appeal is prosecuted. The first question presented is whether or not the lunatic was properly before the court on the amended and supplemental petition.

Inasmuch as the inquest of lunacy was void for want of proper process, it follows that there could be no appointment of a committee for her. (Section 2151, Kentucky Statutes, supra.) As she had no lawful committee, the service of summons on the Louisville Trust Co., as committee, was void; and, as there was no service on any of the other persons enumerated in section 53 of the Code, it follows that the defendant was not before the court, and the judgment against her is void. As this case must be reversed for this reason, we deem it proper to point out that the evidence in nowise supports the judgment on the issues raised by the answer of the guardian ad litem to the amended and supplemental petition. This pleading controverted the allegation of the lunacy of Joanna C. Norman, and the entire evidence on this point is contained in the following answer, by the superintendent of appellee, to a question propounded to him: "I have only known her for about

three years, and in that time her physical condition has been fairly good; but her mental condition has incapacitated her from labor of any kind."

The judgment covers the keep and maintenance of Joanna C. Norman for six years; during three of them the superintendent knew nothing of her whatever; and as to the remaining three he does not state that she was a lunatic at all, but simply that her mental condition incapacitated her from labor of any kind. While the lunatic was liable under an implied contract for necessaries furnished her (*Coleman v. Frazier*, 3 Bush, 800; *Pearl v. McDowell*, 3 J. J. Marsh., 858), it is essential that the lunacy should be established by sufficient evidence; that the articles furnished were necessary for her comfort, and the charge therefor reasonable.

This action, as finally presented, was commenced by the filing of the amended and supplemental petition and the issuance of process, and the running of the statute of limitations ceased at that time.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

HALL v. HALL.

(Filed February 28, 1904—Not to be reported.)

Divorce and alimony—Excessive judgment—Where the husband is well advanced in years, in an action by the wife for divorce and alimony, where the evidence is conflicting, the estate of the husband being worth only about \$3,500, a judgment allowing the wife alimony of \$2,000, this amount and the costs reaching about \$2,500, is excessive, and out of proportion to the ability of the husband to pay.

Lee & Hester for appellant.

Jas. F. Webb and R. E. Johnston for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Rose Hall, brought this action against her husband, W. S. Hall, under section 2124 of the Kentucky Statutes for alimony and maintenance upon the ground of cruelty, settled aversion and failure to make suitable provision for her support. At the same time she sued out a general attachment against his property. The answer was a traverse of all the affirmative allegations contained in the petition. Upon final submission of the case the trial court decided that appellee was entitled to a judgment of divorce *mensa et thoro*, and for \$2,000 alimony, and that all the real estate of appellant be sold to pay same, with interest and cost, including an allowance of \$150 to her attorneys. Appellant, W. S. Hall, asks a reversal of the judgment for alimony and the allowance to appellee's attorney. It appears from the pleadings and proof that appellant and appellee were married on the 1st day of April, 1871, and lived together as husband and wife from that time in the same neighborhood until the 16th day of June, 1902, when appellee voluntarily abandoned the home of appellant, taking with her their youngest daughter and the bulk of the household furniture. It is developed by the proof that for several years prior to appellee's withdrawal from the home of her husband that they had lived very unhappily together, and that

she had repeatedly threatened to take the step which she finally did. The main ground of complaint was that her husband had transferred the affection due to her as his wife to another woman, and smarting under this real or fancied injury, she had grown unhappy, and was habitually disagreeable to her husband in their domestic relations, and often gave vent to her feelings in abusive talk to and about him to their neighbors and friends. Three children were born to them, one, now a married woman about thirty years of age, a son about grown, and a daughter fifteen years of age. The older daughter and son testified in behalf of the father, the youngest daughter being the chief witness for the mother. It would be unprofitable to review in detail the various criminations and recriminations proven in the record. The sole question we have the power to consider upon this appeal is the reasonableness of the amount allowed to appellee by way of alimony. It is shown that appellant is a farmer by occupation, well advanced in years; that he owns a tract of eighty acres of land worth about \$1,600, and four-fifths of a tract of one hundred and twenty-five acres, the remaining one-fifth belonging to his wife, worth about \$1,500, and about \$250 or \$300 worth of personal property, consisting of two horses, a cow, some hogs, and household plunder, all his property being worth (in the aggregate not exceeding \$3,500. There is some evidence in the record conducing to show that he may have some little money. This evidence is, however, very vague and uncertain. It also appears that he had paid to appellee as temporary alimony \$175, and that the judgment in this case in favor of appellee, with interest and cost of the suit, which is very large, including the allowance to her attorneys of \$150, will approximate \$2,500. In other words, appellant is adjudged to pay a sum equal to two-thirds of his entire estate, and in default of payment thereof his lands are directed to be sold by the master commissioner. The petition in this case did not pray for a divorce, but only for alimony and maintenance, and whilst the judgment decrees divorce from bed and board, this judgment under the statute does not bar either dower or appellee's distributable rights in appellant's estate in the event she should survive him. It seems, therefore, entirely probable that his entire estate would be swept away if the judgment were enforced. There is no fixed rule laid down in this State for determining the amount of alimony which should be allowed, but it is manifest that the allowance made by the trial court is grossly excessive and out of all proportion to the residue of appellant's estate or his ability to pay. Appellant owns one hundred and eighty acres of land, the two tracts are contiguous, and both have dwelling houses on them. We think, therefore, that appellee should have been adjudged by way of alimony one-third of the one hundred and eighty acres, or sixty acres, so laid off as to include one of the dwelling houses, if possible, and adjoining the twenty-five acres owned by her, for her use and occupation during her life, or whilst living apart from her husband, one horse and one cow in lieu of the judgment for \$2,000, and that the attorneys' fee allowed her counsel should be reduced from \$150 to \$100.

For reasons indicated the judgment is reversed and cause remanded for proceedings in conformity with this opinion.

1850 BRAMBLETT, & CO. V. DEPOSIT BK. OF CARLISLE.

BRAMBLETT, & CO. V. DEPOSIT BANK OF CARLISLE, KY.

(Filed February 26, 1904—Not to be reported.)

Banks—Interest—Limitation—Where a note was executed to a bank, payable twelve months after date, where there was no interest reserved, the note being in lieu of an old one in which the interest for the ensuing year was included, it was not placed upon the footing of a foreign bill of exchange pursuant to section 483, Kentucky Statutes, and the five year statute of limitation does not apply.

Kennedy & Dickson and Lewis Apperson for appellants.

Wood & Ross and John I. Williamson for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted on a note which reads as follows:

"\$2,322.80.

Carlisle, Ky., January 25, 1893.

"Twelve months after date we promise to pay to the Deposit Bank of Carlisle, Ky., or order, \$2,322.80, for value received, negotiable and payable at the Deposit Bank of Carlisle, Ky., with interest at the rate of 8 per centum per annum after maturity until paid. The drawers and endorsers hereof waive presentment, protest and notice of dishonor.

"BRAMBLETT & GIBSON."

For some years previous to the date of the execution of the note in suit Bramblett & Gibson became indebted to the Deposit Bank of Carlisle by overdrafts for which they executed a note. The note was renewed from time to time, in which the various amounts of interest which had or were to accrue thereon were embraced. On January 25, 1902, the note amounted to \$2,150.80, and on that date the note in suit for \$2,322.80 was executed, payable twelve months after date, in which was embraced \$172 interest for the ensuing year. This was computed on the note for \$2,150.80. The appellants pleaded that under the charter of the bank the note was placed upon the footing of foreign bills of exchange, therefore, the five-year statute of limitation bars a recovery on the note. It will be observed that the note in question is made payable to the order of the bank. The question here is, was the note discounted in the meaning of the special provision of the charter of the bank? It is not claimed for appellant that the note was discounted in contemplation of section 483, Kentucky Statutes, which reads as follows: "Promissory notes, payable to any person or to a corporation, and payable and negotiable at any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which shall be endorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks in this Commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange."

The phraseology of the statute differs from that of the charter of appellee. In construing the provision of the statutes this court in *Louisville Banking Co. v. Buchanan*, 107 Ky., 125, held that the note could be placed upon the footing of a foreign bill of exchange under the provision of the statute when three separate distinct facts existed: First, it must, by its terms, be made

payable to a person or corporation at a bank incorporated under a law of this Commonwealth, or of the United States; second, it must be endorsed to the bank by the payee or holder thereof; third, it must be discounted by the bank taking out the interest in advance and paying the balance of the proceeds of such note to the vendor. The court gave the statute the same construction in *Magoffin v. The Boyle National Bank of Danville*, 24 Ky. Law Rep., 585. The General Statutes contain a provision substantially the same as section 483 of the Kentucky Statutes, and this court, in *Nicholson, &c. v. National Bank of New Castle*, 92 Ky., 251, and *Stevens v. Gregg*, 89 Ky., 466, interpreted the General Statutes the same as it has section 483, Kentucky Statutes.

The provision of appellee's charter under consideration reads as follows: "This corporation shall have the right to employ any portion of their capital stock in the purchase or discount of foreign and domestic bills of exchange and promissory notes made negotiable and payable at the office of said company, or at any of the banks or branches of banks chartered by this Commonwealth or national banks, and any such promissory notes purchased or discounted by said corporation shall be, and they are hereby, placed on the same footing with foreign bills of exchange, and remedy may be had thereon jointly or severally against the drawers and indorsers, and with like effect."

This court, in *Eastin, &c. v. Third National Bank of Cincinnati*, 102 Ky., 64, had under consideration a clause of the charter of the New Farmers Bank of Mt. Sterling, which was almost identical with appellee's charter which we have quoted. It appeared in that case that T. H. Eastin and L. D. Wilson presented to the New Farmers Bank at Mt. Sterling their promissory note for \$3,000, payable to its order six months after date. The bank accepted the note and retained the \$120, which was 8 per cent. interest on the \$3,000 for six months, and placed to Wilson's credit \$2,280. The court held that the note was discounted, and in so holding, said: "So the case turns upon what is meant by discount. The bank deducted the \$120 as interest from the amount lent at the time the loan was made; in other words, took the interest in advance at the rate of 8 per cent. for six months. In *Bouvier's Law Dictionary* discount is defined to be 'interest reserved from the amount lent at the time of making a loan.' The *Century Dictionary* defines discount in finance 'to purchase or to pay the amount of in cash, less a certain per cent., as a promissory note, bill of exchange, etc., to be collected by the discounteer or purchaser at maturity.' * * * Bank discount is simple interest paid in advance and received, not on the sum advanced in the purchase, but on the amount of the note or bill. Counsel for appellant cites *Flexner v. Bank of the U. S.*, 8 Wheaton, 461, to sustain his position, but we are of the opinion that it sustains the opposing view. The court said: 'What is it to discount? Has it not a right to take an evidence of the debt which arises from the loan? If it is to discount, must there not be some chose in action or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means *ex vi termini* a deduction or draw back made upon its advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank.' We think that when

the appellants presented the note to the New Farmers Bank, and the bank retained the interest and credited Wilson with the balance of the note, that the bank discounted it."

In the case at bar there was no interest reserved. In fact there was no money loaned from which it could be reserved. It was simply the execution of a new note for an old debt, in which was included the interest for the ensuing year. It was not a discounting of a note under the definition given in the Eastin case, hence was not placed upon the footing of a foreign bill of exchange, and the fifteen, and not the five, years' statute of limitation applies.

The judgment is affirmed.

HAVEN v. DAUGHERTY'S ADM'R.

(Filed February 26, 1904—Not to be reported.)

Lands—Liens—A judgment ordering a sale of land to satisfy lien debts will not be disturbed where it does not appear that it can not be advantageously divided.

W. H. Barnes for appellant.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted on four promissory notes, aggregating \$170, which had been executed for the purchase money on fifty acres of land. Three of the notes had matured; the other had not. The court gave judgment for the amount of the notes which had matured, and ordered a sale of the entire tract to pay the judgment.

There are no other liens upon the land, and all of the notes were held by the plaintiff. A reversal is sought upon the ground that the land is not susceptible to division without material impairment of its value. This fact is averred in the answer, but accompanied with a statement of the reason of the pleader for such conclusion, to wit: "The limited number of acres contained in said tract and its being of no considerable value."

Subsection 3, section 694, provides that where liens are held by same party the court may order the sale of enough of the property to pay the debt then due, unless it appears that the land is not susceptible of advantageous division. There is no question but what the court should refuse to order the sale of land to satisfy a part of a lien debt which is due where the land is not susceptible of advantageous division or for some other reason that the sale would cause a sacrifice of the property, or seriously prejudice the interests of the defendant. Where a reason is given in an answer for the averment that the land is not susceptible of advantageous division the court will determine whether the reasons given will support the averment. If the reasons given show that the conclusion of the pleader is erroneous, the court will so adjudge, just as it has adjudged that a house and lot can not be advantageously divided (*Faught v. Henry*, 13 Bush, 471), and that a tract of thirty acres of land can be advantageously divided. (*Sears v. Henry*, 18 Bush, 414.)

Fifty-acre tract may be divided, and the fact that it is of little value does not indicate it can not be advantageously divided.

Judgment is affirmed.

CRAIG v. WELSH, HACKLEY COAL AND OIL CO.

(Filed February 26, 1904—Not to be reported.)

1. Practice—Where the lower court dismissed a petition and adjourned for the term, it had not jurisdiction to disturb a judgment except in a direct proceeding for a new trial.

2. Same—An amended petition can only be filed in a pending action or proceeding.

J. H. Wilson for appellant.

J. Smith Hays for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Paynter.

The appellant sued appellee in the Knox Circuit Court. The court sustained a demurrer to the petition, and dismissed it. An appeal was prosecuted to this court, and the judgment was affirmed. Afterwards appellant moved to redocket the case, and tendered and offered to file an amended petition, and the court overruled both motions. Complaint is made of that action of the court.

When the lower court dismissed the petition and adjourned for the term, it had no control over the judgment. It had no jurisdiction to disturb it, except in a direct proceeding (if at all) for a new trial. This was not sought. At the time the motions were made the judgment was in full force and effect. The action was not pending in court, as it had been dismissed. The petition had lost its efficacy, and did not exist for amendment, as the action in which it was filed as the initial step was no longer pending. An amended petition can only be filed in a pending action or proceeding. This conclusion is supported by *Houston v. Kidwell*, 12 Ky. Law Rep., 887.

The judgment is affirmed.

YAGER v. NATIONAL BUILDING AND LOAN ASSOCIATION.

(Filed February 26, 1904—Not to be reported.)

Building and loan association—In a defense to an action by a building and loan association on the idea that it was not "a going concern" at the time of the institution of the action, the plea of the defendant in setting up this defense being insufficiently pleaded, the trial court erred in sustaining a demurrer to it.

W. B. Gaines and C. P. Motley for appellant.

J. G. Covington for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

L. R. Porter borrowed of the appellee the sum of \$2,500, for which he executed and delivered his note. At the same time he subscribed for twenty-five shares of appellee's stock, of the par value of \$100 each, and by the terms of his contract agreed to pay monthly the sum of \$15 as dues upon this stock, \$12.50 interest, and \$8.75 cents premium, until such time as the monthly pay-

ments and dividends accruing on the stock should equal the sum of \$2,500, at which time the note was to be deemed paid.

Simultaneously with the execution and delivery of this note Porter and wife executed and delivered to appellee a mortgage upon several pieces of real estate in Bowling Green, Ky., one of which is known as lot No. 23, and which, as will hereafter appear, is involved in this litigation. Subsequently, on the 25th day of April, 1893, L. R. Porter sold lot No. 23 to appellant, for the sum of \$1,509.50, \$250 of which was paid in cash; for \$759.50 he executed and delivered his promissory notes, and for the balance of \$500 he agreed to, and did, assume the payment of \$500 of the mortgage debt due from Porter to the appellee, to be paid in monthly installments of \$7.25, in the way of dues, interest and premiums, until the full sum of \$500 should be paid to appellee.

After the deed from Porter and wife to appellant was received by him he made seventy-six monthly payments of \$7.25 each, and then, on July 31, 1898, assuming that the debt to appellee was paid, he gave it notice that its debt was extinguished, and he would pay no more, demanding that it release the lien it held upon lot No. 23, which was refused; thereupon he instituted this action in equity, setting forth, substantially, the foregoing facts, and praying that the cloud on his title, caused by the unreleased lien in question, be removed.

The petition, among other things, contains this allegation: "That it was a part of the consideration of said transfer from said Porter to the plaintiff (appellant) that the plaintiff was to assume to pay said debt to the defendant (appellee) in installments of \$7.25 each month to the defendant in the way of dues, interest and premiums on said mortgage debt of \$500 so long as same should remain unpaid; that said agreement between said Porter and this plaintiff was sanctioned by and agreed to by the defendant, and thereupon defendant accepted plaintiff as a stockholder in said association, and said Porter transferred to plaintiff his said shares of stock, which was by defendant transferred on its books to this plaintiff."

The petition also contains the usual plea of usury which occurs between building and loan associations and their borrowing members when the time of settlement arrives.

The answer denies the usury, pleads that it is not a "going concern," and is doing no business except winding up its affairs, being in liquidation; "that on the 8th day of October, 1901, at a regular annual meeting of the stockholders of defendant, it was determined that defendant should go into voluntary liquidation, and the directors of defendant were authorized and directed to convert all of the assets into cash, and distribute the proceeds to the stockholders as rapidly as possible;" and by way of counterclaim, it states the account existing between it and appellant, showing him to be indebted to it in the sum of \$386.72, with interest at the rate of 6 per cent. per annum from July 31, 1898, until paid, for which it prayed judgment, and for the enforcement of its mortgage lien on lot No. 23. Appellant filed a reply, and an amended reply, to which general demurrers were sustained, and which were afterwards formally withdrawn.

Afterwards, on the 4th day of June, 1903, appellant filed what he calls a "re-reply" to the answer and counterclaim of appellee, this pleading being

in lieu of the reply and amended reply withdrawn. The only allegation of this last pleading which we deem necessary now to notice is that which puts in issue the allegation of the answer, that appellee, prior to the institution of this action, had, by resolution of its stockholders, gone into liquidation. A general demurrer to the re-reply was filed and sustained; whereupon the appellant declining to plead further, his petition was dismissed, and a judgment rendered in favor of appellee, as claimed in its answer and counterclaim, for \$336.72, with interest from July 31, 1898, until paid, and enforcing the mortgage lien. Except the issue as to appellee's having gone into liquidation, the questions raised by the pleadings in this case are of law. Appellant, by his pleadings and the exhibits, shows that he assumed the position of Porter in regard to the \$500 of the latter's debt to appellee, and that stock in appellee, representing this sum, was set aside to him; also that he was accepted and received as a stockholder, and stood, with reference to it, exactly as Porter had stood before the transfer; in other words, he became a borrowing member to that extent, and entitled to settle with appellee precisely as Porter would have had to settle, had he not entered into the contract with him.

The question then arises, how was appellant to settle with the appellee? The rule by which settlements between borrowing members and building and loan associations are made is so well established as to need no citation of authority now. If the settlements are made while the corporation is a "going concern," then the debtor is entitled to credit on his debt by all of the sums paid by him, whether as interest, premiums or dues, under the rule of partial payments. It having been assumed by the court that his undistributed dividends will offset the dues paid; on the other hand, if the corporation is in liquidation, then he is entitled to credits only by premiums and interest paid, his rights as to the dues paid by him being reserved until the affairs of the corporation are finally adjusted. This rule is conceded by the learned counsel for appellant; but he contends, first, that appellant had severed his relation with appellee on the 31st day of July, 1898, at which time he ceased to make payments. As it appears, however, that at this time, according to his own calculation, he still owed appellee \$75, which he neither paid nor tendered, he could not be considered as having withdrawn as a member of the corporation. (*Globe Building and Loan Association v. Spillman*, 23 Ky. Law Rep., 1431.)

Appellant further contends that the corporation could not go into voluntary liquidation, so as to defeat his right to a settlement with it as a "going concern," and thus obtain credit, not only for the interest and premiums paid, but also for the dues. This, as a proposition of law, was decided adversely to him in the case of *Eminence Building and Loan Association v. Bohannon*, 31 Ky. Law Rep., 1549.

The remaining question for adjudication is whether or not appellee was a "going concern" at the time of the institution of this action. It does not appear under what authority appellee was incorporated, and we are, therefore, unable to determine how it could be dissolved. Assuming for the moment that it was incorporated under the present corporation law, the allegations of the answer, even if undenied, are not sufficient to show that it was lawfully placed in liquidation. Section 561, Kentucky Statutes, author-

izes the dissolution of any corporation organized under the present corporation law, by the consent in writing of the owners of a majority of its shares of stock, unless otherwise provided in the articles of incorporation, or amendments thereto. The answer does not allege that the resolution which is pleaded was passed by a majority of the owners of the shares of stock of the corporation, and the imperfect allegation which is made on this subject is placed in issue by the reply.

The question as to how a corporation may go into liquidation is exhaustively discussed in the case of Economy Loan Association, &c. v. Paris Ice Co., 24 Ky. Law Rep., 107. This opinion makes it unnecessary to further discuss this phase of the question. The manner of settlement between appellant and appellee turns upon the question as to whether or not it was a "going concern" at the time it was made. The judge of the trial court evidently entertained the view that appellee was in liquidation, and the judgment rendered was based upon this view. His attention seems not to have been called to the fact of the insufficiency of appellee's pleading on this question, nor to the further fact that the allegation which was made as to the liquidation was placed in issue by the reply. Had his attention been so directed he would doubtless have overruled the demurrer to the first paragraph of the reply, or carried it back to the insufficient pleading.

For these reasons the judgment is reversed for proceedings consistent with this opinion.

SNELLING'S ADM'R v. LEWIS.

(Filed March 1, 1904—Not to be reported.)

New trial—Upon an application for a new trial where it appeared that the party applying lived sixty miles from the courthouse; that his attorney upon whom he relied to manage his suit had died without his knowledge, and that he had not learned of his death until after the judgment against him had been rendered, and that his other attorney was sick and unable to be present at the trial, it was error to sustain a demurrer to a petition setting up these facts.

D. S. Trumbo and R. Gudgeon & Son for appellant.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Hobson.

On May 26, 1886, John F. Alexander, as administrator of Frank Snelling, filed his petition in equity in the Morgan Circuit Court against William H. Lewis, &c., to recover on a note executed by Lewis to his intestate dated May 20, 1882, and due on the 19th day of the next June, for \$657, the balance of the purchase price of land sold Lewis by the intestate. He also sought to enforce the lien on the land. He admitted the payment of \$500 on the note on October 11, 1882. The defendant answered, alleging that he had also paid on the note the sum of \$338 on May 26, 1882, and as evidence of the payment filed with his answer the following receipt:

"May 26, 1882. Received of W. H. Lewis eight steers at \$330. Fifty dollars and \$18 for back taxes on the land that this money was paid for in the year 1875 on the same land that this money is paid on.

"FRANK SNELLING,
"R. W. D. HUNT,
"T. J. JONES."

The answer was filed at the June term, 1896, and sixty days was given to plaintiff to file reply. No reply having been filed, or none appearing to have been filed, on the second day of the November term, 1897, the case was submitted and a judgment was entered in favor of the defendant on his counterclaim for \$27.28, with interest from June 11, 1882, he having pleaded that his two payments more than paid the note by this sum. At the March term, 1898, the plaintiff filed affidavits and moved the court to set aside the judgment and grant him a new trial on the ground that the judgment had been entered by a casualty preventing him from preparing his case on the merits. The court properly overruled this motion as a final judgment had been rendered which could be opened only by petition. Thereupon the plaintiff filed this suit, alleging the facts stated, also the following: That at the time of the institution of the suit he employed as his counsel Hon. John P. Salyer, then a resident of Morgan county, and an efficient attorney of the bar of Morgan county, who prepared and filed the suit; that the plaintiff also employed as associate counsel D. S. Trumbo of Bath county; but that the engagement of the counsel was that Salyer was to conduct the case in court, prepare the pleadings and take control of the action; and that Trumbo was to attend to the taking of the testimony the plaintiff might want taken in Bath county where the plaintiff's witnesses resided; that before the expiration of the sixty days given him to file reply the plaintiff prepared a reply and sent it to his attorney, Salyer, to be filed; whether the reply was filed or not he did not know, but that the reply was not on file with the papers of the case; that the plaintiff then resided, and still resides, in Bath county, nearly sixty miles from the Morgan county courthouse; that his counsel, Salyer, died some time in the month of March or April, 1897, and the plaintiff did not learn of his death until the commencement of the November term, 1897, of the court; that at this term of court, and for some time before, Trumbo, his other counsel, was sick, and unable to attend that term of the Morgan Circuit Court; that the case was submitted and heard without any representation by counsel or otherwise on his behalf; that he had depended upon his counsel, Salyer, to conduct his case in court; that by some unavoidable calamity or misfortune his counsel failed to receive and file his reply to the answer, which was a traverse of its affirmative allegations, and cast the burden of proof on the defendant to support his plea of payment of the note sued on; that the death of his counsel, without his knowledge, his failure to file the reply, and the subsequent submission of the case for trial with the answer uncontroverted and when he was not represented by counsel, was such an accident and surprise as he could not have guarded against with ordinary prudence. He also alleged that the \$398 for which the receipt filed with the answer was given were not paid upon the note sued on, but upon another note; that the defendant still owed the balance of the debt, and after the death of his intestate had admitted that he owed it, and promised and agreed to pay it to him. The court sustained a demurrer to the petition, and dismissed it. The plaintiff appeals.

By section 518 of the Civil Code the court rendering a judgment shall have power after the expiration of the term to vacate it or modify it for unavoidable casualty or misfortune preventing the party from appearing or defending, and in construing this section the court has laid down the rule that a

new trial may be had where the casualty or misfortune preventing the party from appearing or defending is such as ordinary care would not have guarded against. (*L. & N. R. R. Co. v. Bickel*, 97 Ky., 222; *White v. Richards*, 20 Ky. Law Rep., 1369; *Vittetow v. Ames & Co.*, 21 Ky. Law Rep., 225.)

In the case before us, if the reply had been filed by the attorney, the burden of proof would have been on the defendant to make out his own defense, and the case could not have been submitted and judgment taken for the defendant on the pleadings before he had taken any depositions to sustain his defense. The plaintiff lived sixty miles from the court, and naturally relied upon his attorney, Salyer, to manage his case, it being a suit in equity. The attorney had died without his knowledge, and he did not learn of his death until the commencement of the November term of the court, and on the second day of the term the case was submitted, his other attorney, Trumbo, by reason of sickness, not being present at that term of the court.

On demurrer the allegations of the petition must be taken as true, and it is, therefore, conceded that the payment pleaded in the answer was paid on another debt; and in view of the geographical situation of the parties, the death of the leading counsel, and the sickness of the other at that term of court, it seems to us there was such surprise and misfortune in the case being submitted without a reply being filed that a new trial should be granted, if the allegations of the petition are sustained by the proof.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition and for further proceedings consistent herewith.

MILLER v. BAKER.

(Filed March 1, 1904—Not to be reported.)

Attachment bond—Action on—In an action to recover upon an attachment bond after an attachment had been discharged, while there was some conflict of evidence, the verdict being supported by it and the instructions conforming to the law, the judgment of the trial court will not be disturbed.

D. E. Castleman for appellant.

G. M. Rogers for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Hobson.

Appellant filed suit against appellee to recover \$2,530, and took out an attachment which was levied on some land belonging to appellee. Defense was made to the action and in addition the grounds of attachment were controverted. The defendant's answer was held insufficient as to the debt, and judgment was entered in favor of the plaintiff therefor, but the evidence being heard on the grounds for attachment, the attachment was discharged on the ground that the defendant was, at the institution of the suit, a resident of Kentucky, and had sufficient property in the State subject to execution to pay the plaintiff's debt. Thereupon this suit was filed on the attachment bond to recover damages for the attachment, and judgment was rendered in favor of the plaintiff for \$225, and the defendant appeals. The chief item of damage shown on the trial was the attorney's fee in contesting the attach-

ment, which was placed at \$300. In addition to this the following items of damage were claimed: \$25 feed bill; \$5 toll; \$10 board; personal expenses of husband \$10, making in all \$350. The proof for the plaintiff showed that she had twelve or fourteen witnesses present, and it took nearly a day to try the question of attachment; also that \$300 was a reasonable fee for the attorneys. The proof for the defendant placed it much lower, being to the effect that there were not so many witnesses and less time was taken up with the trial. While the evidence was conflicting the verdict is not so against the evidence as to warrant us in disturbing it on this ground. The court properly instructed the jury, limiting the recovery to the expenses about the attachment without regard to the defense on the merits of the case. The defendant offered to show that when the attachment was discharged an execution was issued on the judgment and levied on the land. This proof was excluded by the court. The purpose of the evidence was to show that the discharge of the attachment did not substantially help the plaintiff; but her right to recover on the attachment bond accrued when the attachment was discharged, and the measure of her recovery could not be affected by the subsequent conduct of the defendant in suing out an execution and levying it on the land. This was a separate transaction, and the defendant could not, by his vigilance in suing out the execution, affect her right of recovery against him on the attachment bond, which was perfected before the execution issued. To permit him to do so would be to make her recovery on the attachment bond to depend not on what was done about the attachment, but on his subsequent diligence in the collection of his judgment debt.

Judgment affirmed.

BRYANT, &c. v. KENDALL.

(Filed February 26, 1904—Not to be reported.)

Lands—Mistake of boundary—Where a call on a surveyor's books was S. 71 W., and resulted in something like double the amount of land which the State had acquired upon a tax sale, and N. 71 W., being a call that represented the correct amount of the land, the latter was evidently the correct call, and the mistake can not have the effect of vesting title in a greater amount of land than was originally embraced in a patent covering it.

Geo. P. Johnson and Hazelrigg & Chenault for appellants.

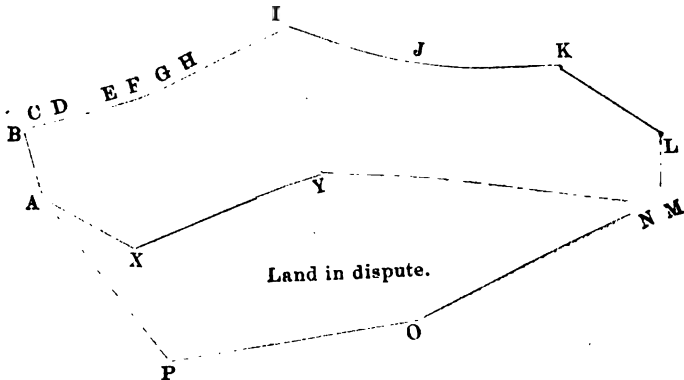
Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hobson.

On October 18, 1855, a patent was issued by the Commonwealth to Jacob Hudson and Cyrenus Waite for ten thousand acres of land, minutely described by metes and bounds, in Whitley county, the description of the land concluding with these words: "Plotting out of the survey all lands heretofore surveyed."

This excluded from the grant older surveys, but the patent was valid as to all the land embraced within it not theretofore surveyed. (Breathitt Coal, Iron and Lumber Co. v. Strong, 106 Ky., 699.) Before the patent was issued on July 8, 1848, Milton E. White had obtained a patent for three hundred and fifty acres of land lying within the boundary of the Hudson and Waite pat-

ent. On June 19, 1871, White having failed to pay the taxes, his tract was sold for taxes and purchased by Joseph Bradford, to whom the auditor afterwards made a deed. Appellees claim under Bradford, and the question here involved is what land they own. The dispute is illustrated by the following map, on which the land embraced in White's patent is indicated by the lines A, B, C, D, E, F, G, H, I, J, K, L, M, N, Y, X, A; and the land embraced in the deed which the auditor made to Bradford is indicated by the lines A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, A:



The patent and the deed, as shown by the map, are the same from the beginning corner, A, until the point N is reached. From this point the patent calls are as follows: "Thence N. 71 W. 240 poles to a stake; thence S. 87 W. 196 poles to a stake; thence N. 23 W. 66 poles to the beginning." But from this point the calls of the deed made by the auditor are as follows: "S. 71 W. 240 poles to a stake; thence S. 87 W. 196 poles to a stake; thence N. 23 W. 66 poles to the beginning." If from the point N the next line is run S. 71 W. 240 poles it will go to the point O, and if the next line is run on the call of the deed the closing line will not be 66 poles long as called for in the patent and the deed, but will have to be extended as shown on the map to reach the beginning corner. The way the discrepancy occurred is this, the calls of the patent follow the calls of the copy of the survey filed with the register of the land office on which the patent issued. But the deed made by the auditor follows the calls of the survey as recorded by the county surveyor of Whitley county on the surveyor's records of Whitley county. It will be observed that the only discrepancy between this record and the record at the register's office is in the call of the line running out from the point N, one giving the call as N. 71 W. 240 poles, and the other as S. 71 W. 240 poles. All the other lines in both are identical; both call for three hundred and fifty acres. It is, therefore, evident that in one or the other a mistake was made and the letter N written for the letter S, or S for N, by mistake in the recording of this call.

White testified on the trial that he had the land surveyed and obtained the patent; that the patent covered the land as the same was surveyed as he now remembers it, and that he never claimed any land by reason of the survey

except that covered by the patent. In addition to this the plat of the land made by the county surveyor on the copy of the survey filed with the auditor and the plat made by him on his surveyor's books as part of the record give the land as lying in the same shape and as represented on the plat above by the lines A, B, C, D, E, F, G, H, I, J, K, L, M, N, Y, X, A, or substantially so. Neither of these plats give the land such a shape as it would have if run out on the lines N, O, P, A. It is apparent by the application of an ordinary ruler to the plats that each of them is drawn on a scale of one inch to one hundred poles; that the boundary of land embraced is a little larger than a rectangle four hundred and twenty poles long by one hundred and twenty-five poles wide, which would contain three hundred and forty acres. It is, therefore, apparent that the boundary so plotted contains about three hundred and fifty acres of land. It is also apparent that to run the lines, as claimed by appellee, would be to make the survey embrace twice as much land as called for, and to give the closing line a different course from that given in any of the papers, besides making it three or four times as long as it should be. We, therefore, think it evident that the call S. 71 W. on the surveyor's books was simply a mistake for N. 71 W.

The State, by its purchase from White, only took such title as White had, and Bradford, by his purchase from the auditor, got no more than this. For by the patent of 1854 the title to all the rest of the land was vested in Hudson and Waite, and their title could not be affected by the deed which the auditor made to Bradford. The auditor was only authorized to convey the land which the State had bought for taxes, and his conveyance passed no more than the land which White owned. The question is not here presented of a mistake in the patent which did not follow the survey by a mistake either of the county surveyor in making the copy or the register in issuing the patent. The patent evidently followed correctly the survey as actually made. The mistake was made by the county surveyor in recording his survey on his record book. But this mistake, being apparent from the face of the records, can not have the effect of vesting in White title to land which was not patented to him, and was not in fact embraced in the survey.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

MENGEL BOX CO. v. CITY OF LOUISVILLE.

(Filed March 1, 1904.)

Taxation—Exemption—Where a corporation had quit business in a city and a foreign corporation was organized, taking over the property of the old corporation, the stockholders being composed of some of the members of the old corporation and some of them being new men, where before the organization and location of the new concern the city attorney was advised with and gave it as his opinion that the concern would be exempt from city taxation as provided by section 170 of the Constitution, section 2880a of the Kentucky Statutes, and a city ordinance passed in pursuance of those provisions and an affidavit was filed with the city assessor setting forth all of the facts as to the organization, thus keeping in touch with the city authorities, all these facts appearing, the latter corporation was a new concern and was, therefore, exempt from taxation for the period of five years from the date of

its location. The old factory had ceased to exist; as a business enterprise it was dead, and the fact that its plant was bought by the new corporation did not affect the status of the latter concern at all. It is a new concern to all intents and purposes.

A. E. Willson, J. Parker and Gibson, Marshall & Gibson for appellant.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

This action involves the right of appellant to the five years' exemption from taxation authorized by section 170 of the Constitution, section 2980a. of the Kentucky Statutes, and the ordinance passed in pursuance thereof.

C. C. Mengel, Jr. & Bro. Co. is a corporation of Louisville, Ky., carrying on a lumber business. Prior to 1899, it, in connection with its chief business, was also engaged in box making, and had a plant for that purpose, representing in round numbers an investment of \$200,000. The principal customers of the corporation for boxes were the tobacco manufacturers; and when, subsequently, these went into a combine, there being no longer any competition in the purchase of boxes, their manufacture became so unprofitable that it resolved to go out of that business. This determination was not carried out immediately, owing to the existence of certain unfinished contracts which had to be fulfilled before the enterprise could be actually stopped; but it was finally and definitely determined that it should be abandoned at the end of the contracts in question, and the property constituting the plant sold for whatever it would bring in money, and the proceeds distributed among the stockholders.

About this time C. C. Mengel, Jr., conceived the idea of forming a new corporation, to consist in large part of foreign capital, which he successfully carried into execution, the result being the organization of the Mengel Box Co., under the laws of the State of New Jersey, with a capital stock, at first, of \$1,000,000, subsequently increased to one and one-half million dollars. After its organization the question as to where it should be located came up for determination, the foreign incorporators being inclined to St. Louis, rather than Louisville; but the latter city being the home of Mengel, he insisted that it should be located there, and as an inducement for so doing represented that the new plant would be entitled to five years' exemption from municipal taxation; and that there might be no mistake on this score he addressed a letter to the city attorney, setting forth the facts, and asking whether or not he was correct in the assumption that the new corporation would be entitled to the exemption. In reply the city attorney, after setting forth a summary of the law bearing upon the question, said: "In my opinion, in the case you put, of a concern organized in another State, if it desires to manufacture in this city wares or goods, it can come to this city and acquire the property of another manufacturing concern, or any one else, and being a new establishment, so far as the city of Louisville is concerned, or its location having been induced by the ordinance aforesaid, such concern will be entitled to the exemption from taxation. In other words, it makes no difference whether the establishment comes from another State, or is organized under the laws of this State, its coming into the city limits and lo-

cating is the condition precedent to its being entitled to the benefit of the exemption provided in said ordinance. The whole object of the ordinance is to increase the manufacturing interests of the city and to induce the location of the same within its limit."

In pursuance of the ordinance relating to the subject-matter, the president of the new corporation filed his affidavit with the city assessor, setting forth all of the facts connected with the organization and establishment of the proposed corporation and the location of its plant, thus in every movement, keeping in touch with the city authorities, and acting in accordance with their advice. After the establishment of the plant this action was instituted by the city for the purpose of recovering taxes on the property for the year 1900. The corporation answered, pleading the exemption; and that alone is the question for adjudication. The evidence in the case consists of the testimony of C. C. Mengel, Jr., the letter of the city attorney, the articles of incorporation of appellant, and the affidavit filed with the assessor in pursuance to the terms of the ordinance.

The law regulating the subject in hand consists of this provision, contained in section 170 of the Constitution: "The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

Section 2980a of the Kentucky Statutes (being a part of the act regulating cities of the first class): "That the general council shall have power by ordinance to exempt from municipal taxation, for a period not exceeding five years, manufacturing establishments, as an inducement to their location within the city limits."

And an ordinance passed in pursuance of this authority, which is as follows: "That in order to induce the location of more manufacturing establishments within the city limits, any such establishment, owned and operated by any person, firm or corporation, which shall have been, after the passage of the act authorizing this ordinance, permanently located and conducted within the limits of the city of Louisville, shall be, and the same is hereby, exempted for a period of five years after such location and the commencement of the business of manufacturing thereat from all taxation whatever by the city of Louisville, on all property, real or personal, tangible or intangible, owned, employed and used by such person, firm or corporation, in conducting the business of such manufacturing establishment, and which would otherwise be subject to city taxation: Provided, however, The exemption herein specified is granted on the condition that the person, firm or corporation owning and operating such manufacturing establishment shall comply with the provisions of the third section of this ordinance, and no such establishment shall be entitled to an exemption from city taxes until said section is complied with. * * *

"Section 3. That any person, firm or corporation that shall be induced by the provisions of section 1, or section 2, of this ordinance to locate or bring a manufacturing establishment within the city limits shall, prior to the first day of September next, after said establishment shall have been located or brought within this city and begun the business of manufacturing thereat, file with the city assessor a written statement, verified by the pro-

prietor, or one of them, if composed of a firm, or by the chief officer or manager in charge of the corporation, as the case may be, showing the following facts, viz. : The name of the proprietor, or of the members of the firm or corporation owning and operating the establishment; the place where the establishment is located within the city; the kind of manufacturing engaged in, and when begun at such location; and that the manufacturing establishment is a new one, or has been located or brought within the city limits since the passage of the act authorizing the ordinance; that it has been thus located or brought within the city in good faith, with the intention of being continued permanently, or for a longer period than five years."

The question presented for adjudication is one of great moment to the municipalities of the Commonwealth, and it is, therefore, of paramount importance that we should establish a principle which will not unduly diminish their revenue on the one hand, by allowing corporations to escape a fair share of the public burdens, through a construction so broad and lax as to permit the transfer of established plants, under the specious pretense of locating new manufactories; nor, on the other hand, drive away new capital by a rule so narrow and technical that the spirit of the law will be killed by its letter, and the very end sought to be attained defeated.

The cardinal rule for the construction of laws is the ascertainment of their reason and spirit, as against the mere letter of the enactment. Taking this as a guide, it will be profitable to recur to the history of the subject of such exemptions pending the formation of the Constitution. When it had been determined by the convention to adopt the ad valorem system of taxation as the uniform rule of the fiscal scheme of the Commonwealth, it was urgently brought to the attention of that body that, in the intensely competitive struggle between cities of the country to secure the location of manufacturing plants, the heavy burden of the ad valorem system was calculated to drive manufactories from the cities of our own State to those of States having a more favorable system. In recognition of the soundness of this apprehension, the convention adopted section 170, by which cities are enabled to offer five years' exemption from all taxation as a bonus for the location of new manufactories within their corporate limits, it being assumed that after the exemption period has expired they will not be likely to incur the great loss incident to removal in order to escape future taxation; and the cities will thereby secure this additional capital to tax after the expiration of the exemption period, as well as the enjoyment of the immediate fruits of additional employment for its working classes, and that general impulse of prosperity which at once flows from the presence of new capital and enriches every department of municipal vitality.

The purpose, then, of the provision of the Constitution is the attraction of new capital for manufacturing purposes. Applying this principle to the facts before us, we reach these questions: Was the Mengel Box Co. a new plant, and did it locate in Louisville under the inducement of the constitutional provision and the statute and ordinance passed for the purpose of carrying it into effect? Undoubtedly these interrogatories must be answered in the affirmative, if the evidence of C. C. Mengel, who alone testified in the case, can be accepted as true, unless the fact that the new corporation invested a part of its capital in the old plant forbids this conclusion. The

undisputed facts show that C. C. Mengel, Jr. & Bro. Co. had gone out of the box-making business before the new corporation was formed. So far as Louisville was concerned it had lost this factory as a business enterprise, as wholly and completely as if it had never existed there. It is true the wheels of the machinery had not actually ceased to revolve, owing to the fact that the old corporation had certain contracts which had not expired, and which it was bound to fulfill; but the determination had been finally and definitely reached to discontinue the enterprise, and as soon as its contracts were all carried out, to sell the property for what it would bring in money, and distribute it among the stockholders. So, then, C. C. Mengel, Jr. & Bro. Co. had gone out of the box-making business. With this state of affairs in hand, C. C. Mengel undertook to organize a new corporation, with new capital, to go into the same business, and to sell to it the old property as a part of its new plant. It will not do to say that this was a mere expansion of the old business. Such an assumption does violence to the only evidence in the case bearing upon the question, and substitutes the arbitrary opinion of the judge for the sworn testimony of the witness. The C. C. Mengel, Jr. & Bro. Co. did not dissolve, or merge into the new corporation; it is, on the contrary, still in existence, carrying on the original business of dealing in lumber. What difference did it make to the city of Louisville whether the new corporation purchased the old plant or not? Or whether a few of the incorporators of the new were members of the old? Did it any the less enjoy the benefit of the added capital? Suppose, instead of buying the old plant, the new corporation had purchased the site and machinery of some third parties' planing mill, would any one contend that this was not a new venture? And yet, so far as the result to the municipality was concerned, would it not have been precisely the same? Just the same amount in value of property, which had theretofore been paying taxes, would thereafter, for five years, be exempted. Or, suppose the C. C. Mengel, Jr. & Bro. Co. had sold out its box plant for money to a third person, and then invested the proceeds in a new plant in connection with the foreign stockholders, would any one contend that because the old stockholders were once members of a box factory they never could be members of a new one? Under the contention of appellee, the old plant of appellant could, under identically the same circumstances, have been turned into any kind of a new plant, except a box factory. This view is not consonant with the reason and spirit of the law. The object was to locate new factories; to attract new capital; this was done. The old factory had ceased to exist; as a business enterprise it was dead; it was to be quickened into new life only by the potent touch of new capital. What matter if this new life was that of a box factory, or a planing mill? It furnished new work for the unemployed; new deposits for the banks; new trade for the merchants, and sent a new and richer current of capital through every artery of trade and commerce. In other words, it brought everything to Louisville which the law was designed to secure; and having done so, it is entitled to the exemption for which it has paid the price.

The fact that the new corporation bought out the old plant is a mere coincidence, which should not be considered in the solution of the question; to do so would be but to confuse the immaterial with the material; to elevate

a coincidence into a predominant factor of the problem. If the transaction had only been the enlargement of an old plant, the mere addition of capital to a going concern, the conclusion of the chancellor would have been sound; but the evidence does not disclose this state of facts. The old plant was dead; it was not to be merely enlarged by the transaction, but the property was to go as a small part of the new plant. The question is one of fact, and every case must be determined by its own merits; no inelastic rule can be laid down, lest, on the one hand, fraud be accomplished by undue laxity; or, on the other, the usefulness of the law be minimized by a too narrow and rigid construction.

This record shows the utmost good faith on the part of the new incorporators; they consulted with the city authorities at every step in the establishment of the new venture; secured the favorable opinion of the city attorney on their title to the exemption under the existing facts; and filed the affidavit required by the ordinance with the city assessor, thus showing in advance they had purchased the old plant, and supposing, up to the time this action was instituted, that there was no cloud on their title to the exemption claimed. Their integrity is not challenged, either in the evidence or in the argument; and unless an old plant, which has ceased to be a "going concern" can never be purchased for the establishment of a new one of the same kind, without operating to deprive the investors of the exemption otherwise authorized by the law, they are clearly entitled to exemption from taxation for five years after the establishment of their plant.

There can be no danger to the municipality in a transaction such as this record discloses, and the well wishers of appellee have substantial cause to rejoice when it can exchange the right to tax \$150,000 worth of property for a period of five years for the establishment of a new plant with a capital of one and a half million dollars.

Judgment reversed for proceedings consistent with this opinion.

PEARSON v. COMMONWEALTH.

(Filed March 1, 1904.)

Indictment—Construction of statutes—Section 2106, Kentucky Statutes, provides that a certificate by a parent addressed to the county clerk, consenting that a license to marry shall issue, shall be attested by two subscribing witnesses, and that his signature shall be proved by the oath of one of them; and where a paper purported to be only signed by the father, it was not a certificate of consent within the meaning of the law, and one who signed the name of another to such paper, without its conforming to the statute in the manner pointed out, was not guilty of uttering and publishing a forged writing.

E. E. Hogg for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Major Pearson, was indicated by the grand jury of Owsley county for the crime of uttering and publishing as true a forged writing.

purporting to have been signed by Job Eavens, consenting that the clerk of the Owsley County Court should issue a license authorizing the marriage of his infant daughter, Fanny P. Eavens, to the appellant, and that the clerk of the Owsley County Court, relying upon the genuineness of the writing, issued a license for the marriage of the appellant, Major Pearson, and the infant, Fanny P. Eavens. A trial before a jury resulted in appellant's conviction and his sentence to the penitentiary for a term of two years. The paper which he is charged to have forged, set out in the indictment, is as follows:

"Green Hall, Ky., January 4, 1904.

"This is to certify that I have given Major Pearson my consent for him and my daughter, Fanny P. Eavens, to marry. You are authorized to issue a license to him.

"JOB EAVENS."

The indictment is under the following sections of the Kentucky Statutes:

"Section 2105. No marriage shall be solemnized without a license therefor, issued by the clerk of the county in which the female resides at the time. But where she is of full age or a widow, and it is issued on her application in person, or by writing signed by her, it may be by any county clerk.

"Section 2106. If either of the parties be under twenty-one years of age, and not before married, no license shall issue without the consent of his or her father or guardian, or, if there is none, or he is absent from the State, without the consent of his or her mother, personally given, or certified in writing to the clerk over his or her signature attested by two subscribing witnesses, and proved by the oath of one of them, administered by the clerk. Where the parties are personally unknown to the clerk, a license shall not issue until bond, with good surety, in the penalty of \$100, is given to the Commonwealth, with condition that there is no lawful cause to obstruct the marriage."

A reversal of the judgment of conviction is asked by the appellant on the ground that the writing alleged to have been forged by him, purporting to have been signed by the girl's father, does not purport to be, and is not, a certificate within the meaning of the statute, for the reason that it was not attested by two subscribing witnesses as therein required, and was, therefore, not valid for the purpose for which it purports to have been designed, or sufficient to deceive or mislead the clerk to whom it was directed into the issue of a license to marry. The rule established by the text-writers and the adjudications of this and other States is that a writing invalid on its face can not be the subject of forgery, because it has no legal tendency to effect a fraud. Bishop's New Criminal Law, volume 2, section 538, quoting *Cunningham v. People*, 4 Hun. N. Y., 455, lays down the rule as follows:

"Subsection 1. A writing affirmatively invalid on its face can not be the subject of forgery, because it has no legal tendency to effect a fraud.

"Subsection 3. Whether a bond or other instrument is valid is a question of law, and if, therefore, a statute authorize a writing of this sort not known to the common law, and so prescribes its form as to render any other null, forgery can not be committed by making a false statutory one in the form thus invalid by the statute, even though it is so like the genuine as to deceive most persons. For example, it is not indictable to forge a will attested by less witnesses than the law requires."

"Legal forgery can not be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded, however dark may be the moral hue of a transaction, courts of justice can only act upon a legal crime upon criminal breaches of perfect legal operation." (People v. Shall, 9 Cowan, 778.)

"Howsoever clear the fraudulent puprose, unless the writing is sufficient to accomplish that purpose, it is not a forgery, since without a single exception actions only, and no evil intentions, are punishable by the English law." (Hammond Digest, chapter 1, 142, Forgery.)

In the very elaborate note to the case of *The People v. Munroe*, 100 Cal., 164, 24 L. R. A., 33, the editor has collated a large number of cases in which the question involved in this case is elaborately considered, and the general principle announced that: "A writing void on its face because of the want of the legal requisites to its validity, is not the subject of indictment for forgery in consequence of its incapacity to effect fraud."

It was essential to the validity of the writing, which is the basis of this prosecution, that it should have been attested by two subscribing witnesses, and even then the county court clerk was not authorized to issue the license on the strength of it unless it was identified and proven under oath by one of the subscribing witnesses. We, therefore, conclude that the paper in controversy does not purport to be, and is not, a certificate of consent by the father within the meaning of section 2106 of the Kentucky Statutes; and that the defendant was not guilty of the crime charged in the uttering and publishing of it as alleged.

The judgment of the trial court is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

STROH v. SOUTH COVINGTON AND CINCINNATI STREET RY. CO.

(Filed March 1, 1904—Not to be reported.)

1. Damages—Pleading—A judgment will not be disturbed on account of smallness of damages where the special damages arising by loss of time are not sufficiently pleaded.

2. Same—In an action for damages it was not prejudicial to appellant for the court to refuse to permit her counsel to further cross-examine an expert witness, where such witness had been thoroughly examined and had told all he knew of the subject in hand, where appellant made no avowal as to what a witness would state if permitted to answer a question, the failure to do so renders it impossible for the court to determine whether she was prejudiced by the refusal to permit the witness to answer the question.

B. F. Graziani for appellant.

Ernst, Cassett & McDougall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellant, in alighting from one of appellee's cars, fell, receiving bodily injuries, to recover damages for which she instituted this action, charging that her mishap was occasioned by the negligence of the employes of appellee in charge of the car. The answer placed in issue the allegations of the

petition, and pleaded, affirmatively, the contributory negligence of appellant. Upon the first trial the jury awarded a verdict in the sum of \$4,000. An appeal to this court resulted in the reversal of the case, in an opinion contained in 23 Ky. Law Rep., 1807. Upon the return of the case another trial was had, resulting in a verdict in favor of appellant for the sum of \$500, of the smallness of which she is now complaining.

Appellant's hope for a reversal because of the smallness of the verdict awarded her is based upon the testimony that she was engaged in the business of cloak-making at the time she received her injuries, for which she was paid the sum of \$10 per week; that up to the time of the accident she had always been healthful, and had never missed any time from her work; that, since then she has been unable to work for a period of about three years, and that she has lost, by reason of loss of time occasioned by her injuries, the sum of \$1,500. And it is urged that, although section 341 of the Code forbids the reversal of a case for personal injuries because of the smallness of the verdict, as to the amount which she lost in money by her inability to labor for the period named that comes within the principle announced in *Taylor v. Howser*, 12 Bush, 468, and *Ray v. Jeffries*, 86 Ky., 367. Conceding this to be sound, as a proposition of law, still appellant is not entitled to a reversal for the reason named, because the special damages arising by loss of time is not sufficiently pleaded. In her petition we find the allegation of the subject of her damages as follows: "Plaintiff says that she has been to great expense for the services of a doctor and medicine; that her expense for medicine, up to the present, has been \$100, and will be more; that her expense for doctor, care, nursing and other treatment, up to the present, has been about \$200, and will be more; that because of her pain and suffering permanent injury and inability to earn money, and loss of time from June 4, 1899, up to the present, she has been damaged in the sum of \$15,000."

It will be observed that appellant's special damages are alleged to consist of the sum of \$500—for doctor's bills, medicine, nursing, etc.; but there is no allegation as to the amount of special damages for loss of time; this is included in the lump sum of \$15,000, which she claims to have suffered in the way of general damages. This very question arose in the case of *Jesse v. Schuck*, 11 Ky. Law Rep., 463. In the opinion in that case the court say: "The petition, after averring the assault and battery, says that, by reason thereof, the appellant 'was confined to his bed for — weeks, and suffered greatly in body and mind, and was put to and incurred considerable expense, to wit, in the sum of — dollars, in securing medical attention, nursing and medicine, and, by reason of said assaulting, beating and bruising, this plaintiff lost — weeks from his business, and was damaged greatly, viz., in the sum of — dollars; and he says that, by reason of said acts and doings of said defendant, this plaintiff was damaged in the sum of \$5,000.' It is blank as to the time lost, the expense incurred, and the damage resulting therefrom. * * *

"It can not properly be said that the petition in this case states the facts as to the special damage, and that the amount thereof is a matter of inquiry upon the trial. The facts, being material to a recovery, must be so stated as to enable the defendant to plead understandingly as to them, and to determine whether he will or ought to deny them. Any resulting damage not

implied by law from the doing of a wrong should be stated with particularity. Any other rule would authorize such a loose mode of pleading as to often lead to surprise and undue advantage."

In the case cited, as in the case at bar, the jury had awarded a small verdict for the plaintiff, thus showing that the injuries received were caused by the wrongdoing of the defendant. In that case, as in this, the loss of time was clearly proved; but the court affirmed the judgment because of the failure of the plaintiff to sufficiently allege the special damages which he claimed. This opinion is conclusive of the question under discussion. The verdict covered all the special damage sufficiently pleaded.

The second and third error complained of may be considered together. These consist in the fact that the court permitted it to be known by the jury that the two physicians who testified in the case as to the extent of appellant's injuries had been appointed by the court; and the misconduct of the attorney for appellee in stating to the jury in his argument that these doctors had been appointed by the court. We do not see how this could have prejudiced appellant's case; the doctors had been appointed by the court, under that large discretion which he possessed, and which is fully recognized in the case of the Belt Electric Line Co. v. Allen, 19 Ky. Law Rep., 1656. The question is not material how they came to know the facts of which they deposed, but rather the truth of their evidence after they were on the stand. Appellant could not have been prejudiced by the knowledge on the part of the jury that these two witnesses came from an entirely impartial appointment. Nor do we think appellant was prejudiced by the refusal of the court to permit her counsel to further cross-examine the expert witness, Dr. Zinke. The doctor has been thoroughly examined, and had told all he knew on the subject in hand; any further cross-examination of him was an unnecessary prolongation of the trial which the court, in its wisdom, had the right to curtail.

The fifth error assigned by appellant is the refusal of the court to permit her to show, on the question of the extent of her injuries, that she would probably be rendered sterile as a result of the accident. The record shows that when the court sustained objections to the questions propounded along this line, appellant made no avowal as to what the witness would state, if permitted to answer the question. The failure so to do renders it impossible for us to say whether or not she was prejudiced by the refusal of the court to permit the witness to answer the question. *Brown v. Commonwealth*, 14 Bush, 398; *Bowler v. Lane*, 8 Metcalfe, 311.)

Judgment affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.
VAUGHT.

(Filed March 1, 1904—Not to be reported.)

Railroads—Damages—Where appellee was in a refrigerator car engaged in cleaning out straw when a servant of appellant coupled it to an engine and hauled it away, when appellee, on going to the door to see where he was being carried, was struck by the door, which slammed against him, after striking the platform of appellant's station, severely injuring him, the evidence au-

thorizing it and the instructions conforming to the law, a judgment in his favor for \$500 will not be disturbed.

O. H. Waddle and John Galvin for appellant.

Denton & Robinson for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Cincinnati, New Orleans & Texas Pacific R. R. Co. is a corporation operating a railroad through the State of Kentucky, a part of its line being in Pulaski county. The appellee, D. F. Vaught, was, at the time of the occurrence which produced this litigation, in the employment of the Somerset Ice Co. The appellant had hauled a refrigerator car loaded with ice to the place of business of the Somerset Ice Co., and left it there to be unloaded. Appellee, by order of his employer, had unloaded the ice from the car, and was engaged in cleaning out the straw from the floor and gathering up the ice hooks for the purpose of turning over the car, unloaded and cleaned, to appellant; but just before he left it an engine in the custody and control of appellant's employes backed down, coupled onto the empty car and hauled it away. The door of the car, which was large and heavy, opened out on hinges, and was swinging open when it started.

After the car started appellee went to the door, in order to look out, and, as he says, to see where he was being carried, at which time the heavy door, which was swinging outwardly, struck against a platform, which constituted a part of appellant's station, with such violence that it was slammed to, striking him on the head, shoulder and abdomen, knocking him senseless and severely injuring him. Appellee's evidence was to the effect that he was not notified of the fact that appellant's servants were about to move the car, and knew nothing of their purpose so to do, until it was started on its journey away from the place where it had been standing; that being a refrigerator car, there was no place from which he could look out except the open door, and that he went to this door to look out and see where he was being carried.

For the appellant John Starkle testified that he was one of the brakemen in charge of the train which moved the car upon which appellee was engaged in working; that before the engine was attached to it he saw appellee and told him he must get out, as they were going to take it away; that appellee answered "all right," and at once threw out some of his implements; whereupon he, supposing appellee had left the car, gave the signal which started it on its destination. The jury returned a verdict of \$500 in favor of appellee, of which appellant is now complaining.

The court instructed the jury as follows:

"A. The court instructs the jury that if they believe from the evidence that the plaintiff, Vaught, received injuries on the breast, abdomen and legs, by being struck by a car door, while plaintiff was in a car on the side track of the defendant, and said injuries were caused by the negligence and carelessness of the defendant, its agents, servants and employes in pulling or pushing said car, without warning to the plaintiff, and by allowing the car door to remain open and by pulling or pushing said car door against the platform, you will find for the plaintiff such sum as will reasonably compen-

sate him for his suffering and physical agony (if any), and loss of time by reason thereof, and will, if you believe he is permanently disabled, you will find such damages as will reasonably compensate him therefor. Your whole finding, however, not to exceed \$1,000.

"B. It was the duty of the defendant in handling its cars to do so in such manner as not to inflict injury upon any person who had a right to be upon or in any of said cars of the defendant, and if the defendant's agents failed to use reasonable care or diligence to ascertain his presence and warn him of danger, they were guilty of negligence.

"No. 1. Unless you believe from the evidence that the employes of the defendant railroad engaged in moving the car causing the injury to plaintiff complained of failed to exercise such care in the movement of said car as an ordinarily prudent person would have exercised under the same or similar circumstances, you will find for the defendant.

"No. 2. If you believe from the evidence that the plaintiff was notified that the car in which he was located was about to be moved, and he was requested to leave the same and he had sufficient time to have left the same in safety before the collision of the car door with the platform of the depot, and failed to do so, such conduct would be contributory neglect on his part; and if the injury complained of would not have occurred but for such contributory neglect, you will find for defendant.

"No. 3. If you shall believe from the evidence that plaintiff knew of the condition of the car and of the door thereto, and after knowing said car was being moved he placed himself and remained where said door could strike him, when it was unnecessary for him to have remained in said car, or to have occupied such position, this would be negligence on his part, and if such negligence so contributed to the injury received by him as that he would not have been injured but for such negligence, you will find for defendant.

"No. 4. Negligence, as used in these instructions, is the want of ordinary care. Ordinary care is such care as would be exercised by an ordinary prudent man under the same or similar circumstances as those under investigation."

These instructions constitute, as we think, the correct rule of law applicable to the case at bar; certainly, taken as a whole, they are not unfavorable to appellant. Appellee was not bound to jump from the car after it started, as is contended for by appellant, although he might think that could be done with safety; and if the car was being hauled off with him in it, without his knowing where he was being taken; it was but natural for him, and he had the right, to go to the door, which afforded the only means of obtaining the information he desired of the situation, although he might have known there was danger attending his so doing; but he was not entitled to unnecessarily place himself in peril, and the question, whether he did or not do so, under all the circumstances of this case, was a question for the jury. His perturbation of mind would necessarily be increased or diminished by the fact as to whether he was being carried far from home, or merely shifted around in appellant's yards, with the opportunity, after a few minutes, of being allowed to leave the car in safety.

For the reason indicated the judgment is affirmed.

MATTHEWS, ASS'EE v. MATTHEWS, ASS'EE.

(Filed March 1, 1904—Not to be reported.)

1. Limitation of actions—Former judgment—In an action to enforce a lien on land where no defense was interposed that the claim had not been verified, or presented to the assignee for allowance, and where limitation was not relied on, after final judgment had been rendered it was too late to set up the plea of limitation on the ground that the claim had not been proved before the assignee and that fifteen years had then run after maturity of the debt.

2. Jurisdiction of county courts—By section 87, Kentucky Statutes, county courts are authorized to direct assignee to sell land assigned to him for payment of debts.

J. I. Blanton for appellant.

W. S. Cason for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hobson.

James Matthews, in the year 1895, made an assignment to T. W. Hardy for the benefit of his creditors, and under section 85, Kentucky Statutes, the county court appointed three persons to lay off to the assignor his homestead in the land assigned. Their report having been filed in the county court, B. B. Petty, as assignee of Jackson Matthews, filed exceptions to the report on the ground that his debt was created before the purchase of the land by James Matthews. The statute referred to provides: "The report setting apart the exempted property may be excepted to by any person in interest. * * * If exceptions are filed they shall be heard by the court and disposed of." The case was heard in the county court, and it was adjudged that the debt set up by Petty had been fully paid, and his exceptions were overruled. Petty appealed from this judgment to the circuit court, making only James Matthews defendant to the appeal. No objection was made in the circuit court before trial that Hardy, as assignee, was not party defendant on the appeal. At the June term, 1896, of the circuit court the case was tried on the merits, and it was adjudged that Petty's debt was contracted before the purchase of the land, and was unpaid. The case was remanded to the county court, "with directions to set aside the order overruling the exceptions taken by B. B. Petty, assignee of Jackson Matthews, to the homestead allotted to James Matthews, and to enter a judgment in said court sustaining said exceptions, and adjudging that James Matthews is not entitled to a homestead as against the debt due to B. B. Petty, assignee of Jackson Matthews." On March 15, 1897, the assignee, under section 90, Kentucky Statutes, filed in the county court his report of claims, rejecting the debt of Petty, as assignee of Jackson Matthews, on the ground that it was barred by limitation. On March 22 the assignee filed his final report, and on the same day Petty, as assignee of Jackson Matthews, filed exceptions to the report of the assignee, Hardy, rejecting his claim. Previous to this, however, on August 24, 1896, Petty had filed in the county court a copy of the judgment of the circuit court above referred to, and the county court had entered an order entering it as the judgment of the county court on the exceptions. Without any action being taken except continuances of the case, on January 28, 1901, the

A proceeding was filed away with leave to reinstate on the docket. On April 21, 1902, Petty gave notice, and had the case reinstated on the docket. His exceptions to the report of the assignee were then sustained, his claim was allowed and the assignee was ordered to sell the land for the payment of the debt. An appeal was taken from this judgment to the circuit court, and in the circuit court the defendants offered to show that Petty's debt was paid, but the court held this matter concluded by the former judgment, and affirmed the judgment of the county court. The appeal before us is prosecuted from this judgment of the circuit court.

As by the statute the county court is authorized to have the homestead laid off, and it is provided that any person in interest may file exceptions to the report of allotment and that these shall be determined by the county court, Petty properly filed his exceptions in the county court when the homestead was allotted. If James Matthews was entitled to a homestead against his other creditors, but not against Petty, the county court had jurisdiction to determine the rights of the parties, for the plain purpose of the statute is to provide a summary mode of settling the assigned estate in the county court; and if the assignor was not entitled to a homestead as against Petty's debt, Petty was entitled to have the assignee directed to sell this land for the payment of his debt; otherwise the proceeding in the county court would not have settled the rights of the parties, and would have been only the starting point for new litigation. This would defeat the purpose of the statute.

When Petty appealed from the judgment of the county court, holding that his debt was paid and rejecting his claim for that reason, he should regularly have made Hardy, as assignee, a party defendant; but as no other creditor had a debt which was superior to the homestead, James Matthews, the claimant of the homestead, was the only defendant really a party in interest, and the case having been tried on the merits in the circuit court, as between them the judgment of the circuit court was valid, for Hardy, as assignee, had no interest in the homestead of James Matthews, none of the other creditors asserting privileged debts.

The statute of limitation could not be pleaded to Petty's claim in the county court after the return of the case from the circuit court, and the county court had entered the judgment of the circuit court as its judgment. The proceeding to settle the assigned estate was pending in the county court when Petty filed his exceptions to the report allotting the homestead. These exceptions made him a party to the proceedings and were the assertion of his claim, which was not then barred by limitation. No objection was then made that his claim had not been verified or presented to the assignee for allowance. The defense of payment was interposed, but limitation was not relied on. After the defendants were defeated on the defense of payment, and a final judgment had been entered in favor of Petty, it was too late to set up the defense of limitation on the ground that the claim had not been proven up before the assignee, and that fifteen years had then run after the maturity of the debt.

The order of the county court struck the proceedings from the docket with leave to reinstate. It was evidently stricken off before the exceptions to the report of the assignee were acted on, and was properly reinstated on notice. Judge Ward, the attorney for Petty, having been taken sick, and died pend-

ing the proceeding, no action was taken in the matter until Petty employed new counsel to look after it. When the case was returned the second time to the circuit court he properly refused to hear again the evidence on the question of payment, for this was concluded by the former appeal. By section 37, Kentucky Statutes, the county court is authorized to order the assignee to sell real estate assigned to him for the payment of debts.

Judgment affirmed.

JOSEPH'S ADM'R, &c. v. LAPP'S ADM'R.

(Filed March 1, 1904—Not to be reported.)

1. Insurance—Construction of statutes—By section 1408 of the Kentucky Statutes the proceeds of policy of insurance in this action became chargeable with the debts of the insured, and the heirs at law took no title in it except subject to the provisions of the statute, and were not authorized to transfer it to another for collection, or to enter into a contract for its collection, and one relying upon such contract will have to look to the heirs for payment and can not recover for services of administrator who collected policy.

2. Attorney and client—It is a well-settled principle that a client may discharge an attorney at any time with or without cause, and may do so even where the fee is contingent, but where the attorney has performed services he may recover for them if the discharge was without cause.

Alfred Seligman for appellants.

W. T. Burch for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Burnam.

Margaret Lapp was the beneficiary of a policy of insurance in the Knights of Honor on the life of her son, John Lapp, for \$2,000. She died a few days after the death of her son, without having collected the policy. After her death, on the 31st of January, 1899, Carrie Lapp and Lou Meglemary, children, and her grandchildren, George Felix Stranger, Maggie Schwellkert and Desda Cochraon, who were her only heirs at law, transferred and delivered this policy of insurance, or benefit certificate as it is sometimes called, to Armour & Co. for the purpose of collection. The writing provided that after paying the cost of collection and debts due by John Lapp to Armour & Co., the balance to be turned over to the heirs. Armour & Co. employed appellants, attorneys at law, to take such steps as might be necessary to collect the policy and delivered it to them. On the 25th of April, 1899, appellants entered into a written contract with the heirs at law to represent them in the collection of this policy for a fee equal to one-third of the sum realized thereon. Shortly after the execution of this last contract appellee, Carrie Lapp, qualified as administratrix of the estate of her deceased mother, and demanded possession of the policy from appellants, which they refused to deliver. She thereupon instituted a suit for the collection of the policy, and caused a rule to issue against appellants, requiring them to deliver the policy to her. They responded, setting out their contract with Armour & Co. and with the heirs at law, and asked that they be protected in their

rights. Their response was held insufficient, and they were compelled to deliver the policy. Appellee prosecuted her suit against the insurance company to judgment, and recovered thereon the sum of \$2,958.26, the amount of the policy and interest. Thereupon appellants, upon their own petition, were made parties to this proceeding, and set out their contract with the heirs at law, and asked that they be adjudged \$986.09 from the fund collected from the insurance company, subject, however, to the claim in favor of Armour & Co. for \$185.87. A general demurrer was interposed and sustained to this pleading, and their petition dismissed, and they have appealed, and ask a reversal upon the ground that they had a valid, enforceable contract with the heirs at law and a lien for their fee under section 107 of the Kentucky Statutes. Section 1403 of the Kentucky Statutes provides that "where any person shall die intestate as to his personal estate, or any part thereof, the surplus, after payment of funeral expenses, charges of administration, debts, shall pass to and be distributed among the same persons as real estate is directed to descend, except, etc."

Under the provisions of this statute the policy of insurance, or the proceeds thereof, became chargeable with the payment of her debts, and her heirs at law took no title thereto except subject to this provision of the statute. They had, therefore, no such interest in the policy of insurance as authorized them to transfer it to Armour & Co., or to enter into a contract with appellants for its collection. An action can not be maintained by the heir for the recovery of a debt due to the ancestor unless the obligation to the ancestor is by its terms payable to the heirs. (*Brunks v. Means*, 50 Ky., 211; *Montgomery v. Commonwealth*, 17 Ky., 197; *Newman's Code Pleading*, 94, and numerous authorities there cited. The trial court, therefore, decided that appellants were not entitled to a judgment to any portion of the fund which had been recovered by the administratrix. It was her duty to apply the money collected by her to the payment of the debts of her intestate in the manner directed by the statute, and the surplus which remained after the payment of such indebtedness became the property of the heirs. Appellants will have to look to their clients individually for anything due to them for their services. Besides, the law is well settled that a client has the right to discharge his attorney at any time with or without cause, even in a case where the fee is contingent. If, however, the discharge is without cause and after the attorney has actually performed services in the line of his employment, he is entitled to recover the value of such services. (*Henry v. Vance*, 23 Ky. Law Rep., 496.)

For reasons indicated the judgment is affirmed.

DEAN v. COMMONWEALTH.

(Filed March 2, 1904—Not to be reported.)

1. Criminal law—Evidence—Where it appears from the record that appellant began the difficulty which resulted in the homicide, and after an altercation with deceased, pursued him, shooting him until he had killed him, deceased attempting all the while to escape, a verdict and judgment of manslaughter, fixing his punishment at confinement in the penitentiary for twenty-one years, will not be disturbed.

2. Same—In a prosecution for murder it was competent to permit the Commonwealth to prove that just before the affray deceased lent another his knife because such evidence was corroborative of that of another witness who testified that the knife with which appellant was cut was in his own hand, and was struck by deceased in attempting to ward it off, thereby cutting appellant.

8. Same—Section 593, Code of Practice, provides that "the court shall exercise a reasonable control over the mode of interrogation," the discretion of the trial court being broad in such matters and it appearing that a witness was fully interrogated by appellant's council, it can not be said there was unnecessary interference on the part of the court in ruling that the witness should tell all he knew before being interrupted by attorneys by questions.

James Andrew Scott for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

The appellant, George Dean, was indicted and tried in the Franklin Circuit Court for the murder of Ed. Adams. Notwithstanding his plea of not guilty, he was convicted of voluntary manslaughter and his punishment fixed at confinement in the penitentiary for twenty-one years, and the lower court having overruled his motion for a new trial, he has appealed.

The difficulty which culminated in the homicide began in a bawdy house situated on Gas House alley, in the city of Frankfort. The house was kept by a woman called Jessie Douglass. According to the evidence of the Commonwealth appellant and Adams met at the house of the Douglass woman on the night of December 25, 1902. Jessie Douglass was making eggnog in the kitchen. There were present, besides Jessie, appellant and Adams, her daughter, known as Cecil Howard, Myrtle McQueen, and in the front room at the time the difficulty began were Ape Willis and Wade Morse. The women were all of loose morals, appellant being the apparent favorite of Jessie Douglass, and Adams that of her daughter, Cecil Howard.

Jessie Douglass began to complain at her daughter for having attempted to go that morning to Lexington, and claimed that Adams was to blame for it. The latter said: "Jessie, you needn't to blame me about it because I smacked her for wanting to go." Appellant then interfered by saying to Adams, "If you want to chew the rag, chew it with me," and further remarked that he had had it in for Adams a long time, and now he was going to take it out, and thereupon struck Adams on the head, which was bandaged on account of wounds received in a previous fight with another. Adams said to him: "I have always been a friend of yours, and always want to be; you see I am in no condition to fight." But unmindful of his protestations, appellant struck him again, and was told by Adams, in substance, if he wanted to fight to lay aside his pistol and go out in the alley and he would fight him a fair fight. Appellant then threw his pistol on the bed, saying he would go with Adams anywhere, and again struck him, knocking or forcing him into the front room. They started out of that room toward the alley, when appellant knocked Adams over a washstand in the room, and as he stood over him with a knife in his hand, Adams in knocking off the

stroke that appellant seemed about to make with the knife, struck the hand that held it, and caused it to enter appellant's neck, thereby inflicting upon him a dangerous wound." Adams then said: "Take him off, he is killing me." Whereupon Myrtle McQueen opened the door and told Adams to leave, which he did.

Down to this time appellant's pistol had remained on the bed, but when Adams left the house appellant regained possession of the pistol, and following in the direction taken by Adams, caught up with him near the corner of Washington and Clinton streets, just after the latter encountered one Wm. Hayden, of whom he attempted to borrow a pistol, but as Hayden had no pistol he could not comply with the request.

Hayden testified that Adams was running as he approached him, and while they were yet talking about the pistol appellant came upon them with his pistol in hand. Adams jumped behind Hayden, caught him by the arms and held him between his own body and appellant, who was still advancing upon him with his pistol presented as if to shoot. Adams kept pushing the body of Hayden first one way and then another in the effort to shield himself from the pistol of appellant, and Hayden repeatedly asked the appellant not to shoot, telling him that he did not wish to be shot himself. Appellant replied that Adams had cut him, and he intended to kill him.

As appellant got near enough to attempt to reach around Hayden's body to shoot Adams Hayden succeeded in breaking away from Adams, and appellant immediately shot the latter, who exclaimed, "Oh, Lord," and ran toward Griffy's saloon, pursued by appellant, who snapped the pistol at him in the effort to shoot him before he entered the saloon, and then following him into the saloon, shot him again as he fell or crouched near the counter. Adams died immediately after the last shot was fired by appellant. Two wounds were found upon his body, one ball having entered the arm, the other the back, just below one of the shoulder blades, the wound in the back evidently causing Adams' death, but it does not appear from the evidence whether it was from the shot fired by appellant on the street, or the one fired by him in the saloon.

In addition to the facts immediately connected with and surrounding the homicide which were testified to in the main by the two women, Cecil Howard and Myrtle McQueen, and by Wm. Hayden, the Commonwealth introduced evidence of threats made by appellant against Adams shortly before the killing in the presence of divers witnesses, who testified with great particularity as to the times and places of such threats. Upon the other hand, the appellant and Jessie Douglass, who were the only other persons besides Adams, Cecil Howard and Myrtle McQueen in the room when and where the difficulty that led to the killing began, gave a widely different version of the facts to that testified to by the witnesses for the Commonwealth. The appellant testified in regard to the difficulty and subsequent homicide, in substance, as follows: "Ed. Adams came back in there, and he walked over to me and said: 'That day me and Chism had that fight you wouldn't let me have your pistol; I said, go on, I don't want to have any trouble, I have got a crippled arm, and he says, you come out here and I will whip hell out of you; I said, go ahead, I don't want any trouble. He said, lay down your pistol and come out here and I will whip hell out of you. When I started

for the door he hit me with a knife. One arm Kelly and I clutched him with one hand, we both fell over the washstand, and he said you son of a bitch, you, I will go and get a gun and come back and finish you, and he went up the alley and asked Innis Clark for a gun; Innis didn't give him one, and he asked Bill for a gun, and he started down towards me, and I shot him. The pistol snapped as he went into Griffy's saloon, and I shot another in there."

Appellant further testified that after he was cut by Adams he started for a doctor, and that Adams turned back on him, and he shot him. He was corroborated in the main by Jessie Douglass as to the difficulty in the house, and in some measure by Ape Willis, who, being in the front room when the difficulty began, failed to hear some of the quarrel preceding the fight. The same is true of the testimony of Morse and Kelly, each of whom saw only the latter part of the fight, and neither of whom saw or heard what led to it. Appellant was also corroborated by one other witness as to Adams asking Innis Clark for a pistol, and several witnesses testified that threats were made against his life by Adams shortly before the homicide. But appellant's statements as to what occurred at the time of the killing of Adams were not only not corroborated, but were flatly contradicted and disproved by Hayden and persons in the saloon.

Much of the evidence introduced by the Commonwealth in rebuttal tended to contradict many of the material statements of appellant's witnesses, and taking the evidence as a whole, we are unable to say that it did not authorize the verdict of the jury. Whatever may be said of the conduct of Adams as a contributing cause to the difficulty in the house, it is apparent that appellant was equally, if not more, at fault, and in respect to the subsequent killing of Adams it is apparent from the evidence that it was wholly without justification, for, according to the testimony of Hayden, who saw Adams shot in the street, and of those who saw him shot in the saloon of Griffy, where he was pursued by appellant, he was then not only without the means or apparent inclination to harm appellant, but was actually fleeing for his life. We can understand how the jury might have found something in what led to the fight in the house that, in their judgment, justified them in reducing the homicide from murder to manslaughter, although they were not authorized by the evidence to say that the killing of Adams was, under the circumstances, excusable.

It is, however, insisted for appellant that the trial court erred in allowing the Commonwealth to prove that the deceased, just before his death, lent Taylor Kinkead his knife, and that the latter had it in his possession when deceased was shot. One of the issues made by the appellant was that he was cut in the fight in the house by a knife in the hands of Adams. Appellant testified that he had no knife, but was cut by Adams.

One other witness introduced for the defense, Jessie Douglass, testified that she saw Adams' hands in his pockets when and before the fight began, and that she saw a knife in his hand when appellant was cut, and that Adams did the cutting. Upon the other hand, Myrtle McQueen positively testified that the knife with which appellant was cut was in his own hand, and that the cutting was done by Adams knocking the hand of appellant so that the knife was thrust into his neck by his own hand. A knife was found by

this witness, or Jessie Douglass, behind the door, and given to an officer of the court, by whom it was lost. No knife or other weapon was found on the person of Adams after his death. We are of opinion that the evidence of Kinkead, though by no means conclusive, was competent as tending to corroborate Myrtle McQueen as to the manner of the cutting, and to contradict the appellant and Jessie Douglass, both of whom testified that appellant was cut by a knife in the hands of Adams. In any event, the evidence complained of could not have been prejudicial to appellant, for though Adams may have unlawfully cut him with a knife in his possession, under the evidence appellant was himself in the wrong in pursuing and killing Adams at a time when he had no reason to apprehend danger to his life or person at his hands.

It is also complained by counsel for appellant that the lower court erred in not permitting him to conduct the examination of the witness, Wade Morse, without unnecessary interference from the court. An examination of the testimony of the witness in question found in the bill of evidence will show that after certain questions, mainly preliminary, had been asked the witness, the court, interrupting the examination, ruled that "the witness should tell all about it before being interrupted by the attorneys with questions. After making a full statement, he could then be interrogated."

Section 593, Code of Practice, provides that "the court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct and as little annoying to the witness and as effective for the extraction of the truth as may be." It must be confessed that no particular reason appears from the record for the ruling complained of, yet many reasons not apparent to one not present at the trial may have existed therefor. The discretion of the trial court in such matters is broad, and in this case it is not perceived that any injury could have resulted to the rights of the appellant, for it appears from the bill of evidence that the witness was subsequently fully interrogated by appellant's counsel touching all matters about which information could have been given by him in regard to the case.

Complaint is also made that the court refused to permit Charles Kelly to testify as to the reputation of the deceased. We are of the opinion that the court did not err in excluding the testimony of the witness on the point indicated; as a whole it shows that his acquaintance with the reputation of the deceased was based more upon his personal knowledge of the latter's escapades and particular acts of wrongdoing than upon what people generally in the community in which he had lived said about him. Moreover, several other witnesses testified as to the bad reputation of the deceased, and at most the testimony of Kelly would have been merely cumulative.

Another alleged error complained of by appellant is that the lower court refused to permit Ben Conway to testify regarding a threat made in his hearing by the deceased shortly before his death. The testimony of this witness as to the threat in question was as follows: "I went down the street and he (deceased) walked up behind me, and he said, 'which way are you going,' and I said, going home, and he walked on down the street; he started to go across the street, and he said, 'which way are you going,' and I said, I am going home; he said, 'I am going down here and kill some God damned son of a bitch,' but he didn't call who it was."

The witness subsequently stated that deceased, after making the threat, started toward the "alley." The record shows that the court, upon objection of the Commonwealth's attorney, expressed the opinion that the testimony of the witness was incompetent, presumably because the statements of deceased detailed by the witness were too general to be pertinent, but they were not in terms excluded by the court from the consideration of the jury. Indeed the bill of evidence shows that the witness subsequently repeated to the jury the threat made by deceased in all its details, without objection from court or counsel, consequently the entire testimony of the witness, including the threat, went to and was obviously considered by the jury, without qualification or restriction. It is further contended for the appellant that the court erred in permitting leading questions to be asked Thomas Rogers, foreman of the grand jury.

Criminal Code, section 113, provides that "a member of the grand jury may, however, be required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining its consistency with the testimony of the witness given on the trial." * * *

It appears from the record that Jessie Douglass testified as a witness before the grand jury that found the indictment against appellant. It further appears that her testimony before that body was reduced to writing by the foreman, and was read to and signed by her. If, therefore, her testimony given on the trial of appellant in regard to the difficulty, that resulted in the death of Adams, was contradictory of, or inconsistent with, her statements in regard thereto made to the grand jury, the Commonwealth had the right, after laying the foundation therefor by obtaining her denial of any material statement made by her before the grand jury, to introduce the foreman, or other members of the grand jury, to contradict her, in doing which it was the right and duty of the counsel representing the Commonwealth to ask him leading questions in the same general form used in the cross-examination, on the same points, of the witness thereby sought to be contradicted.

We understand this to have been the course followed by the Commonwealth's attorney on the trial in the court below in the examination of both the Douglass woman and Rogers, therefore, it was not error for the court to permit the asking of Rogers the leading questions complained of. We do not regard as error the action of the lower court in refusing, on appellant's motion, to set aside the swearing of the jury, and continue the case on account of the absence of the witness, Brawner, who was taken sick after the trial began. The affidavit of appellant as to what he expected to prove by Brawner was read to the jury as the latter's deposition. The material matter therein relied on was only an uncommunicated threat alleged to have been made by Adams against appellant. The evidence was only cumulative, as other witnesses introduced for appellant testified as to divers threats of similar import claimed to have been made by Adams, and, besides, it does not appear from the record that Brawner, if personally present, would have testified any more strongly or intelligently in appellant's behalf than he was made to do in the affidavit setting forth his statements.

As a motion for a continuance is a matter that addresses itself to the sound discretion of the court, such discretion will not be interfered with by

this court unless it is made manifest that the appellant's substantial rights have been prejudiced by its abuse, which we are unable to say has been done in this case. We are likewise unable to sustain the further contention of appellant's counsel that the trial court erred in refusing to permit so much of the first affidavit for continuance as contained the statement attributed to Innis Clark, George Oliver and Andrew Dougherty to be read to the jury as evidence. No subpoena was issued for George Oliver, nor had he been recognized. No diligence was, therefore, shown as to him. It is true that a subpoena was issued for Innis Clark and Andrew Dougherty, in common with other witnesses of appellant, August 7, 1903, and was executed on all the witnesses named therein except Clark, Dougherty and two others, on September 15, 1903, which was only two days before the trial of appellant began in the lower court.

The state of facts presented by the record fails to show diligence upon the part of the appellant in the effort to procure the attendance of the witnesses named. Though the subpoena seems to have been issued on August 7, 1903, it does not show, nor does it appear from the appellant's affidavit, when it was placed in the sheriff's hands for service. Probably it was not placed in the sheriff's hands until about the time of service on such of the witnesses as are named in the return, else why did he delay its service until almost the calling of the case for trial. It may be that the subpoena was not executed upon Clark and Dougherty for the very reason that the placing of it in the sheriff's hands was delayed too long. Its service upon them would perhaps have been effected by the prompt placing of the subpoena into the officer's hands. Who can tell from the record the reason of the delay? Facts showing diligence must be made to appear affirmatively in order to entitle one to a continuance, or the right to read as a deposition statements that may be put into an affidavit as the testimony of an absent witness. We are further of opinion that the statements attributed to the witnesses, Clark and Dougherty, if read to the jury, would have been in a large measure cumulative, as the same facts were in effect testified to on the trial by other witnesses of appellant. No complaint is made of the instructions given on the trial. A careful consideration of the record convinces us that no error was committed by the lower court that can be said to have operated to the prejudice of the substantial rights of the appellant.

Wherefore, the judgment is affirmed.

THOMPSON v. STARK, &c.

(Filed March 2, 1904—Not to be reported.)

1. Contracts—Notice—Where the seller of fruit trees had notice that the land belonged to the children of a deceased owner before they delivered trees under a contract by which they were to have certain crops for certain years, and that certain deeds by which the title to the land on which the trees were planted was attempted to be conveyed were void, and, therefore, did not divest the real owners of their title, their contract can not be enforced against a purchaser for value and without notice.

R. C. Kinkead and Montgomery & Montgomery for appellant.

J. P. O'Meara and L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted in the Hardin Circuit Court on September 17, 1902, by Stark Bros., a firm engaged in the nursery business in the State of Missouri, against Leo C. Ritchie, wife of W. H. S. Ritchie, W. H. S. Ritchie as guardian and trustee for T. M., Madaline C. and W. C. Ritchie, T. M. Ritchie, Madaline C. Ritchie, W. D. Butler, Ellen R. Bulter and appellant, Annie G. Thompson, seeking to have the court adjudge that appellees are entitled to any two crops of apples and peaches and to any three crops of pears that they may select that may grow on certain apple, peach and pear trees furnished by them, within fifteen years from the time the trees were set out, and also that appellant be enjoined from interfering with their gathering and removing the crops when selected. It is alleged in the petition that the defendant, Leo C. Ritchie, was the owner of the land therein described on which the trees were planted, and while the owner thereof, on September 15, 1894, signed, acknowledged and delivered to them a written contract by which they agreed to furnish her 18,350 apple, peach and pear trees to be set out on the land, and carefully cared for by her. She agreed for herself, her heirs and assigns to deliver to Stark Bros. any two crops of apples and peaches, and any three crops of pears yielded by each of the respective varieties of the trees that Stark Bros. might choose within fifteen years next after the planting of the trees, they to receive the fruit on the trees in the orchard. It is further alleged that the contract was accepted by them and duly recorded in the Hardin County Court clerk's office on October 24, 1894, and that they furnished all of the trees to Leo C. Ritchie, and same were set out on the land and were then growing thereon. It was also alleged that in 1897, while Leo C. Ritchie was still the owner of the land, they entered into another agreement with her by which they furnished her 1,590 apple trees and 1,900 pear trees, to be set out by her on the same terms as those purchased prior thereto, and that these trees were set out and were then growing on the land. They allege that this last contract was not signed by Leo C. Ritchie, but was signed by her agent, T. M. Ritchie, but was never recorded.

Appellant filed her separate answer to this petition, in which she denied that Leo C. Ritchie ever owned or was in the possession of the land described in the petition, and denied knowledge or information sufficient to form a belief as to whether Leo C. Ritchie made the contract referred to, or whether any of the trees were on the land as claimed by the appellant. She alleged that she bought the land from T. M. Ritchie, who was the owner thereof, for value and with no notice of the claim of Stark Bros. The issues were made, the case tried, and on final hearing the appellees were granted the relief they sought, and from that judgment the appellant, Annie G. Thompson, has appealed.

The facts leading up to this litigation are complicated, but, in substance, are as follows: Sarah J. Ritchie was the first wife of W. H. S. Ritchie, and she owned in her own right four tracts of land adjoining and forming one body, one tract containing 212 acres, one containing 60 acres, one contain-

ing 25 acres and one containing $5\frac{1}{4}$ acres. At her death she left a will from which we quote two provisions which have application to the questions herein involved:

"2d. I give and bequeath and devise to my children, sharè and share alike, all the estate, real and personal and mixed, of which I may die seized or possessed.

"4th. I hereby nominate and appoint my husband, W. H. S. Ritchie, the trustee and guardian of all our children and their issue and survivors, and invest him as such trustee with the legal title to all my said estate and personality of whatsoever kind and wheresoever situate, and desire that during his natural life he manage and control the same for the sole and exclusive use or benefit of all our said children, their issues and survivors; and for that purpose I authorize him to sell and dispose of my said estate and property and reinvest the proceeds, which proceeds are to be held and invested for the sole and exclusive use of our said children, their issue and survivors."

This will was recorded January 17, 1893. At her death she left three children, viz.: T. M., Madaline C. and W. C. Ritchie. About twelve months after her death her husband, W. H. S. Ritchie, married again, his second wife being one of the defendants, Leo C. Ritchie. Soon after this marriage W. H. S. Ritchie made a conveyance by which he conveyed to one Prewitt the three smallest tracts of land, viz., the 60 acre, the 25 acre and the $5\frac{1}{4}$ acre tract, for the recited consideration of \$550, \$200 of which was cash and the balance on time. This deed was signed "W. H. S. Ritchie, executor of the will of Sarah J. Ritchie, deceased." On the same day Prewitt conveyed these same three tracts to Leo C. Ritchie for the same recited consideration. About this time W. H. S. Ritchie, who signed as the executor of the will of Sarah J. Ritchie, deceased, conveyed to his wife, Leo C. Ritchie, the 212 acre tract of land for the recited consideration of \$3,000, \$1,600 cash, the balance on time.

About the latter part of the year 1897 this Prewitt became uneasy about being a warrantor in the deed to Leo C. Ritchie and brought an action to have both these transactions set aside, and to be relieved as warrantor in this deed. He alleged and proved that no consideration passed from him to W. H. S. Ritchie, nor from Leo C. Ritchie to him, and that they were both without consideration, and the court granted him the relief he asked for. About this time W. H. S. Ritchie and wife, Leo C., reconveyed to him, as executor and guardian of his children, the 212 acre tract, reciting in the deed that the former deed was a mistake, and that no consideration had passed.

About this same time an action was instituted by T. M. Ritchie, for himself and by him as next friend of his infant brother, W. C. Ritchie, against the estate of Sarah J. Ritchie for the collection of a note for \$5,000, alleged to have been executed to them by their mother, by which action they sought to subject the real estate to the payment of their note. In defense this note was alleged to be a forgery. In compromise and settlement of this action it was agreed that T. M. Ritchie should take and receive a conveyance of the 60 and 25 acre tracts of land in full satisfaction of his interest in his mother's real estate which he recieved under the will, and also in satisfaction of his claim in the note sued on, and he in turn was to release to the estate all his

claim to the 212 acre and the 5½ acre tracts. The conveyances were executed.

On September 11, 1899, T. M. Ritchie sold and conveyed these two parcels, the 60 acre and the 25 acre tracts, to appellant, Annie G. Thompson, for the price of \$2,000, which was all paid before the institution of this action. The counsel for appellant and appellees discuss at length in their briefs whether this contract executed by Leo C. Ritchie to appellees, and which was recorded in 1894, was a contract with reference to personal property or real estate. Under our view of this case we deem it unnecessary to settle this question because if it was a contract pertaining to personal estate, it was not a recordable instrument, and was not notice to any one. If it pertained to an interest in real estate, it did not have any effect to create any lien thereon for the reason that her husband did not join with her in the execution of it, and in addition Leo C. Ritchie did not own the real estate upon which to execute a lien.

Appellees contend that Leo C. Ritchie, under section 2128 of the Kentucky Statutes, had the power to make contracts for the improvement of her real estate without her husband joining in such contracts. If a contract for the setting out of fruit trees upon land is such an improvement of real estate as is contemplated by section 2128 of the statute, which we do not decide, this can not avail the appellee for the reason that Leo C. Ritchie did not own any real estate to improve. It appears from this record that appellees had notice of the fact that these lands belonged to the children of Sarah J. Ritchie before they delivered any fruit trees under their alleged contract with Leo C. Ritchie. It also appears that any reasonable investigation on the part of appellees would have disclosed the fact that these lands belonged to the children of Sarah J. Ritchie, and that these deeds from Ritchie to Prewitt and from Prewitt to Leo C. Ritchie were executed without any consideration, and were void, and did not have the effect to divest the children of their interest in the land.

Appellant's proof shows that she did not have any knowledge or information as to the contract between Leo C. Ritchie and the appellees when she bought and paid for this land; that she paid a fair cash value for it and that she did so without any notice whatever of any legal or equitable claim of appellees against this land or to the fruit from any of the trees thereon. Appellees do not controvert this evidence, but claim that because her vendor, T. M. Ritchie, had knowledge of appellees' claim, that she is bound thereby. In this appellees are mistaken. It is shown that she was an innocent purchaser for value, without any notice of appellees' rights or equities, or without any notice of any fraudulent purpose on the part of her vendor.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

BUTLER, &c. v. STARK, &c.

(Filed March 2, 1904—Not to be reported.)

The syllabus in the preceding case of *Thompson v. Stark, &c.* applies to this case as they were heard together, and the facts in both cases are substantially the same.

R. C. Kinkad and Montgomery & Montgomery for appellants.

J. P. O'Meara and L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

The appellees brought this action in the lower court against these appellants, together with Annie G. Thompson. Their cause of action is as stated in the opinion this day filed in the case of *Annie G. Thompson v. C. M. Stark, &c.*, ante, 1882. While one action was brought against the appellants in this and in that appeal, Annie G. Thompson made her separate defense, and the case was tried as if there were two actions, and they appealed separately.

The facts in this case are the same as those stated in that opinion except the additional facts as stated herein. When Sarah J. Ritchie bought the 212 acre tract of land from Sophia Wobbe she did not pay all the purchase price, and at her death there was still due about the sum of \$1,300.

The Fidelity Trust and Safety Deposit Co., of Louisville, Ky., became the owner of these unpaid notes, and was charging from 7 per cent. to 8 per cent. interest thereon. The Ritchies were hard pressed for money, and Ellen Butler, a sister of W. H. S. Ritchie, purchased these notes from the deposit company, with an agreement with her brother that she would exact only 6 per cent. interest and would give him all the time he wanted, provided he would pay the interest annually. When the trouble arose in the Ritchie family over the presentation of the \$5,000 note professed to have been executed by Sarah J. Ritchie to her sons, T. M. and W. C. Ritchie, Ellen Butler was informed that they would no longer pay the interest on her notes. The Butlers then brought suit on their notes and sought to enforce their lien on the land. A judgment was rendered for the sale thereof, and W. D. Butler, as agent for his wife, attended the sale and became the purchaser of the whole of the 212 acres at the price of about \$1,450. The land was appraised on that day at the price of \$3,800. The proof shows that Sarah J. Ritchie paid more than \$3,800 for it, and that it was worth on that day from \$5,000 to \$7,000. It also appears that when Butler bid the amount of his wife's debt, interest and cost the commissioner did not offer or give an opportunity for any one to take a less number of acres and pay the debt, interest and cost. W. H. S. Ritchie was present at the sale. Soon thereafter he and his sister entered into a written lease, whereby he was to have the land for the term of ten years at the price of \$125 per year. It was further stated in substance in the writing that Ritchie should have the privilege of repurchasing the land from his sister by paying her her debt and for any valuable and lasting improvements made on the land by Mrs. Butler.

While on this question we think it proper to say that, from all the facts and surrounding circumstances appearing in the record, we do not believe

that Mrs. Butler, by this purchase, intended to deprive her brother, niece and nephews of all their rights and interest in this land, and in good conscience she ought not to be allowed to deprive them of it. In our opinion it was her intention to protect them, rather than deprive them of it. There is a contest as to whether or not the Butlers had notice of the existence of these fruit tree contracts, but under our view of this case we deem that question immaterial, as their lien is not affected in any way by reason of the contract sued on. It appears that at the time the first contract with reference to the fruit trees was executed that the children and devisees of Sarah J. Ritchie were all under the age of twenty-one years. T. M. Ritchie, being the oldest, was about twenty years of age at that time. It appears that Madeline C. and W. C. Ritchie were under age at the time all the contracts with reference to the fruit trees were made, and at that time could not have made a contract themselves with reference to these trees, or give a lien on their land by which they would have been bound, and they are not bound by any attempted contract made by their stepmother, Leo C. Ritchie. Appellees attempt to plead an estoppel as against Madeline C. and W. C. Ritchie, alleging and proving that although under age, they knew of and approved the contract, and aided in setting out the trees on the land. Whatever work they performed was under the direction of their father and stepmother, and they did not say or do anything to induce appellees to enter into these contracts or part with their trees, and the interest of these children was not affected in any way by reason of these contracts. Their father and stepmother and the appellees had no power to make and enter into a contract by which they were to be improved out of their interest in this real estate. The judgment of the lower court, in so far as it affected the interest of Madeline C. Ritchie in this land, was error.

It appears that W. C. Ritchie, the youngest child, is dead. But it does not appear from the record, or at least we have been unable to find from the record the exact date of his death, nor whether he died under the age of twenty-one years or afterward. If he died in infancy his interest in the land would pass, under section 1401 of the Kentucky Statutes, to his brother, T. M., and his sister, Madeline C. Ritchie, in equal portions. If he died after arriving at the age of twenty-one years, his interest in the land would pass, under section 1393 of the Kentucky Statutes, to his father, W. H. S. Ritchie. If W. C. Ritchie died under the age of twenty-one years, his one-half interest in the 212 acre and the 5¼ acre tracts passed in equal portions to T. M. and Madeline C. Ritchie, thereby making T. M. Ritchie own one-fourth of the two tracts. If W. C. Ritchie died after arriving at the age of twenty-one years, then his one-half interest in the two tracts passed to his father. In either state of case the appellees are entitled to enforce their contract upon that part of these two tracts which passed to either the father or the brother. The appellees' plea of estoppel as against them should prevail, for it is shown by the proof that they both, notwithstanding they had full knowledge of all the facts with reference to the title to this land, used all the power they possessed to induce the appellees to enter into these contracts, and they ought not to be allowed to defeat the appellees in their contracts in so far as either of them may have an interest in the land. They induced appellees to believe that the title to this land was in Leo C. Ritchie.

Although T. M. Ritchie began this while under age, yet he continued it until 1897, the date of the last contract.

Appellees, under their contract, have no lien on this land which they can enforce and recover money, but under their contract they have a right to the fruit as stipulated in their contract from that portion of the land owned either by T. M. Ritchie or W. H. S. Ritchie, as their interest may appear, under the facts as to the age of W. C. Ritchie at the date of his death.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

CARROLL'S ADM'R v. CITY OF LOUISVILLE.

(Filed March 2, 1904.)

1. Damages—Negligence—Peremptory instruction—Where one was riding his horse at a rapid pace along a public street at a railroad crossing when the horse stumbled and fell, throwing him and injuring him to the extent that he soon died, the fact that the crossing was made of improved street construction did not render it of itself unsafe, and it appearing that the deceased met his death by his own negligence, a peremptory instruction to find for the city was proper.

2. Construction of statutes—By the provisions of section 2825, Kentucky Statutes, the board of public works of the city of Louisville has control over the construction of its streets, and it has the power to prescribe a plan for a railroad crossing, and it is the duty of a railway company to conform to such requirement.

3. Evidence—In an action to recover for the death of one who was killed by being thrown from a horse at a crossing of a railroad in a city, where the testimony fails to show any defect in the construction of the crossing, or that, all things considered, it was not the most suitable design at that point, it follows that the accident was not due to defective construction.

Pryor & Sapinsky, Matt O'Doherty and Thos. Walsh for appellant.

Helm, Bruce & Helm and Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The appellant, who was the plaintiff below, brought this action to recover damages for the death of his intestate which he alleges resulted from the negligence of the appellees, the city of Louisville and the Louisville & Nashville R. R. Co., in the construction of the railroad crossing at the intersection of Third and A streets in the city of Louisville. The allegation of negligence recited in plaintiff's petition is as follows: "On or about April 1, 1901, the defendants arranged the crossing at Third and A streets in the following manner, to wit: That beginning with the extreme northern rail of the track to the extreme southern rail thereof there was placed the entire length of said crossing, running parallel with said tracks, iron or steel rails about three inches apart, and between these rails was placed cement, or some concrete substance; that it was the duty of said defendants, and each of them, to keep said intersection or crossing of said public highway in a reasonably safe condition for the use thereof by the public, but that the manner

of said crossing as above set forth, was not reasonably, or at all, safe, but was, on the contrary, highly dangerous, unsafe and insecure; that said rails became, and were at all time, dangerously smooth and slippery, so that a horse stepping thereon would slip and fall; that said dangerous, insecure and unsafe condition of said crossing was well known to the defendants, and each of them, or could have been known to them, and each of them, by the exercise of ordinary care, for such a period of time preceding the happening of the accident hereinafter mentioned to have permitted and allowed said defendants to have remedied same, and make said crossing safe and secure, but that notwithstanding all of the above the said defendants permitted said crossing to remain and continue in said dangerous and unsafe condition; and that on August 8, 1901, plaintiff's decedent, Pat Carroll, while riding horseback over and along Third street, going in a southerly direction, approached said crossing, and while proceeding across same his horse, because of the said dangerous, unsafe and insecure condition of said crossing, and especially the iron or steel rails which composed same, slipped and fell, with the result that said Pat Carroll was thrown violently to the ground, occasioning him such severe injuries that his death occurred therefrom within a few hours thereafter. Plaintiff says that the death of his son was brought and occasioned solely and altogether by the negligence and carelessness on the part of the defendants, and each of them, in the matters aforementioned."

The allegations of negligence were traversed by separate answers, and the contributory negligence of the plaintiff's intestate was relied on. No issue was made as to the description of the construction of the crossing between the rails of the railroad track. Upon these issues the case went to trial, and at the conclusion of the testimony of the plaintiff the circuit court directed a verdict for the defendant. To this ruling of the trial court plaintiff excepted, and a judgment having been rendered on the verdict he has appealed.

It appears from the bill of evidence that two tracks of the Louisville & Nashville R. R. Co., about eight or ten feet apart, occupy A street at its intersection with Third, and have so occupied it for many years; that Third street is paved with asphalt, and is one of the most generally used streets of the city, both for light and heavy hauling; that about the 1st of April, 1901, a little over four months before the accident which resulted in the death of appellant's intestate, the Louisville & Nashville R. R. Co. constructed the crossing across their railroad tracks at the intersection of the two streets in strict conformity with the plan therefor which had been prescribed by the board of public works of the city of Louisville; and that a similar design for railroad crossing had been prescribed and followed by the railroads at many points in the city. The gist of the complaint is that the plan or design of the crossing was imperfect and dangerous. There is no allegation that there had been any substantial change or deterioration in the crossing subsequent to its construction and previous to the accident. During the progress of the trial the plaintiff attempted to show by a witness that the original design of the crossing required that the filler rails should be covered over by cement to the depth of about an inch; and that the defendants had permitted this coat to wear off and to expose the surface of the iron rails,

The defendants objected to the admission of this testimony, on the ground that the alleged negligence charged went only to the design of construction, and not that it had been permitted to become out of repair. This objection was overruled by the trial court on the ground that the plaintiff had a right to so amend his cause of action that the pleadings would conform to the proof. But no such amendment was ever offered, and it is apparent from the general design of the crossing that it would have been practically impossible to have covered the iron rails with a cement coat which would have withstood for any length of time the pressure of heavily loaded wagons passing over it. To show that the design was dangerous, plaintiff introduced a witness who testified that he was a surveyor; that a crossing constructed in the manner of this one presented a smoother surface than a crossing constructed of oak planks; and that horses were more liable to slip upon such a crossing than upon a wooden one. He admitted, however, upon cross-examination, that there was no question that the design of this crossing was more durable and permanent in its character than wooden crossings, and less liable to get out of repair. Several other witnesses, living in the immediate vicinity of the crossing, were permitted over the objection of the defendants to prove that they had seen horses at various times stumble and slip upon this crossing. It does not clearly appear from their testimony when these accidents occurred, but we think it fairly inferable that they were so close in point of time to the accident which resulted in the death of plaintiff's intestate as to make the testimony competent, although there is decided conflict in the authorities as to the competency of this kind of evidence for any purpose except to bring home to the city and railroad company notice of the dangerous character of the crossing. That was immaterial, however. In this case, as it is admitted that the railroad company constructed the crossing under the direction and in accordance with the design prepared by the city, and both were chargeable with knowledge of the plan. It also appears from the testimony that decedent was riding at a very rapid pace on horse back out Third street, about 9:30 o'clock on the night of August 8, 1901, and that while crossing the railroad tracks his horse stumbled or slipped and fell, and that he was thrown to the street, receiving the injuries which caused his death. There is some discrepancy in the testimony as to whether the horse fell while on the track of the railroad or in the street between the two tracks.

While it is the duty of the city to keep its streets in a reasonably safe condition for ordinary travel, a corresponding duty rests on those who legitimately use the streets to avoid being injured. The rule is admirably stated in Dillon on Municipal Corporations, section 1015, as follows: "The liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist, or such as may be reasonably expected to occur."

Section 2825 of the Kentucky Statutes, which is a provision of the charter of the city of Louisville, vests in the board of public works exclusive control over the construction of its streets. They had the right, and it was their

duty, to prescribe a plan for the crossing of railroad tracks at the intersection of the public streets of the city, and it was the duty of the railway company to conform to such requirements in this respect as the board of public works might prescribe. It is difficult for the most competent engineers to devise a plan for such a crossing that will meet the requirements of safety, durability and convenience. In passing upon the liability of a city growing out of an alleged defective design or plan of construction, this court, in *Teager v. City of Flemingsburg*, 32 Ky. Law Rep., 1443, used this language: "It is argued for the city in this case that the plan of street improvements is one within the discretion of the council, and not to be interfered with by the courts. Some authority is cited from other States supporting this contention, but we rather incline to the view that while the city governing body may exercise its discretion in the selection of a plan of street improvement, if the plan adopted is one palpably unsafe to travelers, the city would be liable. But when the plan is one that many prudent men might approve, or where it would be so doubtful upon the facts whether the street, as planned or ordered by the city governing board, was dangerous or unsafe or not, that different minds might entertain different opinions with respect thereto, the benefit of the doubt should be given the city, and it should not be held liable."

While there is testimony that a horse is more likely to slip upon a crossing of the character complained of than a wooden one, the testimony fails to show any defect in its construction, or that it was not, all things being considered, of the best and most suitable design at that point. Undoubtedly horses are more liable to slip on asphalt than on macadam streets, and more liable to slip upon macadam than upon the ordinary country dirt road, but this is no ground or reason for the condemnation of asphalt streets. The necessities of modern city life require, next to safety, permanence and durability in the construction of the streets and crossings. The testimony in this case conduces to show that the unfortunate accident which resulted in the death of plaintiff's intestate was attributable to the rapid and negligent rate at which he was traveling when he attempted to pass the railroad crossing, rather than any defect in the crossing itself. It, therefore, follows, in the absence of testimony conducing to show that the accident complained of was attributable to the defective construction of the crossing, that the peremptory instruction should have gone.

Judgment affirmed.

NALL v. COULTER, AUDITOR.

(Filed March 2, 1904.)

1. Office and officer—Salary—Where one was elected to an office, as shown by the face of the returns, assumed the duties of the office, and received the salary until he was ousted in a contest proceeding, the remedy in an action by the one who was adjudged to be the duly elected officer for the recovery of salary paid the wrongful holder lies against such wrongful holder and not against the State.

2. Same—Where one assumed the duties of an office upon receiving a certificate of election from the canvassing board, he can not be said to be a

mere intruder while a contest is pending, and the auditor who paid his salary had the right to believe that he was the legal officer until he was ousted by the contest proceeding, and it was not required of the auditor before paying the salary to go behind the claimant's commission and investigate his title to the office and right to the salary.

Hazelrigg, Chenault & Hazelrigg for appellant.

N. B. Hays for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

In the election of State officers in the month of November, 1889, the appellant, Nall, was a candidate for the office of commissioner of agriculture, one Throckmorton being the opposing candidate.

On the face of the returns Throckmorton was declared elected by the canvassing board, a board duly created by and under the laws of the Commonwealth, whose duty it was to count the vote and determine for whom the greater number of votes were cast. It was not the duty of this board to pass upon the legality of the votes cast.

On January 1, 1900, Throckmorton took the oath of office and entered upon the duties thereof. But after the canvassing board had declared Throckmorton duly elected on the face of the returns, the appellant, Nall, instituted a contest, claiming that because of irregular acts done, whereby the votes counted for Throckmorton were procured, and by reason of illegal votes cast at the election, he was entitled to the office. The contest board decided that Nall was the person elected. Upon this finding Nall instituted a proceeding to oust Throckmorton, who refused to give up the office. After this court decided that Nall was entitled to the office, Throckmorton vacated, and appellant entered and assumed the duties of the office.

It appears that the then auditor, Sweeney, paid Throckmorton his salary for the months of January and February. The present suit was brought by appellant against Auditor Coulter to compel him to issue his warrant on the treasurer of the Commonwealth for the sum of \$383.25, the amount of the salary due him from the 1st day of January to the 25th of February, 1900, the date when the contest board declared appellant entitled to the office. In other words, appellant claims that by reason of his being entitled to the office on the 25th of February that he is entitled to the salary due from the State, beginning January 1, 1900. The appellee claims that the State paid this salary to Throckmorton, who was in the office attending to the duties thereof, and who had been duly declared elected by the board of election commissioners, and held the apparent legal title to the office; that if the appellant is entitled to this salary, he must look to Throckmorton for it, who received it, and contested with him the right to the office.

We are of the opinion that appellee's contention is the correct one. We have not been referred to, nor have we been able to find, any case decided by this court directly in point, but the courts of many States, as well as the English courts, have passed upon the question. The decided weight of authority, both in numbers and reason, uphold the principles contended for by appellee. We have been referred to many cases apparently holding the opposite rule, but upon a close examination of them it appears that many

are not in conflict; some few of them apply to usurpers, having no color of right or title to the office; some few have reference to cases where the appointment or election of the person who held the office and performed its duties was void. The cases of *Caufield v. Auditor*, 21 Ky. Law Rep., 1641, *Gorley v. City of Louisville*, 21 Ky. Law Rep., 1606, also same case reported on first appeal, 20 Ky. Law Rep., 602, are cited by appellant.

The right of *Caufield* to compel the auditor to issue to him a warrant for his salary as clerk of the penitentiary was upon the idea that his removal from office by the acts of the State's officials was a nullity. This precise principle was involved in the *Gorley* case, *supra*. In these cases the State and city officials professing to act for and on account of the State and city, committed illegal and void acts in the removal of *Caufield* and *Gorley*. At least it appears that it was upon these principles that they might be permitted to recover their salaries from the State and city. The case at bar is different. *Throckmorton* was at least a *de facto* officer, and not an usurper, and it is not charged that the State board of canvassers committed any illegal or void act with reference to granting *Throckmorton* a certificate.

In 2d edition, *Am. and Eng. Ency. of Law*, volume 8, 783, it is said: "To constitute a person an officer *de facto* there must be some facts, circumstances or conditions which would reasonably lead persons who have relations or business with the office to recognize and treat him as the lawful incumbent, and submit to or invoke his official action without inquiry as to his title."

Again, on page 794: "Color of title to an office is defined to be 'that which in appearance is title, but which in reality is no title.' It is this color of title, or, it has been said, color of authority, which distinguishes the *de facto* officer from a mere intruder or usurper, whose acts are absolutely void."

It can not be said that *Throckmorton* was a mere intruder or usurper, but, on the contrary, he assumed the duties of the office with the legal certificate of the board of canvassers, and so remained in office until February 25, 1900, when the board of contest declared appellant elected and entitled to the office. The then auditor, *Sweeney*, had the right to believe that *Throckmorton* was then the legal officer. Upon what principle of reasoning can it be required of the auditor to investigate and determine at his peril whether or not a person has been legally elected to an office before he draws his warrant upon the treasurer for his salary? To require the auditor to pay at his peril, or withhold salaries until all contests were finally settled, would in many cases leave the State without officials to perform its service. In the same volume of the *Am. & Eng. Ency. of Law*, page 813, it is said: "The general rule is that a State, county or municipality which, before judgment of ouster against a *de facto* officer, has paid him the salary of the office due at the time of payment, is protected against any liability to the *de jure* officer for such salary."

In the case of *Dolan v. New York*, 63 N. Y., 274, the court said: "If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to

pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the State and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the processes of the court and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed, and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

A case very similar to the one before us is found in 82 La., 1097, *Michel v. The City of New Orleans*. The court in that case said: "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in the possession of the office and performing functions required for the protection of society and the maintenance of peace and order, and after this duty is performed both law and equity forbid that the city or State be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer. * * * We are clear that under our laws the right of a *de jure* officer in such a case must be exercised against the intruder for the recovery of fees or of the salary of the office, and no recourse exists against the State or city for such salary as was paid to the *de facto* officer."

The case of *Anderson v. County Commissioners, &c.*, 20 Kan., 298, was a case which arose over a contest for the county clerk's office. Anderson and one Wildman were opposing candidates. The board of canvassers gave Anderson a certificate of election, and he took the oath and possession of the office. Wildman contested his election. The contest court decided in favor of Wildman, awarding to him the certificate previously issued to Anderson. Wildman immediately qualified, and took possession of the office. Anderson then took the case to the district court on appeal and that court reversed the judgment of the contest court, and awarded the office to Anderson. Wildman then appealed to the Supreme Court, and that court affirmed the district court. Wildman in the meantime held the office, received the salary

and fees from January to October. The county commissioners had, during all this time, full knowledge of all this proceeding, but, nevertheless, paid the salary to Wildman. Anderson sued the board of county commissioners for \$900, the amount of salary they paid Wildman for the time he held the office while the contest was proceeding in the courts. In that case the court said: "It must be remembered that Wildman was not a mere usurper; but he was an officer *de facto*, having possession of the office under color of title. What would be the rule if he were a mere usurper, it is not necessary for us to decide in this case. All that we now decide is, that where a person is in possession of the office of county clerk, under color of title, and is the county clerk *de facto*, and claims to be the county clerk *de jure*, and the board of county commissioners pays to him the salary due to the right incumbent of such office, the county clerk *de jure* has no action against the county board for such salary, and this, notwithstanding the fact the county board may have known at the time they paid said salary that the question as to the title to the office was in litigation, and notwithstanding the fact that the county clerk *de facto* may be insolvent. The remedy of the county clerk *de jure* in such a case is an action against the county clerk *de facto*." To the same effect are the cases of *Benoit v. Auditors of Wayne County*, 20 Mich., 176, 37 N. Y., 518, and other cases which we deem it unnecessary to cite.

Appellant claims that he is protected by section 235 of the State Constitution. This section is as follows: "The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the general assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties."

He contends that if he be not allowed the whole salary for the full term of four years, that this would be a deduction from his salary in the meaning of this provision of the Constitution, and a violation of this provision of the Constitution. In our opinion this section of the Constitution has no application to a case like this. This is not an effort to decrease or change his salary, nor make any deduction therefrom for any neglect of official duty. The appellant had the right to sue the party who litigated with him for this office and recover that part of the salary paid him while in the possession of the office. But it is suggested that in some instances contestants for office are insolvent, and then the officer would lose a part of his salary unless the injured party was permitted to recover from the State, county or municipality. This would be unfortunate, but many persons have suffered loss of claims and costs by being forced to engage in litigation with insolvent persons.

It is also contended "that the State by its officers and agents wrongfully prevented appellant from discharging the duties of his office for a time, and that the State can not now be heard to say that appellant, during that time, neglected his official duty, and, therefore, must not be paid." We do not decide that appellant is not entitled to his salary, or that he was guilty of any neglect of official duty, but conclude that his remedy is against the person who received a part of his salary. It is true that the board of canvassers, board of contest, circuit judge who tried the case, and the Court of Appeals, were officers and agents created by the State, but the creation of them was for the purpose of guarding and protecting the rights and interests of the State and individual. We can not admit that the State should be held

responsible for the mistakes or errors of judgment of its officials. To carry such a construction to its logical conclusion would involve the State and make it liable for all losses incurred by the litigant by reason of the errors or mistakes of its officials.

For these reasons the judgment of the lower court is affirmed.
Whole court sitting.

PRATT v. COULTER, AUDITOR.

(Filed March 2, 1904—Not to be reported.)

M. C. & G. D. Givens and McKenzie Todd for appellant.

N. B. Hays for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1899 the appellant, C. J. Pratt, and one R. J. Breckinridge were opposing candidates for the office of attorney general.

The State Board of Election Commissioners awarded the certificate of election to C. J. Pratt. Breckinridge at once entered into a contest for the office. The board of contest decided that Breckinridge was entitled to the certificate. The circuit court of Franklin county affirmed the action of the board of contest, and Pratt, under protest, surrendered the office to Breckinridge, who assumed the duties of the office. Thus matters stood without a supersedeas or appeal for about a year, when Pratt appealed from the decision of the circuit court to the Court of Appeals, which reversed the circuit court and adjudged that appellant Pratt was entitled to the office. Breckinridge surrendered the office to Pratt, who assumed the duties of the same. Appellant brought this action to require the auditor to issue a warrant upon the treasurer for the amount of his salary from the time Breckinridge went into the office, under the judgment of the circuit court, to the time he was ousted by the Court of Appeals.

It is admitted that the State paid Breckinridge the salary during this time. We are of the opinion that the opinion in the case of Nall v. Coulter, Auditor, ante, 1891, this day filed, applies to the facts in this case, and for the reason therein given the judgment of the lower court is affirmed.

Whole court sitting.

BROWN v. COMMONWEALTH.

(Filed March 2, 1904.)

Criminal law—Instructions—In a prosecution for murder, where the evidence is circumstantial, it is the duty of the court to instruct the jury upon voluntary manslaughter and self-defense, and a failure to so instruct is an error prejudicial to the substantial rights of the accused.

Ford & Ford for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Nunn.

This case was before this court on a former appeal, and was reversed because there was not anything with which to connect the accused with the death of Lair, nor was there evidence that Lair came to his death as the result of violence on the part of any one. (See opinion for history of the case in 24 Ky. Law Rep., 737.)

On the return of the case to the lower court another trial was had, and resulted in appellant's conviction and a life sentence was imposed, and the case is here again on appeal. It appears from this record that the Commonwealth on the last trial strengthened its evidence to some extent. We can not say that there was no evidence to sustain a conviction. The record shows that there was not a witness who professed to be an eye-witness to the homicide or any part of the transaction by which Lair lost his life. Under this state of case the lower court only gave to the jury two instructions, one in proper form, on the question of murder, the other on reasonable doubt. The court did not give, nor was it requested to give, instructions on the question on voluntary manslaughter and self-defense. This, under the law as it exists, as decided by this court, was an error prejudicial to the substantial rights of the appellant.

In the case of Buckles v. Commonwealth, 24 Ky. Law Rep., 572, after discussing the question as to whether there is such a substantial difference between error in giving or failing to give the law of the case in instructions and error in what may be called the practice of the case, in admitting or rejecting testimony and the like, as would justify this court in taking cognizance of an error in the one case, though not excepted to when this court would refuse it in the other, the court said: "But when we come to the question on instruction a different rule obtains. The trial court is required without request to give the law, the correct law, and the whole law of the case. It is not necessary to call the judge's attention to an error; the law requires his attention. It is not only necessary to specify the error which he has committed, but it is not required that he be requested to give all the law of the case."

This court has decided in at least three cases that when the evidence of the homicide is entirely circumstantial, the whole law applicable to any state of case that might have existed should be given. In the case at bar the whole of the evidence produced against appellant was entirely circumstantial. He testified that he did not take the life of Lair, nor did he have any knowledge nor information as to how, or by what means, he lost his life. If appellant committed the homicide, either by murder, voluntary manslaughter or in self-defense, and as there was no person present and saw the act, he may have concluded the best thing for his safety and preservation was to deny all knowledge of the transaction. In such state of case, if his crime, in fact, had only been manslaughter, yet under the instructions given he must be hung or confined in the penitentiary for life, not because he was guilty of murder, but for the reason he told a falsehood, when he denied any part in or knowledge of the homicide.

In McDowell v. Commonwealth, 4 Ky. Law Rep., 354, opinion by Judge Hines, the court said: "In cases depending entirely upon circumstantial evidence it is the duty of the court to give the whole law applicable to any state of case that might have existed."

In the case of *Rutherford v. Commonwealth*, 18 Bush, 608, the court said: "When no witness introduced on the trial saw the homicide committed, or saw the parties after they met on the occasion when the killing occurred, the law applicable to murder, manslaughter and self-defense should be given. In order to meet any state of fact the jury may find from the circumstances in evidence to have existed."

In the case of *Justice v. Commonwealth*, 20 Ky. Law Rep., 390, the court said: "While it was the duty of the court to give the whole law of the case, this does not extend to giving the law of apparent necessity, unless there was some proof of that fact, or an entire absence of proof as to how death was produced and only circumstantial evidence relied on to show the cause. But this court has repeatedly held that if there be an eyewitness to the homicide the case is taken outside of circumstantial evidence, and the court is relieved from giving instructions as to all degrees of homicide and self-defense, but will only give those warranted by the proof." (Section 993 of Roberson's work on Criminal Law.)

For these reasons the judgment of the lower court is reversed and cause remanded for proceedings consistent herewith.

The whole court sitting.

Judges Paynter and Hobson dissenting.

CITY OF LEXINGTON V. CROSTHWAIT.

(Filed March 2, 1904—Not to be reported.)

Street improvements—Limitation—In an action involving the right of a city to collect the cost of street improvements from abutting property, done in 1892 under an act adopting the ten-year plan of payment, the action to enforce the lien having been brought in 1901, the plea of limitation is good as a bar to it. The city could not enlarge the liability of the lot owner by extending the time of payment without his consent, and an attempt to do so was void.

Allen & Duncan for appellant.

Forman & Forman for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

This action involves the right of appellant city of Lexington to collect the cost of a certain street improvement from an abutting property on South Broadway street, done in 1892. The work was done, not under the present statute, but under the act of April 19, 1890. There is a material difference between the two statutes. By the 3d section of the act of April 19, 1890, when such an improvement was properly ordered, its cost was to be borne two-thirds by the owner of the abutting property and one-third by the city, unless, upon request of the property holder, the ten-year plan was adopted.

In the latter event the property holder paid the whole of the cost of improvement in ten equal installments, for which the city issued its bonds, the interest upon which was paid by the city. In this case there was not a request by the abutting property holder to the city to permit the adoption of the ten-year plan of payment, notwithstanding the city did adopt that

plan and issued installment warrants against the property accordingly. This suit brought in 1901 seeks to enforce the lien for the several years' installments which had accrued, some owing to the city and others claimed to have been sold by the city to appellant, Irvine H. Forbing, appellee interposed, among other defenses, the plea of limitation. Having concluded that that plea is good as a bar to the suit, we do not find it necessary to pass upon the other defenses presented. Unless the property owner requested the city to extend the ten-year credit and to issue its bonds for the cost of the improvement, the statute of 1890 made two-thirds of the cost, and no more, a charge against the abutting property, and made it due when the work was completed and accepted. The right to enforce the payment then accrued to the contractor.

The city could not, without the request of the lot owner, enlarge his liability by increasing it and extending the time of its payment for ten years. Its action in attempting to do so in this case was void. The liability to pay for street improvements is one created by statute, and is barred unless enforced within five years from its accrual. (Section 2515, Kentucky Statutes.) The act of 1890 provided for the collection of the assessments by distraint. There was no provision for an action. The present statute, the act of March 19, 1894, allows suit to enforce the liens. The limitation applies alike to both remedies. (*L. & J. Ferry Co. v. Commonwealth*, 22 Ky. Law Rep., 480; *Chicago, & Co., Ry. Co. v. Commonwealth*, 24 Ky. Law Rep., 2124; *Commonwealth v. Nute*, 24 Ky. Law Rep., 2188; *Kirwin v. Nevin*, 28 Ky. Law Rep., 947; *Gleason v. Stone Co.*, 23 Ky. Law Rep., 1740; *Stengel v. Preston*, 80 Ky., 816.)

The judgment of the circuit court dismissing the petition of appellant, Forbing and the cross petition of the appellant, city of Lexington, is affirmed.

ILLINOIS CENTRAL R. R. CO. v. HIBBS.

(Filed March 2, 1904—Not to be reported.)

Railroads—Construction of statutes—A railroad company incorporated under the laws of a foreign State, by complying with section 841, Kentucky Statutes, does not become a domestic corporation so as to prevent it from having the right to remove a cause to the Federal court.

Robbins & Thomas, J. M. Dickinson, J. E. Budgewater and Pirtle & Traub for appellant.

J. M. Nichols & Son for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Settle.

By this action in the Carlisle Circuit Court appellee sought to recover of the appellant \$10,000 in damages for personal injuries sustained by collision with one of its trains, resulting from the alleged negligence of those in charge of the train. The answer denied the negligence complained of, and in the usual form averred that the injuries received by the appellee were caused by his contributory negligence. The trial resulted in a verdict for appellee for \$1,600. At the appearance term of the court, and before answer-

ing the petition, appellant filed a petition in due form, accompanied by an approved bond, and entered motion to transfer the cause to the circuit court of the United States for the Western District of Kentucky, which petition and motion were overruled and refused by the lower court, to which the appellant excepted and the case is now before this court by appeal. It is insisted that the lower court erred in refusing appellant a new trial, and also in overruling the petition and motion for the transfer of the cause to the Federal court. If the last contention is sustained the consideration of the other questions raised by the appeal will be unnecessary.

The grounds upon which the motion to transfer was overruled were the same upon which this court in an opinion by Judge White, in *Davis' Adm'r v. C. & O. R. R. Co.*, 24 Ky. Law Rep., 1125, decided that when a foreign railroad company, such as the appellant, had complied with section 841, Kentucky Statutes, such compliance, ipso facto, made it a domestic corporation, and it could not, therefore, remove a cause from a State to a Federal court on the ground of diverse citizenship. We are of opinion, however, that the action of the lower court in refusing to transfer this case to the Federal court can not be justified on the grounds upon which Judge White bottomed his opinion in the case *supra*, for when the petition of appellant was filed and its motion to transfer the case was entered, there was nothing in the record showing that it had complied with section 841 of the Statutes, thereby placing itself upon the footing of a domestic corporation, hence the motion for removal should have been sustained notwithstanding the opinion in the *Davis* case *supra*. But since the decision of the *Davis* case the petition for a rehearing therein, which was pending at the time appellant's motion for a transfer of the case at bar was overruled by the lower court, was sustained by this court and the former opinion withdrawn, and in lieu thereof it was held by this court, in an opinion by Judge Paynter, that a railroad company incorporated under the laws of a foreign State did not, because of a compliance with section 841, Kentucky Statutes, become a domestic corporation so as to prevent it from having the right to remove a cause to the Federal court. (*Davis' Adm'r v. C. & O. R. R. Co.*, 25 Ky. Law Rep., 342.)

The doctrine announced in the last opinion in the case of *Davis' Adm'r v. C. & O. R. R. Co.*, 25 Ky. Law Rep., 342, has since been reaffirmed by this court in *Swice's Adm'r v. Maysville & Big Sandy R. R. Co.*, 25 Ky. Law Rep., 436.

The lower court erred, therefore, in overruling appellant's petition and motion for the transfer. Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict and judgment and grant appellant a new trial, and to sustain its motion to transfer the case to the Federal court, to the end that such new trial may take place there.

BARDSTOWN & LOUISVILLE TURNPIKE CO. v. NELSON COUNTY.

(Filed February 19, 1904.)

1. Turnpike—Purchase by county—Consideration of contract—Burden of proof—Where a turnpike company suing a county on a contract for the purchase of its road, alleges as a consideration of the agreement the transfer of

the road to the county a plea of "no consideration," merely raises an issue as to the validity of the vote under which the county contracted, but does not inject an issue of fact, or shift from the plaintiff the burden proving a consideration.

2. Payment of indebtedness—Bond issue—Effect of sale—The law requiring a two-thirds majority of the votes cast upon a proposition to incur an indebtedness and issue bonds to pay the purchase price of the turnpike bought by the county, the proposition to buy the road received 1,370 affirmative votes to 563 negative; the proposition for a bond issue submitted at the same time received 826 votes for and 612 against it. Held—That this was authority for the county to incur an indebtedness for the purchase of the road, but was not authority to issue and sell bonds therefor.

3. Conditional proposition—Acceptance—Where the turnpike company conditionally accepted a written proposition submitted by the fiscal court to purchase its road, but which conditions the county rejected and thereupon the company turned the road over to the county under the original proposition, there was an acceptance by the county of the proposition.

4. Abandonment—A county having contracted with the turnpike company for the purchase of its road and appointed commissioners in condemnation proceedings to fix its value pursuant to the statute, and thereafter the county dismissed the proceedings, did not constitute an abandonment of the road by the company, although more than four months had elapsed since it was turned over to the county.

5. Fiscal court—Jurisdiction—A county fiscal court had no jurisdiction to try a litigated question as to whether a turnpike company had abandoned its road, and its judgment that it had done so was void.

6. Valuation of road—Admissibility of evidence—Under the law the company could not sell its road to any one but the county, and it having no market value, by reason of the action of the "raiders" in destroying the toll-gates and terrorizing the gatekeepers, it was the duty of the commissioners appointed under the statute to require the owners to produce books and other evidence showing receipts and expenditures on the portion sold, and the amount of net earnings for each year for six years, and to hear any other evidence conducing to show the value of the property and to award the "actual value" of the property taken.

7. Market value of road and stock—Neither the market value of the road or of the stock can be considered in the sale of a turnpike road to a county which, by law, is made the exclusive purchaser.

8. Instructions—In an action by a turnpike company against a county on its agreement to purchase the company's road, it appearing that for at least six years the company had paid six per cent. dividends on its stock; that the right of way was sixty feet wide, the grade twenty or twenty-two feet wide; metal about twenty feet wide, macadamized and covered with broken rock and gravel from four to six inches; connected with the largest city in the State and passing through a rich agricultural community, enterprising towns and villages, and costing over \$200,000, it was error to give instructions permitting the jury to find that it had no value.

John A. Fulton, Fulton & Fulton, J. S. Kelley and J. S. Barlow for appellant.

Nat W. Halstead, W. S. Pryor, C. C. McChord, Morgan Yewell, Eli H. Brown, Jr., and Robt. L. Greene for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

Nelson county, by vote in 1897, adopted the provisions of the statute known as the "Free Turnpike Act" (section 4748b, Kentucky Statutes). In the following March the owners of the Bardstown and Louisville Turnpike road and Nelson county, the latter acting through its fiscal court, entered into a contract by which the county was to acquire that part of appellant's road in Nelson county, about thirteen miles, and fixing the compensation to be paid by the county for the use of the road pending the fixing of its value by commissioners or a jury, according to the provisions of the statute. The county was permitted to and did take charge of the road under that contract, and has continuously since used and maintained it as a public road by virtue of that agreement. On a former appeal (109 Ky., 800) it was held that the contract in question amounted to an agreement by the turnpike company to sell, and by the fiscal court to buy, the road; that the price was left to be determined in the condemnation proceedings which had been instituted by the county; and that for the use of the road until the price was thus fixed the county was to pay the turnpike company a sum equal to 6 per cent. per annum on the amount finally fixed as the value and price of the road. Instead of prosecuting the condemnation proceeding already instituted under the statute, and which, as was held on the last appeal, was the one the parties had in contemplation in entering into the contract, the county abandoned it. The commissioners had, by their report, fixed the value of the road at \$18,356. The condemnation proceeding was dismissed before the commissioners' report was acted on. The county claimed that the statute subsection 15 of section 4748b expressly provided that the county might, by paying the expenses incurred, abandon the condemnation proceedings begun by it. While that is true, it does not at all follow that the county could abandon the contract made by it with the road owner. On the former appeal it was held that under the statute the county could acquire the turnpike road by contract, lease, purchase or by condemnation, and that the paper exhibited in that suit was both a contract for purchase and lease. By it the county agreed, so it was held, to pay for the road as purchase price the sum to be fixed in the pending condemnation proceeding; and as the county had wrongfully abandoned and dismissed that condemnation proceeding, an action would lie to recover the value of the road at the time it was taken under the contract; that such was the implied undertaking of that agreement. All the foregoing matters were settled on the former appeal between these two litigants. In this action to recover the value of the road the county has attempted to relitigate those questions. But that can not be done. They are res adjudicata. In addition the county pleads as a defense that the contract attempted to be made between it and the road company was void because ultra vires. There was also a plea that the road had been abandoned by the company for more than six months, and had been taken charge of by the county on that account. There was also a plea of no consideration made by the county.

A trial before a jury in the circuit court resulted in a verdict fixing the value of the road as of the date when taken by the county at \$5,000. This appeal by the road company raises the correctness of the jury's verdict, and of the instructions given the jury by the trial court, as well as its rulings in admitting and rejecting evidence. Inasmuch as appellant's petition sets out

the consideration of the agreement sued on, to wit, the transfer of the thirteen miles of road to the county by the company, the plea of no consideration simply raises the validity of the vote under which the contract was entered into. As those matters were fully set forth in the petition, their sufficiency was as well presented by the demurrer to the petition as by the plea of no consideration. Under the pleadings, as formed, this plea was really only the pleader's conclusion of the legal effect of the contract, under appellee's version of the vote by which it was authorized. It neither shifted the burden or proof not presented an issue of fact in the case. (Chaplin and Bloomfield T. P. Co. v. Nelson County, 25 Ky. Law Rep., 1154.)

Every writing evidencing an indebtedness imports a consideration under our statute. (Section 470, Kentucky Statutes; *Andrews v. Haydon*, 88 Kentucky, 455.) A petition upon such writing, where the consideration is not named in it, need not aver the consideration. If the defendant plead no consideration, he would have the burden of proof. But where the writing states its consideration and the petition also declares upon it, if denied, the burden of proving it is upon the plaintiff; and that is so whether the form of the denial is a traverse or an affirmative denial. The trial court should have awarded the burden in this case to appellant.

When the proposition was submitted to the voters of Nelson county whether they would adopt free turnpike and gravel roads, there was also submitted the question whether they were in favor of issuing bonds to pay for the roads. The first proposition received 1,370 votes in the affirmative, and 563 against it. But on the second proposition there were cast only 826 votes in favor of it, and 612 against it. From this it is argued that no authority was given to incur an indebtedness to be paid out of the revenues of future years; that section 157 of the Constitution prohibits the incurring of a liability by a county beyond the revenues of the year in which it is incurred, unless the proposition is submitted to a vote of the people of the county, and receives in its favor two-thirds of the votes cast on that question.

When the voters of Nelson county, by 1,370 votes to 563, voted to acquire the turnpike roads, that necessarily involved the incurring of such indebtedness as might be required to pay for them. Merely voting for free turnpikes could not make them free. The voters must have known that they would have to pay for the roads; and their value was such that that could not possibly be done out of the revenues of any one year. The vote in favor of free turnpikes would be meaningless unless it was construed to mean that if it prevailed by the constitutional majority, the necessary indebtedness was also provided for, in order to carry the vote into effect; that is the precise point decided in *Whaley v. Commonwealth, For Use, &c.*, 110 Ky., 154, 28 Ky. Law Rep., 1292.

But in this case there is this additional fact, not in the *Whaley* case: The bond question was also submitted at the same time, and failed of the two-thirds majority required by subsection 9 of section 474b, Kentucky Statutes. This can not mean, though, that 612 votes could annul 1,370 votes in favor of acquiring all the roads at once. Assuming that these voters knew the effect of their action, and intended it, the situation is this: By more than the constitutional majority the voters of the county decided to acquire all the turnpike roads in the county and to make them free to all travel; and

they, by virtue of that majority, invested the fiscal court with the power to incur an indebtedness beyond the revenues of the current year in order to carry the will of the voters into effect. But, at the same time, the voters refused to issue and sell bonds on the public market to meet the indebtedness. They seemed to prefer that the county should arrange to carry this debt by its notes, or contracts, and not by bonds. A vote to incur an indebtedness and a vote to issue and sell bonds to meet it are not necessarily the same thing. We are of opinion that the county was authorized by the vote to incur the indebtedness; but it could not issue and sell bonds on the market as provided in subsection 9 of the statute. (Section 4748b.)

Counsel for appellee cite the case of Maysville and Lexington, &c., Co. v. Wiggins, 20 Ky. Law Rep., 727, as sustaining a contrary doctrine. But the fact is overlooked that that case is discredited on that point, and declared not to be authority in *Whaley v. Commonwealth*, supra. The proposition submitted to the turnpike company by the fiscal court, which was in writing, was accepted by the company, but it added certain conditions to its acceptance. The county by a written order rejected the conditions. It is now argued that a proposition can not be accepted conditionally, so as to impose them upon the other party, and that such an acceptance is no acceptance. Admitting this to be so, yet in this matter when the county rejected the conditions imposed by the company, the latter turned over to the county the possession of the road under the original proposition, which was an abandonment of the condition which it had sought to impose, and left the original proposition accepted without other conditions than were contained in it.

Section 4732, Kentucky Statutes, provides: "When any turnpike company abandons its road and ceases to charge toll thereon it shall be the duty of the fiscal court in the county in which any such road lies to take charge and control of same, and keep it in a safe and proper condition for public travel, and alter or discontinue same as other public roads. The failure on the part of any turnpike company for the period of four months to keep its road in a condition safe for public travel, and their failure to charge toll thereon for such length of time, shall be deemed and held to be an abandonment within the meaning of this section."

After the execution of the contract first named, and after the commissioners appointed in the proceeding to condemn appellant's road as a free turnpike had reported, but before the report was acted on, the fiscal court decided to abandon the proceeding under section 15 of the act. (Section 4748b.) It therefore, dismissed the condemnation proceedings in the county court. It had been more than four months since the turnpike company had turned over the road to the county, and had failed to collect tolls on it, and had likewise during that time failed to keep the road in repair. Assuming that the county's contract with the road company was not binding, and indeed had not been accepted for the reasons above stated, the fiscal court caused a notice to be served upon the road company to show cause before that court on a day named why the fiscal court should not take charge of the turnpike in question as an abandoned turnpike under section 4732 of the Statutes above quoted. The company resisted the motion, but the fiscal court adjudged its defense insufficient and declared and adjudged the road an abandoned road, and ordered it to be taken in charge and kept up as a county road. The

turnpike company prayed and was granted an appeal to the circuit court from that judgment, but never prosecuted it. Now the county pleads that proceeding in bar of this action as an estoppel by judgment. This seems to be the principal contention made in the brief for appellee. We are of opinion that the matter is not a good estoppel. In the first place, there was no abandonment by the turnpike company in any sense of the word, and in the next place, if there was a question about that, the fiscal court was utterly without jurisdiction to try the title to the property, or to adjudge an abandonment or forfeiture. The Constitution does not define the jurisdiction of the fiscal courts. But section 1840 of the Statutes does. In no event is it authorized to try any litigated question, or to adjudge the rights to property. Its attempted proceeding was a nullity. Its judgment was void.

On the trial of the case a number of witnesses introduced by the county testified that, in their opinion, the road was valueless. On cross-examination they gave as their reason for this that tollgate raiders, a species of felons who in the night time went armed and in bands, destroying the tollgates and terrorizing the gatekeepers, had by their action made the property so undesirable as a marketable property that it could not be sold, therefore, they thought it had no market value. Again, some thought as the people of the county had voted for free turnpikes, that meant that all toll roads must be relinquished, and that destroyed their future value. Others yet suggested that the effect of these matters, and of the free turnpike sentiment, took away all market value from the stock of the turnpike companies; that investors would no longer buy it. The only value of that class of evidence was to show that the witnesses giving it were utterly incompetent to judge of the matter about which they were attempting to testify, the actual value of the turnpike road. It was the duty of the county to have protected the gates and property of the road company from the depredations of the marauders. If it failed to do it, and if their strength overcame that of the owners temporarily, that fact should not, and in law does not, detract in the least from the actual value of the properties in the condemnation proceedings by the county, nor has the market value of the road anything to do with the question. There was no market value, and from the very nature of things could not be. Under the law the road company could not sell its road at all except to the county. There was but one purchaser in existence. Manifestly, then, the criterion of a market value could have no application. Where a commodity or species of property can be sold, and there is a market for it, with opportunity for any number of bidders, and where such sales are made, it is thought that condition affords the best test of value, because by reason of the competitive bidding in a free and open market, the value so established is most likely to be the actual value of the thing. Nor did the market value of the stock enter into the question. The stock wasn't being condemned. The company may have been overcapitalized, or may have paid unnecessarily large salaries to useless officers, all of which would have affected the market value of this stock, yet have had no just effect whatever upon the value of its road. While the value of the road would likely have affected the value of the stock, the market value of the stock could not possibly have affected the actual value of the road, except to show its dividend-paying capacity.

The statute governing condemnation proceedings in the county court, as

to how the value of the road was to be ascertained, should have been applied in the circuit court. Section 18 of the act regulates that. These are declared to be probative evidence: First, a view of the road; second, the books and other evidences showing receipts and expenditures on the part of the road to be sold, and showing net earnings for past six years; and, third, "any other evidence conducing to show the value of the property sought to be taken." The commissioners are then required from all that evidence to "award to the owner or owners thereof the actual value of the property taken."

This provision of the statutes speaks of proceedings before the commissioners appointed to find the value of the property to be taken. It must be remembered that in this case because appellee, Nelson county, wrongfully dismissed its proceedings in the county court, the circuit court, as the only court of general original jurisdiction, is undertaking to carry into effect the original contract between these parties. Besides, that section and provision is the legislative test of value. In the trial of a similar case before a chancellor, without a jury, it was said that it applied. (Richmond, &c., T. P. R. Co. v. Madison County Fiscal Court, 24 Ky. Law Rep., 1260.)

In this connection it is well to notice the instructions of the court guiding the jury to a verdict upon the value of this property. The instructions given were as follows:

"Instruction 'R.' The court instructs the jury that they should find for the plaintiff the actual value, from the evidence, of its road in controversy, being that portion of plaintiff's road between Bardstown and the Spencer county line, including bridges, in the condition in which it was on March 7, 1898, unless they shall believe from the evidence said property was of no value on said date.

"Instruction 'S.' By actual value is meant such price or value as could have been obtained at a fair, voluntary sale.

"Instruction 'T.' If they believe from the evidence that the property in controversy was of no value March 7, 1898, they should find for defendant. ;

"Instruction 'U.' The vote in Nelson county November 7, 1897, only authorized said county to obtain the turnpike road in said county, by gift, lease, purchase or contract, for the purpose of making said roads free.

"Instruction 'M.' The court instructs the jury that they are not authorized to consider any failure or cessation of plaintiff to collect tolls at its gates, which they may believe from the evidence was caused by the acts of mobs and tollgate raiders prior to March 7, 1898, as an abandonment of its road or franchise privileges.

"Instruction 'F.' The court instructs the jury that the plaintiff was not required to expend any other portion of its tolls and revenues in the repair and maintenance of its road than was required to keep its road and bridges in a fit condition for public travel, and if the receipts of the road were more than sufficient to so keep it, it was the duty of plaintiff company to declare dividends and pay the surplus earnings and profits each year to the stockholders."

There should have been omitted from the first instruction the last sentence, "unless they shall believe from the evidence said property was of no value on said date."

Instruction "S" and instruction "T" should have been omitted; nor do we see any occasion for instruction "U."

It is true certain witnesses, basing their opinions upon erroneous bases as has been shown, stated that the road was valueless. But that could not have been so in this case. It was a manifest fact from the record, and one of which the court was bound to take notice, that property of this character and quantity had some value. It had for many years, certainly for the six years previous to its being taken, paid dividends to its stockholders on a basis of 6 per cent. per annum on the valuation of about \$28,000 for the thirteen miles of road in suit. The right of way was sixty feet wide. The road was built about 1839. The grade was twenty or twenty-two feet wide, metal about twenty feet wide. The road was a macadam. The base was built of limestone rock set on edge, six inches deep, making what is known as paving. This was covered or napped with small broken rock and gravel, four to six inches deep. The section of country traversed by the road was a rich agricultural community. The road connected the largest city in the State, only about thirty miles distant, with an enterprising and thrifty county town, passing through a number of villages. Two expensive covered wooden bridges, with substantial stone abutments, the bridges about 180 feet long, were a part of the road in this county. The road is an historic one. It was one of the first attempts of the Commonwealth at internal improvements. It was projected and built before the introduction of steam railroads, and was expected to be an interstate thoroughfare. It cost over \$200,000 to build it, of which the State of Kentucky took in stock \$100,000. (Collins' History of Kentucky, volume 1, page 641.) The road was in good condition when taken by the county a dividend-paying investment to its stockholders. The country it traversed, and the cities it afforded a highway between, had grown considerably, and are yet growing, in population and commercial importance, and the use of the road in the future as a highway must necessarily have been increased, and, therefore, been more profitable to its owners. To say, or to submit, whether such property was without value is utterly unjustifiable. The error of the trial court must have been based upon the theory of market value referred to in instruction "S." But even if it had no market value, yet it had a very substantial value to its owner. It is not material, under the Constitution, whether the citizens' property had a market value or not, whether there is such general demand for it as to create a market, if the State or public need it and proposes to take it for public use, they must pay for it; must make the owner whole; must give him in money an equivalent of that value to him, which has been taken for the public. If the thing taken has a market value, then that value is the thing to be restored, for he can go into the market and get the equivalent of what he has been compelled to yield to the public. But if it has not a market value, nevertheless he must be compensated for its actual value to him, in this case to be ascertained in the manner pointed out by the statute.

The finding of the jury of \$5,000 as the value of this thirteen miles of road was flagrantly against the evidence. The court erred in placing the burden of proof. The instructions were erroneous as indicated. The admission of evidence may be regulated by what has been said. The judgment is reversed and cause remanded for a new trial consistent herewith.

The judgment of the circuit court should add 6 per cent. per annum from March 7, 1898, to whatever sum is found and adjudged to be the value of the road for the use of the road under the contract since that date.

WATTS v. PARKS.

(Filed March 3, 1904—Not to be reported.)

1. Mortgage—Sufficiency of pleading—In an action to enforce a mortgage lien, an answer to which no reply was filed setting out and pleading a settlement between the parties as to the amount of debt and interest, did not limit the right of plaintiff to a personal judgment, for the reason that a promise to pay the debt did not release the lien, and if such an agreement had been made it would have been without consideration.

2. Same—Description—Where a farm was described in a mortgage as "the farm conveyed by Draughn to Watts," the latter executing the mortgage, such language fully identifies it. The rule is that "that is certain which may be made certain," and parol evidence may be received to show what body of land was known and designated by the name given in the mortgage.

J. M. Bailey for appellant.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson.

J. M. Bailey filed this suit against J. T. Watts, setting up a debt secured by mortgage on a tract of land known as the A. H. Draughn place, the property of Watts, seeking the enforcement of the mortgage. W. C. Parks, who was made a defendant to the action and alleged to hold a lien on it, answered, setting up a note of \$300 and a mortgage to secure it. He made his answer a cross petition against Watts, but no process seems to have been then issued.

This was at the June term, 1898. After this Watts settled with Bailey, and at the November term, 1901, an order was made that the action should thereafter proceed in the name of W. C. Parks v. J. T. Watts, and process was awarded on the cross petition. At the next term of the court Watts filed an answer, pleading "that after the note sued upon was executed he made several small payments on same, and on the 18th day of March, 1902, they made a full and complete settlement on the note sued upon and the cost and interest on same, and that the defendant, Watts, was due the said Parks the sum of \$261.19, for which amount he is willing for Parks to have judgment, as the mortgage lien was released and settled up, and the said amount is all that was due upon the note sued upon on date of settlement, and that said Parks agreed to have the case dismissed without prejudice, judgment for \$261.19, which defendant Watts agreed to pay."

No reply was filed to this answer, and the case being submitted the court gave judgment in favor of Parks for \$261.19, with interest from the date of the settlement, and ordered the sale of so much of the land as was necessary to pay the debt and costs. Watts complains that anything more than a personal judgment was rendered against him under the allegations of his answer.

At the date of the settlement Watts was indebted to Parks, on the allegations of the answer, in the sum of \$261.19. His promise to pay this debt, which was then due, was only a promise to pay what he owed. Such a promise was no consideration for an agreement by Parks to release his mortgage lien on the land, and if the answer can be construed as averring that Parks agreed to release his mortgage, such agreement by him was without consideration; but as the pleading must be taken rather against the pleader,

we think it properly means no more than that there was a settlement on March 18, 1903, which fixed the amount of the debt at \$261.19. The judgment was not entered until the March term, 1903. Watts had failed to pay the debt, and it is not disputed that a personal judgment was properly entered against him. The plea is insufficient to show that the mortgage lien was released.

It is also urged that Parks' mortgage does not sufficiently describe the property. The description in the mortgage is as follows: "A certain tract or parcel of land known as the A. H. Draughn farm, on left hand fork of Troublesome creek."

The rule is that that is certain which may be made certain, and that parol evidence may be received to show what body of land was known and designated by the name given in the mortgage. The A. H. Draughn farm, as shown by the record, is the farm conveyed by Draughn to Watts; it is fully identified in the record.

The mortgage also contains these words: "This mortgage is just to include a sufficient amount of said farm to secure said debt."

It is urged that these words render the mortgage bad; but this would be the legal effect of the instrument if the words were omitted. They add nothing to it and take nothing from it.

Judgment affirmed.

MARKS & STIX v. HARDY'S ADM'R.

(Filed March 8, 1904.)

W. B. Pugh, S. J. Pugh and Robt. D. Wilson for appellants.

W. C. Halbert and T. R. Phister for appellee.

Appeal from Lewis Circuit Court.

Judge Barker delivered the following extended opinion:

Our attention has been called by counsel for appellants to the use of the following language in the opinion: "William Hardy was an old man, and lived from fifty to seventy-five miles from Willard. There is no evidence in the record to show that he knew his son was carrying on a general merchandise store under his name, or that he ever heard any of the rumors that he was a member of the firm;" and it is suggested, that this might be construed, when the case comes on for trial, into meaning that the admissions of Hardy, that he was a member of the firm, were incompetent evidence. We think the context shows that the language of the opinion is confined to the want of knowledge on the part of William Hardy as to the evidence upon which the general reputation, that he was a member of the firm, was based, and had no reference to any other evidence in the case.

However, in deference to the apprehension of counsel the opinion is extended as indicated.

FRANKLIN V. TRACEY, &c.

(Filed March 8, 1904—Not to be reported.)

H. J. Tilford and P. C. Beckley for appellant.

Huston Quinn for appellees.

Appeal from Jefferson Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

In the petition for rehearing our attention is called to the fact that it is averred in her petition that the plaintiff rented the lower floor of the house; but it is not averred in the petition that the owner retained control of any part of the house, or that the fall of the house was due to defects in other parts of the building than those held by the plaintiff under her lease. The allegations of the petition are, therefore, insufficient to bring the case within the authorities relied on for appellant.

Petition overruled.

ORTH, &c. v. PARK & CO.

PARK & CO. v. CITY OF LOUISVILLE.

LOUISVILLE & NASHVILLE R. R. CO. v. PARK & CO.

(Filed March 3, 1904.)

1. Street Improvement—In an action to enforce apportionment warrants for street construction, the court holding that the apportionment had been made on the wrong basis, but ordered a new apportionment, which new apportionment was made on the basis set out in the order of court, and judgment entered against the owners for the amount of the apportionment, the judgment appearing to do justice to all the parties concerned, it will not be disturbed.

2. Same—Interest—The property owner is not liable for interest upon the cost of street improvements until an apportionment is made according to the statute, and until this is done he is not in default for not paying.

Lane & Harrison for Orth, &c.

H. L. Stone for City of Louisville.

Hardin H. Herr, Tyler Barnett and R. L. Greene for Park & Co.

Helm, Bruce & Helm and B. D. Warfield for L. & N. R. R. Co.

Appeals from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

These three appeals are prosecuted on the same record.

In the year 1900 an ordinance was enacted directing the improvement of the carriage way of Frankfort avenue from the former city boundary line to Cavewood avenue extended, the cost of the improvement to be assessed against the property fronting on Frankfort avenue and extending back to a depth of 195 feet. A contract was made with appellees, Park & Co., for the improvement. The work was done and was apportioned to the property owners on the basis set out in the ordinance. Suit was then filed against the property owners to enforce the apportionment warrants. The court held that the apportionment had been made on the wrong basis, and ordered a new apportionment, dismissing the action as to certain of the defendants. An appeal was taken from this judgment, and it was affirmed. (Park & Co. v. Orth, 24 Ky. Law Rep., 2209.)

The reason the apportionment was held bad was that it was held that the

territory contiguous to the street was defined into squares by principal streets. Section 2883, Kentucky Statutes, provides: "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works, according to the number of feet owned by them respectively, and in such improvements the cost of curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth, as set out in the ordinance."

The new apportionment was made on the basis set out in the order of the court, and judgment was entered in favor of the contractors against the property owners respectively for the amount apportioned to them, with interest from the date of the second apportionment. From this judgment the appeals before us are prosecuted. The appeal of the Louisville & Nashville R. R. Co. questions the liability of its right of way for any part of the cost of the improvement. Since the appeal was taken the question so raised was decided adversely to the railroad company in *Figg v. L. & N. R. R. Co.*, 25 Ky. Law Rep., 350, and *L. & N. R. R. Co. v. Barber Asphalt Co.*, 25 Ky. Law Rep., 1024. The court adheres to the rule laid down in those cases, which are conclusive here.

The appeal of the contractors questions the correctness of so much of the judgment as held the city of Louisville not liable for the interest on the contractors' claim from the date of the first apportionment to the date of the second, the contractor having failed to recover this interest against the property owners by reason of the fault of the city in making a wrong apportionment. It is true a loss will be thrown upon the contractors by reason of the error in the proceedings of the council unless judgment is given against the city for this interest, and whether the contractors must bear the loss or it must fall upon the city depends on the proper construction of section 2884, Kentucky Statutes, which is as follows: "A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of 6 per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned; and in no event, if such improvement be made as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards

of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other."

Under this provision it has been held that when by taking the proper steps the general council can make any improvements at the cost of the owners of adjacent property, the city can in no event be made liable unless it will have the right to enforce the lien against the property; but that if the adjacent property is such that no steps could be taken by the city to render it liable for the improvement, then the city must pay for it; and that all persons dealing with the city must take notice of its power, and if they fail to do so must suffer the consequences. (*Louisville v. Nevin*, 73 Ky., 549; *Craycraft v. Selvage*, 73 Ky., 696; *Louisville v. Leatherman*, 99 Ky., 213; *Louisville v. Bitzer*, 24 Ky. Law Rep., 2263.) In the case before us, if proper steps had been taken and an apportionment had been made on the proper basis at the outset, the property would have been liable for the cost of the improvement, with interest from the time the first apportionment was made. The failure to make a correct apportionment was the mistake of the general council. The property owner is not liable for interest until an apportionment is made according to the statute, for until this is done he is not in default for not paying; and as by the terms of the statute the city shall not be liable without the right to enforce the liability against the property receiving the benefit, no judgment can be entered against the city for the interest in question. In determining this very question in *Gosnell v. Louisville*, 104 Ky., 209, the court said: "Neither interest nor costs should have been allowed against the property holder, except from the time the amount he was required to pay was so fixed that he could discharge it. Nor should interest upon the whole amount of the contract price be allowed against the city, for, while the rule may seem harsh, the contractor must be assumed to have entered into the contract with his eyes open as to its provisions and their enforceability. The contract was not made by the property holder, but for him. As to that portion of the contract price for which he is responsible, his debt was not matured by reason of an erroneous apportionment, and was not payable until maturity. But for that portion which was properly assessable against the property holder the contractor must look to him alone."

This rule was followed and approved in *Louisville v. Selvage*, 106 Ky., 730, 24 Ky. Law Rep., 917. The circuit court correctly followed the rule laid down in these cases, which can not now be departed from. The other questions made arise on the appeal of the property owners. It is insisted for them that the court has no power to make a new apportionment on a new basis fixed by it; that the power to levy taxes and to define the territory on which they are levied is legislative, and can not be exercised by the court. It will be observed, however, that the statute above quoted prescribes how the cost of the improvement shall be apportioned where the territory is defined by principal streets. The court having held that the territory in question was defined by principal streets, simply carried into execution the mandate of the statute as the council should have done. This the court was authorized to do under the provision quoted, requiring that "the courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned." When the territory is defined by principal

streets the statute determines on whom the burden of the tax shall be laid, and this being fixed, there is no reason why the court may not be authorized to ascertain how much of the burden will fall on each piece of property. The council has no power to determine the territory on which the burden of the improvement must fall where it is defined by principal streets, and if it attempts to do so its action is to this extent void. The court, therefore, properly disregarded the provisions of the ordinance that the cost of the improvement should be laid upon the property fronting Frankfort avenue and extending back 195 feet, and made the assessment on the basis that the territory was defined by principal streets, this being the effect of the opinion rendered by this court when the case was here on a former appeal. The court, in making the apportionment, followed the rule laid down in the statute.

It is also insisted for appellant that there was a deviation from the contract. The facts about the matter are these: Frankfort avenue crosses the tracks of the Louisville & Nashville R. R. at an acute angle. The board of public works thought it unwise to construct the improvement across the railroad tracks at an acute angle.¹ The railroad company proposed to build a crossing if it was made across the tracks at something like a right angle. The board of public works accepted the proposition of the railroad company, and it made the crossing as proposed and the contractors then constructed the street to the crossing on both sides of it. In order to reach the crossing on the west side a slight deflection was made to the north. At this point Clifton avenue runs into Frankfort avenue and whether the improvement, as made, lies altogether on what should be called Frankfort avenue, or in part on Clifton avenue, is not very clear from the maps as it is just at the intersection of the streets. Before its annexation to the city of Louisville this part of Frankfort avenue was a turnpike leading out of the city, and from an inspection of the map it rather seems that the entire improvement is within the limits of the old pike. In any event the ground was practically a part of Frankfort avenue. It was necessary for the safety of the traveling public that the crossing over the railroad track should be as direct as possible, for the danger of collision with cars was thus made less than it would have been if the crossing had been for some distance along and on the tracks of the railroad. No additional burden was by this placed upon the property owners, but, on the contrary, they were relieved from paying anything for part of the improvement for which otherwise they would have been liable. Section 2380, Kentucky Statutes, provides as to the power of the board of public works: "When, in the opinion of the board, it shall become necessary in the construction of any work to make any alterations or modifications in the specifications or plans of a contract, such alteration or modification shall be made only by the order of the board, and such order shall be of no effect until the price to be paid for the same shall be agreed upon in writing and signed by the contractor and approved by the board."

There was no written contract signed by the contractor and approved by the board for the reason that no change was made in the price to be paid. This clause of the statute applies only to changes which are to be paid for. The change to be made here was not of that character as the railroad company made the crossing, and the only change in the contractors' work was in

the slight deflection of the carriage way from a straight line. It is also shown that although the board went out to the ground and looked at it, and made the change after full deliberation, the clerk of the board in some way failed to enter the order on his record, and this fact is also relied on. But the order of the board was carried into effect by the railroad company and the contractors, and the mere failure of the clerk to record the order at the time, as he should have done, will not be allowed, under the statute, considering all its provisions, to defeat the lien on the property where no additional burden was thus placed upon the property holders. The purpose of the statute is that the court shall do justice between the parties, and make such orders as may be necessary for this purpose. If an additional burden was placed on the property holder without a compliance with section 2830, and the property holder was insisting that he was not liable for the additional burden without a compliance with the terms of the statute, a different question would be presented. The authorities relied on for appellant were under statutes materially different from that before us. In *Gleason v. Barnett*, 106 Ky., 133, the court, referring to the statute cited, said: "The manifest purpose of the legislature in the use of the language quoted was to modify the rule of strict construction with reference to the statutes and proceedings thereunder imposing burdens upon the taxpayer for the improvement of public ways, and to establish a rule which would authorize the general council or the courts in which suits might be brought to enforce claims against property owners, to make all corrections and rules and orders so as to do justice to all parties concerned, where it appeared the improvement had been made as required by either the ordinance or contract."

In *Elliott on Streets and Roads*, section 567, it is said: "The cardinal rule is that nothing shall be permitted that will tend to do harm to the property owners, but this salutary rule is obeyed rather than violated in permitting a change that is beneficial, and it is not infringed by permitting changes that work no harm to citizens."

Again, in section 585, it is said: "It is beyond the authority of the highway officer to do any act that will materially prejudice the rights of citizens, but they may make amendments and changes which do not substantially impair the rights of citizens. This must be so upon principle, for, having once lawfully acquired jurisdiction, those officers may do what is for the best interests of the public, provided, always, that they do not infringe the rights of those who must pay the assessment." (*Barber Asphalt Co. v. Garr*, 24 Ky. Law Rep., 2231.)

On the whole case the judgment of the circuit court seems to do justice to all parties concerned, and it is, therefore, affirmed.

ROBINSON, &c. v. TALBOT, &c.

(Filed March 3, 1904—Not to be reported.)

Guardian—Next friend—Where one assumed to sue for an infant as next friend, who was neither a guardian, nor had an interest in the infant, and had instituted the action without authority, and where there was no reason for the assumption of such duties, the action of the chancellor in dismissing the action was proper.

W. Buckler and S. Holmes for appellants.

W. S. Cason for appellees.

Two cases, one appealed from Bourbon and the other from the Harrison Circuit Court.

Opinion of the court by Chief Justice Burnam.

These actions are submitted upon a motion by the statutory guardian of the infant appellants to dismiss the appeals prosecuted in the name of Winfield Buckler, as next friend, on the ground that he has no authority to prosecute them. It appears from the pleadings that George H. Talbot died a resident of Harrison county in the fall of 1896, the owner of a considerable personal and landed estate, a part of the latter being in Bourbon county. By his will, which was duly probated in the Harrison County Court, he devised all of his estate to his surviving widow during her natural life, with the provision that at her death her brothers and sisters were to have \$3,000 out of the estate; and that the balance was to be divided equally among the brothers and sisters of the testator, seven in number, or their descendants. The interest of one of these brothers, Daniel by name, was represented at the death of testator by his granddaughter, Mrs Mollie Robinson, who died after George H. Talbot, leaving as her heirs the infant appellants, whom Buckler assumed to represent in both of these suits as next friend. Mary F. Talbot, the wife of George H. Talbot and the life tenant, died on the 15th day of April, 1903. Two days thereafter the appellant, Buckler, volunteered to institute the suit in the Harrison Circuit Court, as next friend of the infant children of Mollie Robinson, who were at that time residing with their brother, Harry, in Maysville, Ky., for a sale of all the landed estate devised by George H. Talbot, and for a distribution of the proceeds among the devisees of George Talbot, or their descendants, one-seventh of which he alleges belonged to the descendants of Mollie Robinson, making the descendants of the other devisees defendants, who he alleged resided in various counties of this State and in various States of the Union. On the 27th of April, 1903, Harry Robinson, the brother of the infant plaintiffs, filed his affidavit in this suit in the Harrison Circuit Court, in which he stated that Winfield Buckler, who assumed to sue as next friend for the infants, was not their guardian, had no interest in any of them, and had instituted the action without authority, and asked that it be dismissed. He subsequently qualified as the statutory guardian of all of the infant plaintiffs, and filed their affidavits to the same effect, and asked that a rule issue against Buckler to show cause why the suit instituted by him in the Harrison Circuit Court should not be dismissed for want of authority on his part to institute the action. Buckler in his response to this rule admitted that he had instituted the suit as next friend without authority, either express or implied, from either the infants or their brothers, who were of full age; but claimed that as they were without statutory guardians at the date of the institution of the suit, he had the right to do so. The response was held insufficient and the suit dismissed. Shortly after the institution of the suit in the Harrison Circuit Court he instituted a similar suit in the Bourbon Circuit Court. The same proceedings were had in the Bourbon court and the case dismissed. And he prosecutes an appeal

from the judgment entered in both cases, and the statutory guardian of the infant appellants has entered a motion in this court to dismiss the appeals in both cases on the ground of lack of authority in Buckler to prosecute them.

Subsection 1 of section 85 of the Civil Code provides that an action of an infant must be brought primarily by his statutory guardian, if he has one residing in the State. Section 87 provides that "no person shall sue as next friend unless he reside in this State and be free from disability. Nor unless he file his own affidavit showing his right to sue as next friend according to the provisions of this chapter."

It does not appear from the record that Mr. Buckler complied with this section of the Code at the institution of the suits. He is not related to them by blood or marriage, he does not reside in the same county, and the record entirely fails to disclose any special reason why he should have so hastily, without consultation with them or their natural friends, have assumed the duties which the law primarily imposed upon their statutory guardian. It certainly can not be assumed that he has their interest more at heart than their brother and statutory guardian with whom they reside.

It is the duty of the chancellor to protect the infants and to see that they are not prejudiced by any act or omission of the next friend; and to this end may, if he deem it necessary, revoke the authority of the next friend and substitute another, or dismiss suits instituted for the ostensible but not real, interest of the infants. (*Longnacker v. Greenwade*, 85 Ky., 516; 14 Ency. of Pl. and Pr., 1041.)

After a careful consideration of the records we have reached the conclusion that the lower courts did not abuse their discretion in the dismissal of these actions, and that the best interest of the infant appellants required that the motion to dismiss the appeal prosecuted by the "prochein ami," should be sustained by this court, as they seem to have been prosecuted wholly without authority and against the advice and wishes of the statutory guardian, and it is so ordered.

ILLINOIS CENTRAL R. R. CO. v. BURTON.

(Filed March 3, 1904—Not to be reported.)

1. Railroads—Where appellee was injured by running over a torpedo which a servant of appellant had placed on the track it was such negligence as entitled appellee to recover, and the fact that the torpedo was placed near a flag station does not alter the rule.

2. Verdict and judgment—Where a jury was composed of a number less than the required number, and no objection was made during the progress of the trial, nor was made the subject of ground for a new trial, this court will not disturb the verdict and judgment.

J. M. Dickinson, Pirtle & Trabue and N. P. Moss for appellant.

Joe W. Bennett and John R. Evans for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Paynter.

The appellee was an employe of the appellant, and his business required

him to approach a station known as Krebs on a hand car. "Within the line where passengers get off and on trains" the hand car ran over a torpedo which had been placed there by an employe of the appellant; it exploded, and a piece of the covering penetrated the calf of appellee's leg, which resulted in an injury from which he did not recover for several weeks, and from which he suffered physical pain and mental anguish. The appellee based his right to recover upon the ground that it was against the rules of the company to place torpedoes at or near stations which might explode and injure persons getting on and off of trains and employes of appellant, whose business might call them at and about the station. The case was tried upon the theory that if the torpedo was so placed within the limits where passengers got on and off at Krebs, the plaintiff was entitled to recover. While the appellant objected to an instruction given by the court which was predicated upon that theory, still it offered instruction A, which is substantially the same as the court gave. It reads as follows: "The court instructs the jury that if they believe from the evidence the defendant, the Illinois Central R. R. Co.'s, agents or servants placed the torpedoes, which exploded and injured plaintiff, if they believe he was injured on the railroad track near the station Krebs, in violation of the rules of said company, they will find for plaintiff whatever sum they think he has sustained, not to exceed \$1,000.00, by the reason of the explosion of said torpedoes."

This instruction was equivalent to the one which the court gave. However, before this instruction was offered the appellant offered instruction B., which reads as follows: "The court instructs the jury that if they believe from the evidence that Krebs is not a town or a railroad station where passenger tickets are sold, but is only a railroad passing, or place where trains pass each other, and where only the section boss of defendant railroad lives, they will find for defendant, notwithstanding they may believe from the evidence that certain accommodation trains of defendant to stop there occasionally upon being flagged, and take on passengers, and upon request to let passengers off."

This instruction is based upon the theory that because Krebs was only a flag station the appellee was not entitled to recover. A flag station is a station in the meaning of the rule the same as it would be if all the passenger trains stopped there. Presumably at a flag station fewer passengers get off and on trains than at a station where all the trains stop, hence the percentage of danger to passengers would be less at a flag than at regular stations. It seems to us, however, the rule is violated if a torpedo is placed at a flag station the same as it would be at a regular station. So the appellant tried the case upon the theory that it would have been liable if a torpedo had been placed within the limits of a regular station and had exploded and injured appellee. Had the court been in error (and we do not think it was) in allowing a recovery upon appellee's theory the appellant did not on the trial of the case endeavor to extricate the court from its error in assuming there could be a recovery for the infraction of the rule which resulted in appellee's injury. The court was of the opinion that it was per se negligence to place the torpedo where it exploded, and in this view we concur.

The bill of exceptions shows that the parties appeared by their attorneys and thereupon a jury was sworn, and their names are given. From the state-

ment in the bill of exceptions the jury which tried the case was composed of only eleven men. It is quite certain that the parties agreed to try the case with eleven jurors (although it is not so recited in the record), or the clerk omitted the name of the twelfth juror in making the transcript. However, it is not proper, and we do not assume that either of these theories is correct. The record fails to show that the appellant assented to a trial with eleven jurors. Of course it was entitled to have its case tried by twelve jurors. In the grounds for a new trial no objection was made to the verdict because it had been returned by eleven jurors. In *Ayers v. Barr*, 5 J. J. M., 286, it appeared that there were only eleven jurors, and that the plaintiff in error was not present in court, and, therefore, did not waive the objection to the number. In *Oldham v. Hill*, *ibid.*, 300, it appeared that only nine jurors were sworn, and the court held that as there was no waiver on the record, express or implied, of the objection to the number of the jury, the case should be reversed. It does not appear in either case that the verdict was objected to in the lower court. Presumably an exception was reserved so as to give this court the right to review the action of the lower court. In *Ross v. Neal*, 7 Monroe, 408, thirteen jurors were sworn and tried the case. It appeared in that case that no exception to the verdict had been taken in the lower court, and that the appellant was silent until he reached this court. The court held that it was not proper to permit him to attack the verdict here for the first time. Under the numerous adjudications of this court, if the error complained of occurred during the progress of the trial, and was not made the subject of an objection in the grounds for a new trial, this court will not consider it. Our opinion is that the appellant is not entitled to have its attack upon the verdict sustained, because it failed to complain in its grounds for a new trial that the jury was composed of eleven men.

The judgment is affirmed.

BOTTO'S EX'OR V. CITY OF LOUISVILLE.

(Filed March 8, 1904.)

1. Taxation—Situs of property—Personal property may be assessed at the domicile of the equitable or beneficial owner.

2. Same—Where there is nothing in a statute authorizing the assessment of personal property negating the right to assess it retrospectively, omitted property may be assessed. The omission to make the assessment is no excuse for the refusal of the taxpayer to share in the burdens of government.

Grubbs & Grubbs for appellant.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

Under the will of James F. Irvin, who died in 1883, domiciled in the city of Louisville, J. H. Lindemberger, as trustee, held the devised estate. The testator left a widow and son, Guy Irvin, who lived in the city of Louisville until their deaths in 1900 and 1895, respectively. The trustee lived at Crescent Hill and outside of the corporate limits of the city of Louisville. The taxes sought to be collected were for the years of 1893 and 1897. The record

conduces to show that the widow and son were the beneficiaries of the income of the estate for the year of 1893. The son died in 1895, and the widow was entitled to the whole income from the estate in 1897.

The first question to be determined is whether the personal property in the hands of the trustee was taxable at his domicile or at the domicile of the beneficiaries of the estate. The general doctrine is that such property is taxable at the domicile of the trustee. It is competent for the legislature to provide otherwise for its taxation. This court in *City of Lexington v. Fishback's Trustee*, 109 Ky., 770, held that the property should be assessed at the domicile of the equitable or beneficial owner. The facts of this case do not distinguish it from that case. It is sufficient to say that the court without further elaboration adheres to the doctrine of the *Fishback* case.

The remaining question in the case is, has the city assessor the right to retrospectively assess personal property? It was not assessed during the period prescribed by the statute for making the assessment. The statute seems to be silent as to the right of the assessor to retrospectively assess personal property which was omitted at the time of the regular assessments. There are no words in the statute which negative the right of the assessor to so assess omitted property. The statute prescribing the time in which assessments shall be made are directory in the absence of words showing that the officer or officers shall not act at any other time. The neglect of the officer to assess the property within the time prescribed by law is no excuse for the taxpayer's refusal to share the burdens of the government. When the assessment is made at a later time than prescribed by law, but within such time as the right to assess and collect the taxes is not barred by the statute of limitation, the proceeding is not void, and the taxpayer is not relieved from the payment of his taxes.

Cooley on Taxation, 2d edition, 281, says "But the negligence of officers, their mistakes of fact or of law, and many other causes, will sometimes prevent a strict obedience, and when the provisions which have been disregarded constitute parts of an important and perhaps complicated system, it becomes of highest importance to ascertain the effect the failure to obey them shall have on the other proceedings with which they are associated in the law. * * * The municipalities, it has been seen, levy and collect taxes not only for their own purposes, but also under State apportionment for the State at large. The power to levy taxes for local uses is usually conferred upon them in merely promissory terms; terms implying a discretion to levy them or not at the will of the local majority or the local board."

On page 283 he says: "If, by the use of negative words, it requires a particular proceeding to be taken in a particular time or manner, and makes it void if not so done, or gives it effect, provided it is so done, or declares that unless it is taken subsequent proceedings shall not be had, or prohibits its being done except at the time the statute prescribes, or if any terms plainly imperative are employed, the intent is clear, and no discretion can be permitted in construction. It is not often, however, that these, or similar, words are met with in the statutes which define official duties under the revenue laws, and the construction of particular provisions must be left for determination in such light as the obvious purpose they were intended to accomplish may afford. * * * No one should be at liberty to plant himself upon the non-

feasanoees or misfeasanoees of officers, under the revenue laws, which in no way concern himself, and make them the excuse for a failure on his own part to perform his own duty. * * * In one of the most recent cases in which this has been attempted the general doctrine is stated as follows: 'There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power, or render its exercise in disregard of the requisition ineffectual. Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated.' "

On page 284 he says: "All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law, and it is hardly reasonable to infer an intent, on the part of a legislative body, that a failure of administrative officers to comply with any provision made for the benefit of the State exclusively, or merely as a guide in orderly proceedings, should deprive the State of all benefit to be derived from a compliance with other provisions that embody the main purpose and object of the law."

The correctness of the doctrine announced by Cooley is approved by *Anderson v. City of Mayfield*, 93 Ky., 230. There is no express statute authorizing the board of valuation and assessment to make retrospective assessments, but this court, in *Louisville and Jeffersonville Ferry Co. v. Commonwealth*, 22 Ky. Law Rep., 464, held it could be done. In *Stone, Auditor v. City of Louisville*, 22 Ky. Law Rep., 423, the court required the board of valuation and assessment to make a retrospective assessment. It is insisted that because there is a provision of the statute governing cities of the first class, which authorizes the assessor to retrospectively assess real property, thereby the right to retrospectively assess personal property is denied. Under the *Anderson* case this right existed, therefore, we must conclude that the provision of the statute which authorizes the retrospective assessment of real property is simply declaratory of the right which previously existed. That taxpayers may be protected, section 2095, Kentucky Statutes, authorizes the mayor to reconvene the board of equalization, thus enabling it to hear the complaints of taxpayers as to excessive assessments, etc.

The judgment is affirmed.

MONEHAN, &c. v. SOUTH COVINGTON AND CINCINNATI STREET RY. CO.

(Filed March 8, 1904.)

1. Railroads—Damages—Where a child six or seven years old, who got on the steps of a street car at the intersection of two streets where it had stopped to discharge and receive passengers, was jolted off the car after it had reached a rapid rate and was injured, in an action for damages against the company for the injury a peremptory instruction was proper, the child being a trespasser and the conductor of the car not being aware of his presence on the car.

2. Same—Evidence—In an action to recover for injuries to a child which was injured in being thrown from a street car by the rapid motion of the car, it was not error to exclude testimony conducing to show that the point where the child got on the car was in a thickly settle portion of the city and that many children congregated thereabouts, and had often trespassed upon the cars with the knowledge of the employes thereof.

C. L. Raison, Jr., Geo. H. Ahlering and A. M. Caldwell for appellants..

L. J. Crawford for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barker.

The appellee is a corporation operating an electric railway over the street of the city of Newport, Ky. The appellant, at the time of the injury of which he complains, was between six and seven years of age. At the intersection of Eleventh and Patterson streets, in the city named, one of appellee's cars had stopped for the purpose of receiving and discharging passengers. On the rear platform of the car were steps so arranged that passengers could get on or off from either side; but appellee only permitted this to be done on one side at a time, and for the purpose of preventing ingress and egress to and from the car on more than one side, it had a small iron wicket gate across the side not in use. This was moveable, so that it could be transferred from one side to the other, as the necessities of the case required.

Appellant, and a companion about the same age, while the car was standing at the intersection mentioned, got upon the lower step of the side of the rear platform which was not being used for the purpose of taking on or letting off passengers, and taking hold of the iron gate with their hands, stood on the step until the car started. The car seems to have soon attained a rapid rate of speed, and appellant was jolted off, falling into the street, receiving injuries about the head, to recover damages for which this action was instituted. Upon the trial of the case, after the close of appellant's (plaintiff's) testimony, the court, on motion, awarded appellee (defendant) a peremptory instruction to the jury to find for it, which was done; and of this appellant is here complaining.

The question involved is whether or not, under appellant's own testimony, appellee owed him any duty other than to avoid injuring him, if that could have been done by the exercise of ordinary care, after his danger was discovered. It is not pretended that appellant was a passenger upon the car; nor can it be denied that he was a trespasser. The evidence does not show that the conductor, who was appellee's agent in charge of the car, saw him; but it is contended that the officer, by the exercise of ordinary diligence, could, and should, have seen him before he received his injury, and have prevented it; and this question, he claims, should have been submitted to the jury. Upon this claim arises the crucial question of this case, whether or not appellee owed appellant any active duty, in order to discover his peril; if so, then the peremptory instruction should not have been granted. In favor of this proposition appellant's counsel cites two cases: Thornton v. L. & N. R. R. Co., 22 Ky. Law Rep., 778, and Vanarsdal v. L. & N. R. R. Co., 23 Ky. Law Rep., 1666.

In the first of these the court said: "The theory upon which this case is

based, and the recovery had, for it is carried into the instruction given supra, is that appellant owed to appellee a duty to prevent him getting off the moving train after those agents knew or had reasonable grounds to believe he was about to jump from the moving train. We are of opinion that the instruction supra given is erroneous. There can be no negligence in failing to do, unless there was a duty to do."

"Appellee, a boy seventeen years of age, and of reasonable intelligence, as shown by his testimony, is on a freight train by invitation of the fireman; he is not a passenger; the appellant owed him no contract duty; the train is not engaged in carrying passengers. Under these circumstances, it is clear that appellee was a mere licensee, if not a trespasser; and appellant owed him no duty unless his danger was discovered in time to have prevented an injury by some agent of appellant. (Dalton's Adm'r v. L. & N. R. R. Co., 23 Ky. Law Rep., 97, and cases cited.)"

In the second of these cases the facts were these: The decedent, Mary Vanarsdal, was a little girl, twelve years of age; at the time of the accident she was walking over one of appellee's railroad bridges; before she could get off she was run over and killed. In the opinion this court said: "It must be conceded that the intestate was a technical trespasser; or, in other words, she had no lawful right to use the bridge as a passway, and that appellee was under no obligations to look out to see if she was upon the bridge. But it is also a well-settled rule of law that if the defendant, its agents or employees in charge of the train, discovered the peril or danger of the intestate, it was its duty to use all reasonable efforts to avoid injuring her, and if they failed so to do the plaintiff would be entitled to recovery. If, however, the defendant used all reasonable efforts to avoid injury, after discovering her peril, the verdict should have been for the defendant."

We are not able to recall any opinion of this court wherein the opposite principle to that contended for by appellant has been more clearly or definitely decided than in these two cases. The question of appellant's infancy is immaterial until it has been established that appellee owed him an active duty, as opposed to the passive duty of not injuring him after his peril was discovered. An infant of tender years may not be able to be guilty of contributory negligence, and in that respect his position is superior to that of one who has reached years of discretion. But contributory negligence presupposes the existence of negligence, and never becomes a factor in the problem until the defendant's duty, and his breach of it, has been established. If the defendant owed the appellant no duty, then the question of his infancy is immaterial.

Appellant was a mere trespasser upon the rear steps of appellee's car, and those in charge of it did not owe him any duty of discovering his peril. In the case of Jackson's Adm'r v. L. & N. R. R. Co., 20 Ky. Law Rep., 809, the decedent was a boy seven years of age, who was trespassing in the yard of the railroad corporation, where he was run over and killed. It was held that the corporation owed the decedent no active duty, and the judgment of the lower court, awarding the peremptory instruction, was affirmed. In the case of Brown's Adm'r v. L. & N. R. R. Co., 97 Ky., 238, the doctrine that the corporation owed a trespasser upon its tracks no lookout duty is fully maintained. (Kentucky Central R. R. Co. v. Gastineau, 83 Ky., 119; Conley

v. Cincinnati R. R. Co., 89 Ky., 402; McDermott v. Kentucky Central R. R. Co., 98 Ky., 408; L. & N. R. R. Co. v. Hunt, 11 Ky. Law Rep., 825.)

We do not think the court erred in excluding the proffered testimony that the intersection of Eleventh and Patterson streets was in a thickly settled portion of the city of Newport; that many children congregated thereabouts, and theretofore they had often trespassed upon appellee's cars, with the knowledge of the employes in charge thereof; and the cases of Shelby's Adm'r v. Cincinnati, New Orleans & Texas Pacific R. R. Co., 85 Ky., 224, and Louisville & Nashville R. R. Co. v. Popp, 96 Ky., 99, do not support this proposition.

In the first of these cases the infant decedent was killed by a backing car, while he was on the defendant's switch, where he had the right to be; and the court found, as a matter of fact, that he was not a trespasser, but, on the contrary, said: "In our opinion, therefore, he had a lawful right to go upon the track at that place, and the company owed to him a duty of active vigilance."

In the second case there is some general language which seems to give color to appellant's position with reference to the admissibility of this evidence; but an analysis of the opinion shows that the servants of the defendant corporation knew the appellee and his companions were in its switch yard and about its cars; and the case, after all, was made to turn upon the knowledge that the injured boy and his companions were in and about the cars, by the backing of which, without notice, the plaintiff was injured.

In the action of the Louisville & Nashville R. R. Co. v. Webb, 99 Ky., 385, on the subject of testimony of this character, it was said: "Over the objections of the counsel for appellant testimony was admitted to prove what was said by the conductor to the boys, including the infant appellee, about helping to take freight from the train, and riding from the tank on days previous to the day on which the accident happened. This testimony ought to have been rejected. The case was between the infant appellee and appellant, and the subject of the investigation was what occurred on the day the injury was inflicted, and what occurred on previous days had no necessary connection with, and was in no sense a part of, the transactions of that day. For this reason, also, the court properly refused to allow proof to be made in behalf of the appellee of what it was alleged the conductor and trainmen said to the boys on the occasion before that day about swinging on the ladders attached to the side of the car, and telling them to do this in order to learn to be 'hoppers' and the like, and that the boys were in the habit of practicing in that way on previous occasions when they rode to the tank." This, we think, states the sound rule on this subject.

Appellee, although it was a common carrier of passengers, owed the infant appellant no different duty than was owed him by the owner of any other vehicle plying the streets of Newport. As he had a right, in common with the general public, to use the public highways, appellee, in common with all other owners of vehicles, owed him the active duty of exercising ordinary diligence not to run over him; but neither it, nor they, were under any duty of anticipating his trespassing on the rear end of the vehicle while they were being driven or propelled along the streets. Suppose a private carriage is being driven along the street; must the driver maintain a look-

out to see that small boys are not stealing a ride by climbing up in the rear of the vehicle, and thereby placing themselves in positions of danger? Surely not; and yet it will be difficult to draw a distinction between the case at bar and that supposed. The fact that there was a conductor on appellee's car would not alter the case; the conductor's duty is, primarily, to attend to his passengers—not to lookout for trespassers; and while the presence of the conductor would necessarily increase the chances of the actual discovery of the infantile trespasser, it would not add the duty of an active vigilance to make the discovery of his presence and danger.

Judgment affirmed.

CITY OF LOUISVILLE v. WEHMHOF, &c.

SAME v. ALVEY, &c.

SAME v. PIRTLE, AGENT.

SAME v. SMITH, MANAGER.

(Filed March 4, 1904.)

Henry L. Stone for appellant..

Kohn, Baird & Spindle, Fred Forcht and Richard & Ronald for appellees.

Appeal from Jefferson Circuit Court, Criminal Division.

Judge O'Rear delivered the following response to petition for rehearing:

Aside from repetitions of arguments made on the original hearing of the case, and which we deem to have been disposed of by the opinion heretofore delivered in these cases, appellees have presented certain criticisms of the opinion, and additional reasons against the reversal, which ought to be noticed.

It is complained that the ordinance being considered is void because it violates section 168 of the Constitution in this, that it provides less penalties than is fixed by statute for the same offense. It was argued before that the offense created by the ordinance was not an offense at all, either at the common law or by statute. The apparent inconsistency of the arguments will not estop counsel from relying on the true one, if either is sound. It is claimed that pool selling is a game such as is embraced by section 1860, Kentucky Statutes, for which a penalty of \$500 fine and confinement in the penitentiary, and disqualification from suffrage and office holding, is fixed. That section applies alone to the setting up and operation of a faro bank, keno bank, "or other machine and contrivance used in betting, whereby money or other thing may be won or lost," and to whoever shall for commission or compensation set up, operate, or conduct a game of cards, oontz or craps, whereby money or other thing may be won or lost, and to aiders and assistants.

This argument is based upon the claim that the ordinance is broad enough in terms to include what is known as French pools; and that as it was decided by this court in Commonwealth v. Simonds, 79 Ky., 618, that the selling of French pools or Paris mutuels on horse races is a felony under section 1860, Kentucky Statutes, that, therefore, the ordinance fixes a less penalty for selling French pools than the statute does. French pool or Paris

mutual is a "machine or contrivance used in betting," as is shown by its description in *Commonwealth v. Simonds*, supra. Furthermore, section 1961, Kentucky Statutes, indicates that it was so regarded by the legislature, for in that section it is said that the change of the name of the games or contrivances "mentioned or included in the preceding section shall not prevent the conviction of any person violating the provisions thereof. * * * Nor shall its provisions apply 'to persons who sell combination or French pools on any regular race track during the races thereon.'"

In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves, the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent. of the wagers as his commission. But in selling ordinary pools on horse races the seller does not operate a "machine or contrivance used in betting." Neither does he bet on a horse race. Such was the express decision of this court in *Cheek v. Commonwealth*, 79 Ky., 359. Therefore, as said by the court in that opinion, "there is no express statutory penalty against the specific act of selling pools." In that opinion the other statute referred to by counsel, what is now section 1960, was referred to, and held not to include pool selling, while French pool was held by the court in the *Simonds* case, supra, to be under that statute. But even if the ordinance was broad enough to include French pools, it would be void only as to that class of pool selling, leaving it valid in all other particulars, including the penalties affixed to the acts of having tickets in possession, and knowingly furnishing telegraphic or telephone messages to the operators, etc., with the intention, or knowledge, that they are to be used to further the business of pool selling in the city of Louisville.

Section 1978, Kentucky Statutes, fixes a penalty of \$200 to \$500 against "whoever shall suffer any game whatever, at which money or property is bet, won or lost, in any house or on premises in his occupation." It is claimed that the act of pool selling, or at least the betting by the buyers of the pools, is a game. Both these contentions were decided adversely to appellees' present version in *Cheek's* case, supra, where the court said: "Appellant could not be convicted under an indictment for the statutory offense of betting at a game or wager, first, because he did not bet or wager anything; and, second, because betting on a horse race, although punishable under a statute against wagering, is not 'gaming.'"

The other criticism of appellees other than the Western Union Telegraph Co.'s manager do not appear to us to be material as affecting their rights under the ordinance. The very earnest petition for rehearing filed by the Western Union Telegraph Co. for its manager, Smith, relies as new matter upon the argument that the ordinance must be held void because it is regulation of interstate commerce, and is, therefore, repugnant to the Federal Constitution.

We are not aware that the congress has ever legislated upon the subject-matter covered by this ordinance. It is conceded that the business of the Western Union Telegraph Co. in carrying messages between persons of different States is interstate commerce. While the Supreme Court has frequently had before it the question of the power of a State to enact legisla-

tion regulating, or having the effect to regulate, commerce between the States, it has not decided the precise point here presented. Nor can any general rule be deduced from the numerous decisions of that court that can be said to be conclusive to the question now presented. It is not for a moment thought that the ordinance in question was intended as a regulation of commerce between the States, or as a regulation of commerce at all. If it operates in that way, it is merely incidentally. The ordinance is an exercise of the State's police power; that the States may, in the exercise of that power, in certain instances, pass laws that incidentally affect commerce among the States, has been upheld. (*Plumley v. Massachusetts*, 155 U. S., 461; *Austin v. Tennessee*, 179 U. S., 348; *Western Union Tel. Co. v. James*, 168 U. S., 650; *Patterson v. Kentucky*, 97 U. S., 501; *Stone v. Mississippi*, 101 U. S., 314.) It would be an extraordinarily unfortunate condition if it were wise. We should imagine that a rightful exercise of this power would be found in State laws prohibiting the importation from another State of diseased or infected cattle, or persons, or impure food, and the like. Here the thing prohibited is the transmission to a pool room operator in the city of Louisville messages intended for use to be used in a vicious enterprise. Their use is that of gambling, and is universally held in this country to be immoral, degrading and injurious to society. Such use can not have any legitimate purpose. The business of furnishing such messages, known to be intended solely for such use, makes the carrier essentially a participator in that offense. Its part of the profits of the business is its tolls for carrying the messages; the pool room operator's part is a toll or percentage on the volume of business. It must be profitable to both, or it would not be kept up. The carrier wants us to say that its part in this unlawful partnership to violate the moral and statute laws of a community is protected by the Federal Constitution. As was said by one of the courts, the Constitution at most gives the congress exclusive jurisdiction to regulate interstate commerce, not interstate crime. The liquor cases are cited by appellees as holding a contrary doctrine to this court's position. We do not understand that they do. Traffic in liquor is not illegal, nor immoral per se. On the contrary it is generally recognized as being a legal business, and is licensed as such. Consequently the transmission of such commodities by freight from one State to another has been held to be a matter not subject to the prohibitive control of any of the States. But wagering bets on horse races can not be an article of commerce no more than could be a lottery business. Both are per se immoral and deleterious to society, and clearly within the power of the States to prohibit. It could never have been contemplated by the framers of the Federal Constitution that the hands of the States were to be tied so that they could not protect themselves from such vices, if one of the participants chanced to use an interstate vehicle of commerce for carrying on the business.

The petitions are overruled.

COMMONWEALTH v. MOREHEAD.

(Filed March 4, 1904—Not to be reported.)

Taxation—Jurisdiction of circuit court—In an action by the auditor's agent against appellee, seeking to collect taxes on certain personal property, a judgment of the lower court dismissing the proceeding will not be disturbed where the inference from the judgment is that the county court found that appellee did not omit to assess any property owned by him in the years mentioned in the statement. By statute the appeal from the judgment of the county court to the circuit court is limited to cases where the county court has decided whether or not the property set out in the statement of the auditor's agent is liable to assessment, the circuit court has no original jurisdiction to assess property.

James B. Clark, M. R. Todd and C. J. Pratt for appellant.

Miller & Todd for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

On February 1, 1903, James B. Clark, as auditor's agent for Daviess county, filed a statement in the Daviess County Court, charging that the appellee, Morehead, had failed to list for taxation for the years 1897, 1898, 1899, 1900 and 1901 notes, bonds, judgments, cash and other choses in action of the aggregate value of \$80,000, of which he was the owner on the 15th days of September of each of said years. The defendant, Morehead, filed an answer, in which he denied that he was the owner of personal property of the character described in the statement of the auditor's agent of the value of \$80,000, which he had failed to list for taxation for the years named; and alleged that he had regularly listed for taxation all the personal property owned by him with the assessor of Daviess county for the years named, and denied that he had omitted any property owned by him for either of the years named, except certain worthless judgments against the county of Muhlenberg in the year 1901. At the June term of the Daviess County Court the proceeding instituted by James B. Clark, Auditor's Agent v. Morehead, and a similar proceeding instituted by the sheriff of Daviess county against the same defendant, were heard together, and the following judgment was entered in the county court: "By consent of parties the two foregoing proceedings are to be heard together. Same coming on to be heard, on motion of plaintiff, R. E. Berry is ordered to make report of proceedings as stenographer. And the court having heard the evidence and being sufficiently advised, it is adjudged by the court that the two foregoing proceedings be, and the same are hereby, dismissed."

From this judgment an appeal was prosecuted to the Daviess Circuit Court by James B. Clark, auditor's agent, and on the 28th of June, 1903, the following judgment was entered in the proceeding: "This action coming on for trial, the defendant moved the court to dismiss the appeal herein, to which the plaintiff objects. Argument of counsel was heard on said motion, and he court being advised, sustained the motion, and it is adjudged that the appeal herein be, and it is now, dismissed."

From this judgment Clark has appealed to this court. The statement filed by appellant in the county court was under the provisions of section 4241 of

the Kentucky Statutes, which provides: "If it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal, as in other civil cases.

The judgment rendered in the county court is not in conformity with the statute, as it does not in terms decide whether appellee, Morehead, was or was not the owner of any personal property of the nature set out in the statement, which he had omitted to list for taxation for the years named. The record does not contain any transcript of the evidence heard by the county court upon the trial of the motion, and the inference from the judgment is that the county court found that the appellee did not omit to assess any property owned by him in the years mentioned in the statement. By the express provision of the statute the appeal from the judgment of the county court to the circuit court is limited to cases where the county court has decided whether or not the property set out in the statement of the auditor's agent is liable to assessment. The circuit court simply passes upon the legal question as to whether the county court has erred in its decision as to whether certain definite property was liable to taxation or not; it has no original jurisdiction to assess or value omitted property. On the case presented by the appeal we think the circuit judge properly dismissed the proceeding.

Judgment affirmed.

MARTIN v. COMMONWEALTH.

(Filed March 4, 1904—Not to be reported.)

1. Criminal law—Dying declaration—The statement of deceased that "I do not believe that there is any chance for me to get well, and I make all the aforesaid statements, believing that I am going to die from the effects of said wounds," was competent as a dying declaration in a prosecution against his slayer.

2. Same—Instructions—Where the elements of affray, sudden heat and passion and provocation, ordinarily calculated to excite passion beyond control were omitted in an instruction in a prosecution for murder, the instruction was misleading and improper.

3. Same—In a prosecution for murder an instruction was prejudicial to the accused which omitted the words "either real or apparent," as the danger which authorizes one to act in self-defense may be real or it may only be apparent.

C. W. Lester for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was indicted by the grand jury of Whitley county in the month of August, 1903, charged with the offense of murder of one Wesley Woods by shooting him with a pistol. A trial was had at the January term, 1904, which resulted in the conviction of appellant for the crime of voluntary

manslaughter and he was sentenced to a term of ten years in the penitentiary, from which judgment this appeal is prosecuted.

The appellant relies upon several errors committed by the lower court to his prejudice. He claims, first, that the lower court erred in permitting a statement to be read to the jury purporting to be the dying declaration of the deceased, Wesley Woods; second, that the court erred to his prejudice in giving instructions to the jury; third, it erred in permitting, on behalf of the Commonwealth, incompetent testimony and rejecting competent testimony offered by him.

As to the first error the appellant claims that the proof did not show that the professed dying declaration was made under a solemn sense of impending dissolution. The proof showed that he was shot in the stomach, thigh and arm; that the wound in his stomach produced his death within five days. In his dying declaration the deceased used this language: "He says that he believes that he is going to die from the effects of said wounds, and desires to make a statement as to how and why he was shot," and then proceeded with his statement, and closed with the following words: "I do not believe that there is any chance for me to get well, and I make all the aforesaid statements, believing that I am going to die from the effects of said wounds." His mother made the following statement: "Before he made his dying declaration he said he believed he was going to die, and never said anything else, but said all the time that he was going to die."

While the question is a close one, and doubtful as to whether the declaration was made in extremis, we do not feel inclined to decide that it was incompetent as evidence. This court, in the case of *Baker v. Commonwealth*, 20 Ky. Law Rep., 1788, used this language: "It may be possible that we should have reached a different conclusion from the trial court as to the admissibility of these statements of the deceased as dying declarations, but it was necessary for the judge of that court to first determine the question of fact, viz., whether at the time the declarations were made they were made under a sense of impending dissolution, and when all hope of this world was gone, before he could decide the legal question of their admissibility. The question of fact is bound up in, and is a part of, the question of law. We should, therefore, give some weight to the finding of the trial judge upon this question as he heard the witnesses testify, and was perhaps in a better position to estimate the value of their testimony than this court can be from the bald record of the words they used; and as the question in the case at bar seems to us to be a close one, we are not inclined to disturb his ruling upon this point."

In the case of *Green v. Commonwealth*, 13 Ky. Law Rep., 897, the court said: "The character of the wound and the attending circumstances may be sufficient to show that the declarant had no hope of recovery."

We are of the opinion that the court erred in its instructions to the jury. The first instruction given by the court is as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, Len Martin, in Whitley county, Ky., before the 28th day of August, 1908, unlawfully feloniously, willfully, that is, intentionally, either with or without this malice aforethought, and not in his necessary, or apparently necessary, self-defense, discharged a pistol loaded with powder, leaden balls, or other explosive and

hard substance, against the body of Wesley Woods, thereby inflicting a wound from which the said Woods died within a year and a day thereafter, you will find him guilty of murder if the shooting was done with malice aforethought; guilty of voluntary manslaughter if done without such malice."

This was the only instruction given which had any application to the definition of murder or manslaughter, and was calculated to mislead the jury. It would have been better to have given an instruction on the question of murder and another instruction on the question of voluntary manslaughter. The words "that is, intentionally" interpolated in this instruction were improper and calculated to mislead the jury, and the only definition of manslaughter as used in this instruction was given in the last sentence, namely, "manslaughter, if done without such malice." The elements of "affray," "sudden heat and passion," and "provocation ordinarily calculated to excite passion beyond control," necessary to make it a proper instruction, were entirely omitted.

Instruction No. 2, or self-defense, was also prejudicial. It was erroneous in this: "Defendant believed, and had reasonable grounds to believe, that he was in danger, etc." The court should have used in substance these words: Defendant had reasonable grounds to believe, either real or apparent, and did believe that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of Woods, and shot to protect himself from such danger, then in such case you will find him not guilty. The danger to one's life or great bodily harm to his person, which authorizes a person to act in his defense, may be real or only apparent danger.

As to the third error in permitting incompetent evidence on behalf of the Commonwealth, and rejecting competent evidence offered by appellant, the facts as they appear of record are as follows: The appellant, to impeach the credit and lessen the effect of the dying declaration of the deceased, introduced, among other evidence, the records of the Whitley Circuit Court showing that the deceased had been convicted of the crime of grand larceny and had been sent to the penitentiary. The Commonwealth then introduced and had read a pardon to the deceased for this crime. The court should not have permitted this pardon to have been introduced as evidence. The appellant offered to prove from the records, by the circuit clerk of Whitley county and the police judge of Williamsburg, that the deceased was guilty of committing many breaches of the peace and much disorderly conduct, for which he had been tried and fined in the two courts. The court refused to permit appellant to introduce this proof. In this the court was right. The Code of Practice permits a witness to be impeached, but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record or judgment that he has been convicted of a felony, but not of misdemeanors.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

MILLER v. COMMONWEALTH.

(Filed March 4, 1904.)

Chas. J. Bronston for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

The very earnest and able petition for rehearing in this case complains especially that the opinion ignores and is in conflict with a number of previous opinions of this court, as well as conflicts with section 126, Criminal Code, in holding the indictment not bad for duplicity. Commonwealth v. Perrigo, 8 Met., 5; Huff v. Commonwealth, 19 Ky. Law Rep., 1065, and Ellis v. Commonwealth, 78 Ky., 130, are cited and relied on. Whether or not the indictment may have been bad for the reason stated, under section 126 of the Criminal Code, does not appear to us to be material in this case. Section 1960 of the statute (Kentucky Statutes, 1903) denounces the offenses of setting up, keeping, carrying on and managing, or assisting therein, a keno bank, faro bank, "or other machine or contrivance used in betting, whereby money or other thing may be won or lost." Section 1961 provides: "An indictment for a violation of the preceding section may charge the accused in one count with any or all of the offenses mentioned or included therein."

These sections were enacted in their present form April 8, 1893. As to the offenses therein created section 126 of the Criminal Code can not apply. It was certainly competent for the legislature to provide that two or more offenses might be joined in one indictment. Having so provided subsequent to the enactment of the section of the Code relied on, the provisions of that section are manifestly inapplicable. For the same reason the decisions cited can not be authority against the sufficiency of this indictment. The Commonwealth might have charged in the indictment the commission of all the offenses named in section 1960, and upon proof of any one of them the defendant should have been found guilty; that the circuit court restricted the proof to the inquiry whether the accused conducted a faro bank can not be prejudicial to any legal right of his.

The position that uncontradicted affidavits filed in support of a ground for a new trial become a part of the record as if the facts therein stated had been recited in the bill of exceptions is clearly untenable. The office of the bill of exceptions is to make a veritable record of the proceedings in court had upon the trial. It particularly shows the rulings of the trial judge upon the motions and objections to evidence as therein recited. It is confessedly the truth as to what occurred, and is the judge's certificate of it.

If after the trial a party by his ex parte affidavit could enlarge the bill so as to incorporate new matter not appearing therein, including the action of the trial judge thereon, it would be to make the party's certificate supersede the judge's. It might as well be allowed that a party by such practice could diminish the bill by showing by his affidavit that what was certified to by the judge did not occur. The fact that the affidavit is uncontradicted we deem immaterial; that the bill of exceptions does not contain the matter is the judge's certificate that it didn't occur, for his certificate implies that.

the bill shows all that did occur, and is conclusive, except that a bystander's bill may be made as to evidence. (Sections 333-340, Civil Code; Patterson v. Commonwealth, 86 Ky., 313; Patterson v. Commonwealth, 99 Ky., 610.) The question has been frequently passed upon by this court contrary to appellant's contention.

It would have been sufficient to say as to the occurrence when the witness, Oder, was on the stand, that appellant did not move to exclude or withdraw the objectionable statement from the jury. His motion was to discharge the jury. In view of the fact that other witnesses had proven the same fact, that is, that appellant was the dealer in a game of faro at the place and time stated in the indictment, the motion to set aside the swearing of the jury was properly overruled. If appellant had moved to have the remark objected to withdrawn from the jury's consideration, it would doubtless have been sustained, and the jury admonished properly to disregard it. It is not every lapse in the course of a criminal trial that justifies the withdrawal of the case from the jury. There may be instances where the prejudicial effect of an objectionable proceeding is such that it can not be removed from the jury's mind, and, therefore, it would be improper to let that jury conclude the case. But here the witness, Oder, denied that he had seen the accused dealing the game of faro, though he was in the room at the time. The effect of this witness' statement, so far as connecting the accused with the game, was probably nil. The Commonwealth's attorney, in endeavoring to have him go further, essayed the statement to the court in the hearing of the jury that the witness had, in his examination before the grand jury, given different evidence. The sole effect of that statement, if testified to by a competent witness, would have been to impeach the witness, Oder. However, if there had been no other evidence of appellant's guilt, the jury might have inferred that the Commonwealth's attorney was correctly stating what the witness had said under oath, when not confronted by the accused, and that his statements were then true, and from that circumstance alone found that appellant was in fact the dealer in the game. But in fact other witnesses had testified that appellant was the dealer in that game, therefore, there was competent evidence of the main fact before the jury. The trial court, at most, should have excluded the Commonwealth's attorney's statement of what occurred before the grand jury, with proper admonition, and proceeded with the trial. But instead of asking for what he was entitled to, appellant asked for what he was not entitled to. His motion was properly overruled. This conclusion is reached independent of the statement in appellant's affidavit in support of motion for new trial, that the trial judge did exclude the objectionable matter. Nor is it based upon the fact that appellant subsequently testified in his own behalf that he was the dealer in the game, but relied on the claim that it was not faro, but baccarat. What was said in the opinion as to the statements of appellant in his affidavit, and when a witness for himself, was to show that by his own admissions in the record his substantial rights had not been prejudiced by the matter complained of.

The petition is overruled.

Whole court sitting.

Chief Justice Burnam dissents.

LOUISVILLE RAILWAY CO. v. COLSTON.

(Filed March 4, 1904.)

Railroads—Instructions—In an action for damages for injuries sustained by being run over by a street car, an instruction was erroneous which told the jury they should find for defendant, except as they believed from the evidence that defendant knew of the peril of appellee, or could have discovered it in time to have avoided injuring her, by the use of ordinary care, when it appeared from the record that the conductor believed that she was only waiting by the track to get on the car instead of her purpose to cross the track, because in the mind of the motorman she was not in peril.

Fairleigh, Straus & Fairleigh for appellant.

O'Neal & O'Neal, A. E. Willson and R. T. Colston for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellee was injured while crossing the intersection of Bismark and Twenty-Eighth streets by one of appellant's cars running against her. She was crossing the intersection diagonally so as to reach the opposite side and corner to take passage on the car. She had seen the car approaching, and had motioned to the motorman that she wanted to get on it. The motorman saw her and understood her signal. There were other passengers waiting at the corner for the car. Without looking back, or paying further heed to the approaching car, appellee continued her course. As she stepped upon the track the car struck her. The motorman saw her plainly. But although she was going at an angle intersecting the track at a point in advance of the car, he thought that she would pause long enough to let the car pass, and then cross behind it, as is usual. Instead, she stepped upon the track too late for him to stop the car before striking her.

It is complained that he neither sounded his gong nor gave other signal of his approach. The purpose of sounding gongs on street cars is to notify persons on or about to cross the track that the car is approaching, so that they may govern their actions with safety. Where, however, the pedestrian sees the car and knows of its approach, every purpose of the rule for sounding the gong has been fulfilled. The failure, therefore, of the motorman to sound the gong is not negligence to such pedestrian if the latter sees or knows of the proximity and approach of the car.

The instructions fairly state the law of the case, except in qualifying the defendant's right to rely on plaintiff's contributory negligence. The jury were told that if the plaintiff was herself negligent in going upon the track, and that but for her negligence she would not have been injured, the jury should find for the defendant, although defendant's servant in charge was negligent as charged, unless they further found from the evidence that defendant knew of her peril, or by ordinary care might have discovered it, in time to have avoided injuring her by the use of ordinary care. This rule of qualification has been approved and applied in certain cases where it was the duty of the railway company to be on the lookout for persons rightfully using its tracks at the point of injury. But we are of opinion that the instruction had no place in this case. Plaintiff was not in apparent peril until the

moment she stepped upon the track, or showed her intention to do so. Being close to the track did not alone constitute peril. It was impossible for the motorman to know what was in her mind, or that she intended doing such an unusual and hazardous thing as to step in front of a car which she had just seen, and which he knew she had seen, and which she knew was passing over the track to the usual and known stopping place at the corner. It is common, and very common, for persons to cross the street railway tracks at other points than regular crossings, especially in crossing street intersections diagonally. The motorman's duty is then to warn the pedestrians of the car's approach. If every time a motorman sees a pedestrian leave the sidewalk and approach the track he must stop his car, such traffic would have to yield to the pedestrians entirely. While pedestrians have an equal right with others to use the streets in the ordinary manner, yet they must do so with respect to the rights of other travelers, including the street cars. As the latter are bound to go on their tracks alone, and can not give way, nor stop so easily as the pedestrian, the latter reasonably should yield the right of way along the track. This is both customary and necessary, and must be known alike to the motorman and pedestrian. Each should govern his actions accordingly unless he has notice that the other is about to disregard the rule and his own safety. In that event, however unjustifiable the other maybe every care then within the motorman's power to avoid injuring the other must be observed.

Appellee may have been in peril, in one sense, from the moment she started from the sidewalk toward the track. But aside from her having for the moment lost thought of the danger to herself, and, therefore, determined to continue her course across the track ahead of the approaching car, she was not apparently in peril. To the mind of the motorman she was not in peril unless by her actions he could see that she was oblivious of the nearness of the car, and intended to continue her course without regard to it. But there was nothing in the evidence in this case that would reasonably indicate that to the motorman. The qualification of the instruction as given was misleading.

Reversed and remanded for a new trial under proceedings not inconsistent herewith.

COX v. COX'S EX'OR.

(Filed March 4, 1904—Not to be reported.)

Evidence—Burden of proof—Where the payee in a note had various settlements with the maker, and the settlements were admitted by the maker, a note executed by her will be upheld because to every written obligation the statute imports a consideration, and the note in this action being supported by circumstances material to the controversy, the judgment of the lower court, that the note was not the act and deed of the maker and that it was without consideration, was erroneous.

J. I. Blanton for appellant.

W. S. Cason for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

A. A. Cox was the mother of appellant, W. H. Cox. She was a widow for many years before her death. She had a large body of farming land and other property, which appellant managed, or helped her to manage. A short while before her death she brought this suit against appellant, alleging that he was claiming that she was indebted to him because of certain notes and checks held by him, and which he was asserting she had executed. The suit seems to have been instigated by other members of her family. She averred that the notes and drafts were without consideration, and that she had not executed them. Appellant was called upon to assert his demands in this action so that she could plead specifically to them. Without objection to the form or nature of the action appellant filed his answer, and made it a counterclaim against appellant, setting up a certain note for \$3,784, dated April 16, 1892, with several credits endorsed, which he alleged she had executed and delivered to him. By reply she denied the execution of the note, and pleaded that it was wholly without consideration. The issue being joined, a large volume of proof was taken by the parties, upon which the circuit court found that the note was not the act and deed of Mrs. Cox, and also found that there was no consideration for it. Upon the issue of non est factum appellant had the burden of proof; and, in our opinion, he clearly sustained it. Mrs. Cox gave her deposition in the case, and testified concerning the transaction. The sum of her testimony is that she did not remember the execution of the paper, but rather admits that the signature is hers. It is abundantly proven by appellant, and otherwise.

Upon the plea of no consideration appellee had the burden. Whether it was sustained is the question. The determination of this point has given us a great deal of difficulty. It would not be profitable in this opinion to undertake to minutely array the various facts and circumstances shown in evidence, nor to follow the witnesses in their statements. The very best result of a repeated examination of the evidence is to leave our minds unsatisfied that the plea has been sustained, whatever may be the truth of the matter. Appellant had transacted nearly all of his mother's business for about twenty years, including the winding up of certain of the affairs of her husband's estate. The transactions do not appear to have been kept in any regular or certain form. Appellant during the whole of the time was blind. His mother appears to have been a woman of very limited business experience. Appellant was trusted by her to look after and manage much of her business, and so far as the record shows did it very well, in the main. He failed, though, to keep books, showing his transactions. Yet from time to time he had settlements with his mother, and was constantly in communication with her about her affairs. Others of her children were at home, and had opportunities for knowing what was being done. Appellant claims that all the matters to which he attended for his mother had been settled with her. Writings are shown in evidence signed by her, in which she admits as much. It is the contention of appellant that the note in suit is the balance found to be owing him by his mother on one of these settlements. Appellee asserts that he has failed to show wherein and how the note represents any balance at any time owing by Mrs. Cox to appellant; that appellant did furnish money to his mother, and that she applied to him for loans from time to

time, and that there were settlements between them is clearly proven in this record. But the money advanced and accounts paid and put into the record are not enough to account for the note. Besides, appellant was collecting money for his mother, and placed some of it to his own credit in bank. He then paid out for her numerous merchandise bills and other debts. From the fragmentary transactions brought forward in the record it is impossible to say, with any feeling of accuracy, that appellant has shown that the alleged consideration for the note actually passed. From this it is argued appellant has failed. If the burden on this branch of the case was on appellant, we should say, too, that he has failed. But to every written obligation under our statute there is imported a consideration, and the burden of showing the contrary is upon the maker. In some instances it may be so that the payee may be called as a witness against himself, and when he claims a certain consideration for the paper, yet fails to satisfactorily establish it, the maker has sustained his plea of no consideration. But here the payee of the note shows that there had been numerous transactions between him and his mother, in which he had advanced her money, and that they had had settlements covering these transactions at times when the recollection of all the parties was better, because nearer to them, and when the accessibility of the evidence affecting the various items was presumably within reach of all. Now, after the evidences of many of the transactions have been turned over to the other party, who has since died, after forgetfulness had obliterated many of them from the minds of the actors, it is sought to defeat the note given upon the settlement because the payee can not show the exact consideration for it. Another rule of law here intervenes, which is, that he who would seek to surcharge a settlement made with him must show wherein it is erroneous. The party holding the note, and showing that it was given many years ago upon a settlement of complicated accounts, is entitled to the benefit of all presumptions as to the sufficiency of the consideration until the maker of the note shows that it embraces items not properly chargeable therein. Else settlements are of no value; and the reduction of running accounts to a note, upon a full settlement, leaves the payee of the note in no better position than he was before.

The evidence on behalf of appellees leaves the mind in great doubt whether the note was executed for a fair and full consideration or not. It is utterly impossible to now state the accounts of these parties as of the date of the note. Yet it is not shown at all that any item embraced in the note was improperly charged against the maker, or that she failed to receive credit for any sum that she was entitled to. To support the judgment below necessarily involves our finding from the evidence that the note is a forgery; that it is a purposeful attempt of appellant to commit fraud against his mother, having all the moral ingredients of theft, and that appellant, his wife and his son have, to accomplish these ends, added perjury to the main offenses. We are unwilling to impose such a finding in the absence of evidence clearly establishing it. Mere suspicion, isolated transactions, unexplained and unsatisfactory, are not enough. No witness for appellees, nor all of them together, say enough to justify such a grave conclusion. The circuit court must have proceeded upon the theory that appellant had failed to satisfactorily explain or show the consideration of the note. He did testify it was for

money advanced to his mother at her request from time to time, and was the result of a settlement between them; that he did not keep books of account to verify his statements is not enough to condemn the transaction as unbelievable. There is not enough evidence to support appellee's plea of no consideration, and the circuit court should have adjudged accordingly.

Judgment reversed and cause remanded, with directions to enter a judgment in conformity herewith.

Whole court sitting.

SPARKS v. WALDEN, &c.

(Filed March 4, 1904—Not to be reported.)

Attorney's fee—In an action by appellant to enforce a mortgage lien for a balance of \$270 for an alleged attorney's fee and for furnishing a bail bond, where it appears from the evidence that the appellees were ignorant people, one of them being barely able to write his name, the other unable to do so, and that the mortgage was procured by fraud, it being the belief of appellees that its only purpose was to secure appellant upon his making a bail bond, the judgment of the lower court in favor of appellant for \$20 will not be disturbed, it appearing that \$100 was a reasonable fee, and that \$80 had been paid the attorney.

D. K. Rawlings for appellant.

Parker, Johnson & Evans for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

The appellant, James Sparks, sued in the Laurel Circuit Court to recover of the appellee, W. C. B. Walden, \$270, alleged balance claimed by him as an attorney's fee for furnishing the appellee bail and defending him in the United States District Court for the Eastern District of Kentucky against the charge of defrauding the United States government, of which offense appellee stood indicted in that court.

The petition sets forth the employment of appellant by the appellee and the undertaking of the former to render the services mentioned for a fee of \$350, of which amount \$80 was paid at the time of appellant's employment, and that as security for the remaining \$270, and to indemnify appellant against loss upon the bail bond to be furnished by him for the appearance of appellee to answer the indictment in the Federal court, appellee, together with his wife, Qumi Walden, executed and delivered to appellant a mortgage upon certain lands and personal property therein described, which was acknowledged and recorded as required by law. It is also averred in the petition that appellant obtained a transfer of the indictment and prosecution of appellee from Catlettsburg to Lebanon, after which he furnished for him the bail bond as agreed, and thereby secured his release from prison, and finally that he made defense for him upon the trial had under the indictment, but that, notwithstanding appellant's full compliance with his contract with the appellee, the latter had wholly failed to pay him the \$270, balance of the fee due him. Wherefore, he prayed judgment against appellee for that sum, for

the enforcement of the mortgage given as alleged to secure its payment, and for a specific attachment against the personal property conveyed by the mortgage as authorized by section 249, Civil Code.

The specific attachment was issued and certain of the personal property described in the mortgage was taken by the sheriff under it, and thereafter placed in the hands of a receiver, by whom it was sold under an order of court. Answer was filed to the petition by the appellee, W. C. B. Walden, and Qumi Walden, his wife (she having been made a party to the action by appellant), wherein it was denied that the appellee, W. C. B. Walden, agreed to pay appellant \$350 as a fee for the alleged services to be performed for him, or that he was indebted to appellant in the sum of \$270, or any other sum exceeding \$30 as a balance due upon such fee.

In addition it is averred in the answer that the appellee, W. C. B. Walden, through his brother-in-law, Alexander Smith, did employ appellant to make for him a bail bond, and assist in his defense in the prosecution against him in the Federal court, for which he was to be paid \$100, and this sum appellant agreed to accept in full payment of his services, and \$50 thereof was then and there paid him by Alexander Smith for appellee, leaving only \$50 of the agreed fee unpaid. It is further averred in the answer that the mortgage was executed by the appellee for the sole purpose of indemnifying appellant against loss by reason of his suretyship upon, and the furnishing of, the bail bond, and that appellees executed the mortgage without any knowledge of the fact that it contained the provision that it was also given to secure the appellant in the attorney's fee; that appellees are both illiterate, the appellee, W. C. B. Walden, being barely able to write his name, and his wife wholly unable to do so, and that in obtaining their signatures to and acknowledgment of the mortgage, the appellant practiced upon them a fraud, in that he falsely represented to them that the only purpose of the mortgage was to secure him against loss as to the bail bond, and to prevent the Federal government from levying on and selling the property of the appellee, W. C. B. Walden, in satisfaction of a judgment which it had obtained against him on a forfeited bail bond; and further, that there were no exemption allowed a housekeeper with a family under the laws of the United States. It is also averred in the answer that appellees were induced to execute the mortgage by the foregoing alleged false and fraudulent representations of appellant, and that they would not have done so if they had known that it gave a lien upon their property to secure a fee to the appellant.

It is denied in the answer that appellant was present or rendered any assistance to the appellee, W. C. B. Walden, in the trial of his case in the Federal court, or that he rendered him any service as an attorney except to provide him a bond to secure his release from jail pending the trial of the indictment. Upon the contrary, it is averred by appellees that the appellee, W. C. B. Walden, employed the law firm of O'Neal, Parker & Trosper to defend him in the trial of his case in the Federal court, and they did perform that service for him under such employment, though there was little for them to do, as appellee pleaded guilty to the charge against him, and by reason thereof received the lowest penalty that could be inflicted under the law, which was confinement for one year in the penitentiary. The material averments of the answer were denied by reply, and after the taking of proof by

Both parties the cause was submitted for trial, whereupon the lower court rendered judgment in appellant's favor for \$20, the amount remaining unpaid of the \$100 admitted by the appellees to have been promised him. Being dissatisfied with the judgment of the lower court, appellant insists that it should be reversed.

Appellant testified in substance that the contract of employment was made with him by Alexander Smith, the brother-in-law of the appellee, W. C. B. Walden, but that Smith was unwilling to agree to the payment of a greater sum than \$100, yet did agree that the amount of the fee over and above the \$100 should be left for adjustment between appellant and appellee, W. C. B. Walden, when the latter and his wife should execute the mortgage. This statement was denied by Smith, who testified that the \$100 was the only fee discussed or agreed upon; that that sum was accepted by appellant in full for the services to be performed by him under the employment, and that he then paid him \$80 of the \$100 thus agreed upon.

Smith also testified that the mortgage was to be given only for the purpose of affording appellant indemnity against loss as bail for appellee, W. C. B. Walden, and to protect the property of appellees from seizure and sale at the hands of the Federal government in satisfaction of its judgment against appellee, W. C. B. Walden.

The appellee, W. C. B. Walden, was in the penitentiary at Atlanta, Ga., when the depositions were taken in this case, and his deposition does not appear in the record; in fact it was not taken, but that of his wife does appear in the record, and it shows that she did not know that a lien was given by the mortgage to secure an attorney's fee, but, upon the contrary, that she was induced by the appellant to believe that the mortgage was to secure him against loss on the bond, and to protect her husband's property from the officers of the Federal government. The only other person present at the time of the employment of appellant by Smith was one Cris Jackson, who was an occupant of appellant's office. Jackson, at appellant's dictation, wrote the receipt that was given Smith for the \$80 paid appellant on the fee. This witness corroborated appellant, but as he was impeached by proof of his conviction of a felony, it is highly probable that the chancellor gave his testimony very little weight.

There are several circumstances of more than ordinary significance connected with the transactions between the parties to this litigation that are apparently corroborative of Smith's version of the contract, and doubtless had some influence upon the conclusions of the chancellor. For example, if, as contended by appellant, he advised Smith, appellee's agent, that his entire fee under his employment by the appellee, W. C. B. Walden, would be \$350, that is, \$270 in addition to the \$80 then paid him by Smith, why did he not, in subsequently preparing the mortgage for appellee's signature and acknowledgment, insert in it the amount of his fee? Or, if the amount of the fee was known to the appellees before, or when they executed the mortgage, why did appellant not require them to execute a note for it? Again, the service performed by appellant under his employment was greatly disproportionate to the amount claimed. The services rendered may have been worth \$100. They certainly were not worth \$350. Appellant claims, however, that though he was not present at the trial of appellee, W. C. B. Wal-

den, he employed one Bruner to assist him in the case, in some way unexplained, and that at the time of his (appellant's) employment he informed Smith that he would have to employ Bruner, and pay him \$100. But he does not contend that Smith or his principal agreed to the employment of Bruner or undertook to pay him. Besides, Smith denies that he was told of the supposed necessity for the employment of Bruner, and even if Bruner was employed by appellant, as claimed, the appellee was not liable for the cost of such employment unless he consented thereto, with knowledge that he would be expected to pay for the services rendered by Bruner.

There is yet to be mentioned a fact which was no doubt all powerful in its influence upon the mind of the chancellor in the determination of this case. We refer to the receipt that was given by appellant to Smith at the time of the payment by the latter of the \$30. Its language is as follows:

"Received of Alex. Smith the sum of \$30 as part payment of a fee in the representation of W. C. B. Walden, charged with violation of the statute pending in the Catlettsburg United States Court, and I am to furnish a bond for said Walden, and he is to execute to me a mortgage to secure me in doing so on his property. The fee is to be \$20, paid in cash, as a fee to represent said Walden.

"This the 5th day of June, 1902.

"JAMES SPARKS."

The receipt is awkwardly expressed, yet it is reasonably clear in its meaning in three respects: It shows the \$30 paid appellant by Smith constituted the fee he was to receive, except \$20. Also that the one fee was to compensate him for furnishing the bond and representing or defending the appellee, W. C. B. Walden, upon the trial. And finally, that the only purpose of the mortgage, as expressed therein, was to secure him in furnishing or going on the bond. As stated, the language of the receipt was dictated by appellant, who is a lawyer, and it was manifestly his intention that it should recite the agreement entered into between himself and Smith, the agent of appellee, W. C. B. Walden.

A careful examination of the record convinces us that the judgment of the chancellor is sustained by the evidence, and it is, therefore, affirmed.

HARRIS v. GREENLEAF, & Co.

(Filed March 8, 1904.)

Lands—Where appellant bought of appellees lots at the price of \$100, they agreeing that upon its payment, on October 1, 1899, they would make him a deed, he paid \$10, and paid the taxes for several years while in possession, when appellees forcibly took possession of the lots, in an action by him for a specific execution of the contract, alleging his willingness and ability to pay the balance of the consideration, and that he had afterward got the money and sent it to appellees who would not receive it. It was error for the chancellor to sustain a demurrer to his petition upon those allegations. Such an allegation is not a good legal tender, but it shows such a state of case as in equity should excuse a better tender, leaving the rights of the parties to be adjusted by the chancellor.

Burnam & Moberley for appellant.

J. C. & D. M. Chenault for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge O'Rear.

Harris bought of Greenleaf three lots at \$25 each, and executed his notes, with two of his children as co-obligors, for the purchase price. Greenleaf executed a bond for title, stipulating that "said Greenleaf is and be not required to make said deed until all the \$75 is paid in full." Harris was put into possession. Later, he says, he was induced to sign another paper with Greenleaf and Evans, whereby the latter agreed to sell to Harris the same lots at the price of \$100 in the aggregate, to be paid October 1, 1899. In that paper it was covenanted that on payment of said sum Greenleaf and Evans were to make Harris a good and sufficient warranty deed. But it was further stipulated that in event Harris failed to pay the \$100 as agreed, that he thereby relinquished all rights or claim to the land, and was to "give up his contract and also peaceful possession of said land without any recourse at law or in any other way."

Harris paid \$10 of the purchase price, and paid the tax for the two or three years while in possession, but failed to pay as required by the contracts. He avers that thereupon appellees forcibly took, and now keep, the possession of the lots. He brought this suit in equity for a specific execution of the original contract of purchase, alleging his willingness and ability to pay the balance of the consideration, and asking an accounting, and credit for the value of the use of the lots during the time that he was wrongfully kept out of possession by defendants.

A demurrer was sustained to his petition, and, failing to amend, it was dismissed. From the arguments here we assume the ground of the demurrer upon which the court held the petition defective was because of the failure of the plaintiff to allege that he had tendered the balance of the purchase price, and because he failed to tender it with his petition. Appellees contend that before the vendee in a contract for the sale of land can maintain an action for its specific execution he must show not only that it is fair and reasonable, but that he has been duly diligent, and has performed, or has offered to perform, the conditions imposed on him by the contract, and that in the matter of the payment of the consideration the only sufficient offer of performance is a legal tender of the balance of the purchase price.

While it is true that where a right is made dependent upon the payment of money the general rule is that an action can not be maintained to enforce such right without allegation of a tender of the money, yet in equity this fundamental rule is subject to modifications and exceptions. If the party suing avers that he is ready and willing to do all the acts required of him in the specific execution of the contract according to its terms, it may be enforced, other equitable requirements being satisfied. In general, the rules of equity governing an actual tender are not so stringent as those of the law. In discussing the necessity of an actual tender in contracts in which time is not essential it is admitted in the note to section 1407, Pomeroy's Eq. Jur., that the American decisions are conflicting on the subject. But the author declares that a certain "group of decisions adopts a rule more in accordance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough

that he was ready and willing, and offered at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree and his previous neglect will only affect his right to costs."

Among the numerous decisions cited as supporting the text is the case from this court of *Woodson v. Scott*, 1 Dana, 470. The author adds, in which we concur: "This is unquestionably the true equitable doctrine."

The case of *Hart v. Brand*, 1 Mar., 159, is enough like this one to make its principles applicable. Hart covenanted to convey to Brand a certain tract of land at \$25 per acre, payable in installments. The land was to be conveyed upon payment of the first installment, the purchaser to give a deed of trust to secure the deferred payments. The circuit court decreed the execution of the contract, and Hart appealed. There was not a tender by the vendee of the purchase money, that is, there was not a legal tender, though the vendee having the money at deposit with a banker offered a check upon the latter, which the vendor refused, and would not wait till the specie could be got from the bank so as to make the tender good. The vendor at the same time tendered his deed. In fine, there was an apparent technical compliance by the vendor and noncompliance by the vendee, from which the vendor assumed that he was absolved from the contract. It does not appear that any other tender was attempted, and the vendee brought his suit for specific execution. The absence of the tender was relied on in defense. The court said: "Whether equity ought to give the relief sought surely depends on the circumstances of the case."

And we may add that this is the universal rule. After showing a vain effort by the vendee to make a valid tender, and the vendor's leaving without giving him further chance to complete it, the court went on to say: "But the agreement did not depend on the payment of the money as a condition precedent, whereby the mere casual failure to make payment on the precise day should render it invalid. It is sufficient to justify the aid of a court of chancery that the purchaser has, with good faith, shown a willingness and readiness, without injury to the vendor, to perform substantially the agreement."

The court lays some stress on the fact of the vendor's having been instrumental in a measure in producing the delay, "giving countenance thereto by lying back." In *Hunter v. Daniel*, 4 Hare, 420, 30 Eng. Ch. Rep., 420, a case very much like this one in lacking a tender by the plaintiff before suit brought for specific performance, the argument was submitted that payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The court responded: "The general rule in equity certainly is not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money."

The case of *Webster v. French*, 11 Ill., 254-279, contains a very full and interesting discussion of this question. A number of cases are examined and applied, some of which were thought to be, though in fact were not, opposed to the conclusion reached by the court, among the number being *Jarboe v. McAlle's Heirs*, 7 Ben. Mon., 279. The court, speaking through Mr. Justice Catron, thus announced its conclusion: "The result of my examination of this subject clearly shows that the court of chancery is not bound down by any fixed rules on this subject, by which it will allow the substantial ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but the merest technicality could require. The money may, at any time, be ordered to be brought into court, whenever the rights of the opposite party may require it; but while he is insisting that the money is not his, and that he is not bound to accept it, it would seem to be a matter of no great consequence to him whether it is in the custody of the court or not. The court possesses a liberal and enlarged discretion on this subject, by the proper exercise of which the rights of all parties may be protected." To the same effect are *Brock v. Hidy*, 13 Ohio St., 306, and *Deichmann v. Deichmann*, 49 Mo., 107.

The following allegations of the petition in the case at bar bear on the question being considered: "Plaintiff further states that afterward, and while he was in possession of said lots of ground, to wit, on the 16th of January, 1900, he again saw defendant Greenleaf and paid him \$10, for which said Greenleaf executed to him, on the 16th of January, 1900, the receipt filed herewith (marked Z) and signed Evans and Greenleaf, and said defendant Greenleaf then agreed with plaintiff he should have a prolongation of the time in which to pay for this land, and stating that he would not have any wrong done plaintiff, but his deed should be made to him; and the plaintiff remained in possession of his lots of ground until ——— day of ———, 1901, when defendant Evans arbitrarily, and without any legal authority whatsoever, and against the rights and consent of this plaintiff, took forcible possession of same, and by his laborers and employes has been using same and getting the rents and benefits of same, and claiming that under the contract of April 5, 1899, they belong to defendants, and that plaintiff has now no right to said land or to a deed for same. Plaintiff afterward, through a friend, got the money and offered to pay Greenleaf, and defendant Evans would not agree to it. * * * Plaintiff is ready and willing to do what is fair and equitable, and to pay what is justly due defendants, after the deduction of what is reasonable and just for the use of same during the time possession had been withheld from him."

Appellees argue that that is not a good allegation of a legal tender. It is not. Nor do we understand that it was so intended by the pleader. But in our opinion it does show such a state of case as in equity should excuse a better tender, leaving the rights of the parties to be adjusted and enforced by the chancellor by appropriate decree, as was done in *Hart v. Brand*, *supra*.

The provision in the last contract, if there be anything to support that instrument, for the vendee to forfeit his contract and all rights under it, including possession of the lots, upon nonpayment of the full purchase price at the time indicated in the paper, was merely a form of additional security. Of a somewhat similar arrangement this court in *Kercheval v. Swope*, 6

Mon., 367, quoted approvingly the following language of Lord Chance Harwick in *Vernon v. Stephens*, 2 Pr. Wms., 66: "If the defendant has money and interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff to lose all the money he has paid; lapse of time in payment may be recompensed with interest and costs. And as to these agreements, they were intended only as a security for payment of the money, which end is answered by the payment of principal, interest and costs."

Of the principal case on this point this court said: "The payment of money, after Swope should enter for default of payment, was contemplated and that Swope's entry and holding the land and improvements was induced as a security and incentive to payment by Kercheval, but was not intended to vacate the agreement. And if it had been, a court of equity would relieve against a hardship and penalty, so grievous to the one party, while the other party, Swope, had received part performance, and held the land for the money, not vacated or released, nor extinguished by such entry on the land." (Page 371.)

True in this case the cash payment was only \$10 and taxes of no amount. But that was by no means all that appellant was made to pay by the contract if the averments of this petition be taken as true, as must be, for he says that the lots had increased in value till they are worth \$375. So he would lose that enhancement, which was undoubtedly his when he paid the purchase money.

Appellees contend that this enhancement of value alone is an equitable consideration against the enforcement of the contract. Where consideration has so materially altered between the making of a contract and a decision to enforce it that it would be unjust to the resisting party to enforce its execution, a court of chancery may, and should, refuse its aid in enforcing it. But generally mere increase in value of the property sold, before the specific enforcement is sought, but after the vendee has performed and is bound for the purchase price, and where his delay in paying to pay the balance is not unreasonable and not in bad faith, is enough to stay the chancellor's hand. People buy and sell with an expectation of natural increase or fall in values. If the value of the lots had been naturally ever so low it would have constituted no defense to an action brought by the vendors to collect the purchase money. As held by the Court of Appeals of New York in *Prospect, &c., R. R. Co. v. Coney Island R. R. Co.*, 1 Am. & Eng. Decisions in Equity, 888, generally a contract to be judged as of the time at which it was entered into, and if fairly made, the fact that it has become a hard one by force of subsequent circumstances or changing events will not necessarily prevent its specific enforcement. It is stated that the exception to the foregoing rule is where circumstances arising subsequent to the making of the contract are such that enforcement would be a great hardship to the defendant, and be of no benefit to the plaintiff. We are of opinion that the demurrer should have been overruled.

Judgment reversed and cause remanded for proceedings not inconsistent herewith.

BICKEL, &c. v. BICKEL, EXOR, &c.

(Filed March 8, 1904—Not to be reported.)

1. Husband and wife—Insurance—In an action by the wife against the deceased husband's executor, in which she sought to recover the part of an insurance policy which was payable to his deceased former wife, the lower court erred in adjudging that under the "Weissinger Act" he had the right to dispose of his personal property with a view of defrauding his wife in her marital rights, because it was not intended by this statute that either the husband or wife should intentionally commit a fraud upon the other in the disposition of their personal property.

2. Assignment of insurance policy—An assignment of an insurance policy by one on the evening before his death on the next day will not be upheld where the evidence conduced to show that he was not in such condition of mind as to understand the nature and effect of the transaction that he entered into.

3. Attorney's fee—An allowance of \$500 to an executor was excessive where it was upon a basis of his collection of \$10,000, where it appears that \$7,700 of it never passed through his hands, but was paid direct to a trust company.

Burnett & Burnett for appellants.

Wm. Furlong for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

In the month of October, 1900, Jacob Bickel died, leaving a widow, five children and one grandchild, the child of a daughter, Mrs. Haller. He left considerable real estate and some personalty, amounting in all to \$40,000 or \$50,000. His indebtedness, as shown from the record, amounted to \$30,000 or more. There were three policies on his life amounting to \$5,000 each. One was payable to his oldest son, Henry, about which there is no dispute. The second one was made payable to his wife, Caroline, and his children. Caroline died several years before his death, and he had married again, his last wife being Louise Haller. She claims that she was entitled to a portion of this policy, the same that Caroline would have received if she had survived her husband, and cites several authorities which she claims supports her contention. The authorities referred to apply to benevolent orders or insurance companies, the charter of which company directs that the amount of the certificate should be paid, at the death of each member, to his family. But the insurance in this case was not in such a company; at least there was nothing in the record showing that there was such a requirement in its charter. When Caroline died her interest in the policy survived to the children. The lower court adjudged this policy to belong to the five boys and Alberta May Haller, his grandchild, in equal portions. The third and last policy was made payable to his executor or administrator. On the evening before the death of Jacob Bickel on the next day he made an assignment of this policy to his five boys. The appellant, his widow, and the Louisville Trust Co., as guardian for Alberta May Haller, contested this assignment, both claiming that at the time the assignment was attempted to be made, by reason of his mental and physical condition, he was incompetent to transact business of any kind, and also that it was attempted to be done in fraud of their rights. The lower court determined that it was done in fraud of the rights

of his widow and was so intended, but held that under the statute, known as the "Weissinger Act," of 1894 he had the right to dispose of his personal property with a view and purpose of defrauding his wife in her marital rights; that this statute changed the law in this respect, and that prior to that time he did not have such right.

That part of the statute referred to reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal. * * * She shall hold and own all her estate to her separate and exclusive use and free from the debts, liabilities and control of her husband. A married woman may take, acquire and hold property, real or personal, by gift, devise or descent, or by purchase, and she may in her own name, as if she were unmarried, sell and dispose of her personal property."

In our opinion the lower court erred in its construction of this statute. It is true it placed the husband and wife upon an equal footing with respect to their property rights and interests. Under the present statute each has the right to dispose of their personal property without the consent of the other, but it was not intended by this statute, nor can it be implied therefrom, that either or both of them have the right, in the disposition of their personal property, to intentionally commit a fraud upon the other, or upon any one. As to the mental and physical condition of Jacob Bickel at the time of the assignment of the policy we can not concur with the finding of the lower court thereon. While it is true that his five boys, who were present at the time of the assignment, with their lawyer, which occurred at 8 or 9 o'clock on the night before he died, testified that he was not dangerously sick and was rational, and knew perfectly well what he was doing, and was competent to do business, yet, taking into consideration all the evidence as to how they happened to arrive there together on that night with their lawyer, and all of them remaining in the kitchen except one, until his wife went to bed, and all the other attendants had left for home, before mentioning the subject to him, together with the evidence of his incompetency, especially that of the two attending physicians, we are convinced that Jacob Bickel was not in a mental state to understand the nature and effect of the transaction that he entered into.

It appears that his condition was such that the family were not willing to risk the case with the regular family physician, Dr. Kelly, and Dr. Warner was called as consulting physician. They arrived about 6 or 7 o'clock in the evening, a few hours before the assignment was made. It is shown that these physicians have no interest in the result of this litigation. We quote a portion of the deposition of Dr. Warner:

"Q. 12. What was his condition? What did you conclude in that consultation to be his condition?"

"A. I concluded his condition to be a desperate one."

"Q. 13. Tell how he was ill? To what extent was life involved in the illness?"

"A. To start with, he had an extremely weak heart—valvular lesion. He was suffering from an odematous condition, what we call 'odematous lungs,' at the time I saw him. By that we mean a watery condition, serum. Blood had been poured into the air cells. He was about to suffocate, and this

weak, debilitated heart was unable to pump the blood through the lung tissues. The odema was constantly increasing. The odema had appeared in the lower extremity, also in the abdomen and in the upper extremity, and I judge from his mental state there was an odematous brain also, what we term a 'wet brain'—odematous brain; the surfaces were cold, pulse rapid and irregular; breathing hard and slow, so much so as to excite my suspicion he had taken, perhaps, too much morphine. On examination of his pulse I found, however, there was no drug, so that the slow, heavy breathing was not due to a drug, but due to his general condition, to pressure upon the brain. He was unconscious except by great effort to arouse him; would speak then only in monosyllables; sometimes sensibly, sometimes incoherently."

"Q. 18. Now, doctor, referring to his condition at the time you had held your consultation on Saturday afternoon or in the evening, you say between 6 and 7 o'clock, was he in a condition to transact business, make a contract, or transact business of any kind?"

"A. He was not. I would not think he was, in my opinion."

Dr. Kelly, the family physician, fully corroborated the statements of Dr. Warner.

The grandchild, Alberta May Haller, is entitled to her interest in this \$5,000 policy.

It appears that there was no surplus personal estate after the payment of the debts of Bickel, even including this \$5,000 policy, and, therefore, the appellant, Louisa Bickel, in not entitled to one-half of this policy. Her cause for complaint is that Bickel had, in his lifetime, mortgaged a considerable portion of his real estate and she had joined with him in these mortgages, conveying her dower interest therein. It was to her interest, and she had the right to require that this \$5,000 policy be applied to the payment of these mortgage debts, thereby releasing \$5,000 worth of real estate from the mortgage liens that she might realize dower interest therein.

With reference to the contention of appellant, that the lower court erred in allowing appellee, Henry Bickel, the sum of \$500 for his services as such executor, we are of the opinion that the allowance was for too much. This allowance was made upon the basis that he had collected and disbursed about \$10,000. It appears from the record that \$7,700 of it never passed through his hands. This sum was realized from some brewery company bonds, which bonds were held by the insurance company and a bank or trust company as collateral, and when these bonds were sold or disposed of, under order of court, the purchaser thereof paid the money direct to the insurance company and the bank or trust company, and thus the appellee was relieved of the responsibility thereof. In our opinion, from all the facts appearing in this record, \$300 would be a reasonable allowance for his services as such executor.

The appellants also complain that the allowance of \$1,200 to the attorneys representing the estate was too large. We are of the opinion that the allowance is too great to be charged against the estate. From the record it appears that the most of their services were rendered in looking after the interest of Henry Bickel, in trying to hold the title to the Payne street property, and all the boys in attempting to sustain the assignment of the life policy and other individual interests of his and theirs. The fee of \$1,200 is possi-

bly small for all the services rendered by counsel in this action, but \$750 is ample pay for the services they rendered the estate.

For the reasons herein stated the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

MAXEY v. TOWN OF TOMPKINSVILLE.

(Filed March 8, 1904—Not to be reported.)

Office and officer—Salaries—Where the board of trustees of the town of Tompkinsville by ordinance fixed the salary of the town marshal at \$15 a month, and subsequently enacted an ordinance providing that the salary of the marshal should be a certain percentum of all fines of the police court and certain fees, one elected after the latter ordinance became effective was only entitled to the compensation provided for by it.

Sherman Spear for appellant.

Harlin & White for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Chief Justice Burnam.

In 1894 the board of trustees of the town of Tompkinsville adopted an ordinance fixing the salary of the town marshal at \$15 per month. On the 28th of August, 1899, they adopted the following ordinance: "The marshal shall receive for his services 30 per cent. of the fines imposed by the police court, and the fees allowed sheriffs for the same services, to be taxed as cost against the defendant."

And at the same time an ordinance was adopted by the board repealing all former ordinances in conflict with the ordinance adopted by the board at that date. The appellant, W. H. Maxey, was subsequently elected by the board of trustees town marshal, and accepted the place, and served therein from the 7th of September, 1899, until the 7th of August, 1900, a period of eleven months. On the 8th of August, 1900, Sherman Hale was elected for the place by the board of trustees and discharged the duties of the place until the 14th of February, 1901. On the 13th of July, 1901, the appellant, W. H. Maxey, brought this action to recover \$165 salary alleged to be due him, at the rate of \$15 per month, while he was an incumbent of the office of marshal.

He also sought judgment for \$93 upon a similar claim assigned to him by his successor, Sherman Hale, for services for six months and six days at \$15 per month. The town denied liability, and alleged that the ordinance of 1894, fixing the salary of the marshal at \$15 per month, was repealed by the ordinance of 1899, which allowed the marshal fees for his services. The case was submitted upon the pleadings and exhibits, and the circuit judge dismissed plaintiff's petition and he has appealed. The sole question presented for decision is whether the appellant, in addition to the compensation allowed by the ordinance of 1899, is also entitled to the \$15 a month provided by the ordinance of 1894. The last ordinance provides that the marshal shall receive the fees therein provided for for his services. There is no intimation that they were to be in addition to the \$15 per month theretofore allowed for his ser-

vices, and taken in connection with the ordinance repealing all previous ordinances inconsistent therewith, and the further fact that no demand was made monthly for the \$15 during the rendition of the service by either appellant or his successor, we think that it was clearly the understanding of all parties that the fees provided by the last ordinance by way of compensation were to be in lieu of that provided by the ordinance of 1894.

Judgment affirmed.

CITY OF COVINGTON v. BRINKMAN.

(Filed March 8, 1904—Not to be reported.)

Street construction—Ordinance—Under section 3006, Kentucky Statutes, the city council of cities of the second class has no power to order the construction of streets at the cost of the abutting owner until petitioned by two-thirds of the owners of the front feet of the real estate abutting upon such improvement, and in the absence of such petition the council had no power to enact an ordinance providing for such construction, and a contract under such ordinance is not enforceable.

F. J. Hanlon for appellant.

Wm. McD. Shaw for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 28d of June, 19002, the general council of Covington, two-thirds of the members thereof concurring, passed an ordinance for the original construction of brick sidewalks on Eighteenth street, between Pearl and Greenup streets. The contract for the work was let to Ellsworth Wood, who performed the work in accordance with the plans and specifications adopted by the city, and an apportionment warrant for \$145.75 for the cost of the improvements, in front of lots Nos. 1 and 2, owned by Susan Brinkman, was issued to him. Susan Brinkman having refused to pay the warrant, this suit was instituted by the contractor against both Susan Brinkman and the city of Covington. Copies of all orders and proceedings of the council bearing upon the question are filed as exhibits with the petition.

The defendant, Susan Brinkman, filed a demurrer to the petition on the ground that it did not allege that the owners of at least two-thirds of the front feet of the real estate abutting on the improvement had petitioned for the construction of the pavement. The demurrer was sustained as to her and the plaintiff's petition dismissed, and the city has appealed. Section 3006 of the Kentucky Statutes, which is a provision of the charters of cities of the second class, to which Covington belongs, is as follows: "The general council may, by ordinance, provide for the construction or reconstruction of the streets, alleys and other public ways and sidewalks, or part thereof, of the city upon the petition of the owners of a majority of the front or abutting feet of the real estate abutting on such proposed improvement, or without petition by a vote of two-thirds of the members elected of each board of the general council. But when such original construction is to be made with brick, granite, asphalt, concrete, or other improved material, or paving, it shall be only upon a petition of the owners of at least two-thirds of

the front or abutting feet of real estate abutting such improvement. Such original construction of public ways shall be made at the exclusive cost of the owners of the real estate abutting on such improvement."

Under this section of appellant's charter the council had no power to order the original construction of a sidewalk by brick at the cost of the abutting owners until they had been petitioned by the owners of at least two-thirds of the front feet of the real estate abutting upon such improvement. In this case there was no petition. The ordinance was, therefore, void. It is, however, contended by the city that as the property owners made no objection to the work while it was in process of construction, they are estopped from complaining. To support this contention we are referred to *Preston v. Robertson*, 75 Ky., 570; *Fehler v. Gosnell*, 99 Ky., 380, and *Barber Asphalt Co. v. Garr*, 24 Ky. Law Rep., 2235. In none of these cases was there any question of the city's authority to enact the ordinance, but the question was very fully considered in *Richardson v. Mehler*, 23 Ky. Law Rep., 921.

In that case the court, speaking through Judge DuRelle, said: "The correct doctrine seems to be that the liability for such improvements must, under the statute, be created by legislative action of the council; and that legislation must be valid at least in part or no liability can arise. If the foundation is a nullity, none of the subsequent proceedings can be valid. If the ordinance be wholly void, it can not be authority for a valid contract, for there is no authority to make the contract except the ordinance. By such an ordinance there is created no obligation to pay for the service for which there is no common law liability. It could not be created except by a statute. It must be created in conformity thereto."

The statute in this case as a condition precedent requires that the owners of two-thirds of the abutting real estate in the district to be improved shall petition therefor. In the absence of such petition the council had no power to enact the ordinance and no contract created thereunder is enforceable. (*Kaye v. Hall*, 52 Ky., 456.)

For reasons indicated the judgment is affirmed.

WALKER v. BANK OF MANCHESTER, &c.

(Filed March 8, 1904—Not to be reported.)

Fraudulent conveyances—Where one indebted to another conveyed property to his daughter in consideration of love and affection, but reserved certain timber which he conveyed to appellant for a valuable consideration, in an action by the creditor against the daughter seeking to set aside the conveyance, a judgment by the court after the purchaser of the timber was made a party upon her cross petition subjecting so much of the timber as was necessary to pay the debt was proper, and will not be disturbed.

Hazellrigg & Chenault and J. J. Fitzpatrick for appellant.

J. J. C. Bach, W. H. Miller and Hall & Baker for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge O'Rear.

Henry Fields, who is now dead, was indebted to appellee bank as surety on a note for \$200. Subsequently he conveyed to his daughter, Mrs. Wells, a certain tract of about 850 acres of land in Perry county, in consideration of love and affection and to "equalize" her with his other children. By the deed he reserved all the poplar timber on the tract five feet in circumference and over, at three feet above the ground, to be measured from the upper side of the tree; also ten oak trees of the grantor's selection. The bank brought this suit, after having recovered a judgment and return of execution "no property found," against the administrator and heirs of Henry Fields, including Mrs. Wells, charging that the conveyance to her was voluntary and void as to that debt. It sought the subjection of the land to the payment of its judgment debt. Mrs. Wells answered, admitting that the conveyance to her was without valuable consideration, but setting out the true consideration, and alleging that the reservation of the timber by her father was for the purpose of paying his debts, except the debt of the plaintiff bank, and that to defeat it he had made a voluntary and fraudulent conveyance to appellant of the reserved timber for the express purpose of defeating the bank's debt. She made appellant a defendant to her cross petition, and asked that the conveyance to him be declared void, and that enough of the timber be sold to pay the decedent's debts. Appellant claims to have bought the timber in good faith at the price of \$400, of which he says he at the time paid \$.00, and is ready and able to pay the balance. The proof shows that this timber is worth from \$1,000 to \$1,500. It is very doubtful whether appellant actually paid to Henry Fields the \$200 under the proof, although they went through the form of counting out the money at the time. Joe Johnson, the county court clerk, who wrote the deed conveying the timber and took the acknowledgment at Henry Fields' room, where Fields was confined by sickness, says he saw the money and saw it counted out, but, significantly, did not see it pass into the hands of Henry Fields. The fact is admitted that he did not get it, but that it was delivered to his son, Bob Fields, who seems to be in some way interested in the case for appellant, if not with him. At any rate, such was the finding of the circuit judge, whose opportunities for knowing the parties give his judgment such a weight that under the evidence we do not feel warranted in disturbing it.

The legal question presented is, admitting that the conveyance by Henry Fields to appellant was fraudulent, can any one other than a creditor of Henry Fields attack it? And as the bank has not attacked that conveyance, can it be done by the grantor's daughter, to whom he had voluntarily conveyed other property sought to be subjected by the grantor's creditors? A voluntary conveyance is not necessarily fraudulent, though as to antecedent debts it is void. A fraudulent conveyance, to which the grantee is a party in its purpose, is void as to the grantor's creditors. In the latter instance the title to the property remains in the grantor so far as creditors are concerned, and they may disregard the conveyance by causing the levy of their executions or attachments upon it, or sue to subject it. (Section 1907a, Kentucky Statutes.) The grantor himself could not sue to avoid it. Not because it is not void for any purpose, nor because the grantor would be estopped, but for the reason that the courts will not hear the complaint of one who seeks relief from his own fraud. Here the grantor has conveyed for a

good consideration certain of his property to a daughter, which, under the statute, is liable for his antecedent debts notwithstanding. He has also conveyed in actual fraud of the creditor other property, of which the grantee had notice. In this suit to settle the estate of the deceased grantor, to which both grantees are parties, a court of equity will require the subjection, first, of the property conveyed fraudulently, before that conveyed innocently. The pleadings are not technically in form, yet they bring before the court all necessary parties and the subject-matter, and litigate after a fashion the questions involved. The chancellor ought not to balk at a quibble in pleading under such circumstances, and favor the vicious transaction over the innocent. As said by the Supreme Court, in *Walden v. Bodley*, 14 Pet. (U. S.), 164: "The court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter."

Henry Fields, if living, could not have required the bank or other of his creditors to exhaust the property conveyed to his daughter before subjecting his property. His fraudulent grantee has no greater right. Or, if Henry Fields were alive, and the bank were seeking to subject the property he had conveyed to his daughter for a good consideration to his debt, a court of equity would compel the subjection of his property first, all the parties being before the court, and all the property in its custody or jurisdiction. Otherwise it would be to permit the grantor to indirectly defeat his own deed, which, as between him and the grantee, was valid and meritorious. His grantee of other property, a party to a purposeful fraud, ought not to have any greater right in it than the grantor would have had under the circumstances.

The judgment of the circuit court subjecting enough of the timber to pay the debts adjudged against the estate of Henry Fields is affirmed.

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KENTUCKY COURT OF APPEALS.

BRADLEY, &c. v. BAILEY.

(Filed March 8, 1904—Not to be reported.)

Ejectment—Parties to actions—Where one who was a party to an action died during its pendency and the death of such party was suggested of record, but there was no order of revivor against her heirs, a judgment ejecting her tenants will not be upheld.

Salzer & Barker, A. H. Howard and Hazelrigg & Chenault for appellants.

J. M. Bailey and J. J. C. Bach for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, J. M. Bailey, instituted an action in the Knott Circuit Court against appellant, John Bradley, and others. In his petition he alleged he was the owner of eight or ten surveys of land, containing several thousand acres, giving the metes and bounds of each survey, and alleged that Bradley and others were wrongfully in the possession of this land. Appellant Bradley answered, denying the allegations of the petition, and set forth a boundary of land, containing about three thousand acres, which he stated once belonged to his father, George Bradley, which George Bradley conveyed to him in the year 1867, and that he had conveyed this same land to Mollie P. Robinson in the month of December, 1896; that his father and himself and his vendee, Robinson, had been in the actual possession of this land, and claiming adversely to all the world, for more than fifty years, and that if any of the patents claimed by appellee covered this land, or any part thereof, they were void to the extent of the interference. He also alleged that he had no interest in the land, but was residing upon it, since this sale to Robinson, as her tenant.

In 1898 appellee reformed, by order of court, his petition, and in that he made Mollie P. Robinson and her husband defendant. Many amended petitions were filed by appellee and many amended answers by appellant, and it is shown by the record a contest arose between appellee Bailey and appel-

lant Bradley as to their private and individual accounts, and much of the proof was taken on this issue. There was not a survey of this land made nor a plat or map filed to indicate the clash between the land claimed by appellee and that claimed by appellant. The appellee in his testimony testified that he did not know whether his land covered the whole of the Bradley survey or not, but that he believed that it covered the most of it. There was not any testimony showing the extent of the conflict between the claim of appellee and the Bradley survey, nor any showing that the house in which Bradley lived was covered by any patent under which appellee claims. Notwithstanding this, the lower court adjudged that appellant Bradley be ejected and all persons on the Bradley land be put off and the possession be delivered to appellee. It appeared prior to this judgment that Mollie P. Robinson had died, and that fact was suggested of record, but there was not any revivor against her heirs, and the court in its judgment expressly stated that it was not to affect the rights or interest of her heirs. It is hard for us to understand how a court could eject her tenants without affecting the interest of her heirs. It is impossible from the record before us, in its confused and defective condition, to determine the rights of the parties, but we have ascertained enough to know that error was committed.

Wherefore, the judgment of the lower court is reversed and the cause is remanded, with directions to the parties to reform their pleadings and divest the record of surplus and irrelevant matter and narrow the issue to the question as to whether or not appellee is entitled to the whole or any part, and if so, to what part, of the land in controversy.

BULLITT, &c. v. EASTERN KENTUCKY LAND CO., &c.

(Filed March 9, 1904—Not to be reported.)

Practice—Leave of court to file an amended answer was no authority for the filing of cross petition in vacation, and the issue of a summons upon a cross petition so filed and a judgment thereon was unwarranted.

J. H. Hazelrigg and Wm. Marshall Bullitt for appellants.

B. F. Day, J. F. Osborn, T. S. Candel and Doulgass & Day for appellees.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Hobson.

The facts of this case are set out in the opinion rendered on the former appeal. (Bullitt v. Eastern Kentucky Land Co., 99 Ky., 334.) On the return of the case to the circuit court the mandate was entered at the December term, 1896, and nothing further material was done, except to revive the action against the executor of J. F. Bullitt (who had died) until the April term, 1899, when certain of the defendants were given leave within thirty days to file an amended answer.

Within the thirty days they filed in the clerk's office cross petitions claiming part of the land, and had process issued upon the cross petitions against the Bullitts. At the next term of the court, the Bullitts not being present, judgment was entered by default against the Bullitts on the cross petitions.

The plaintiff then filed an amended petition setting up these judgments, and on the same day a judgment was entered in favor of the plaintiff against the Bullitts, although, as shown in the opinion rendered on the former appeal, the Bullitts had filed an answer denying the allegations of the plaintiff's petition, and no proof had been taken to sustain its averments. The leave of court to file an amended answer within thirty days was no authority for the filing of the cross petitions and the institution of the cross petitions in vacation. A cross petition is the commencement of an action by a defendant against a codefendant or a person not a party to the suit, and it can only be instituted by leave of the court. Whether it should be allowed is a matter of discretion in the court. The filing of the cross petitions in vacation before the clerk and the causing of a summons to be issued on them was unwarranted, and no judgment should have been entered thereon.

The judgment which was entered in favor of the plaintiff based on these judgments was equally unwarranted. On the return of the case to the circuit court it will make an order filing the cross petition of record, and also filing the answer thereto subsequently tendered by the Bullitts. The parties will then be permitted to complete the issue or file such additional pleadings as may be proper. Proof may then be taken and the case heard on the merits.

Judgment reversed and cause remanded for further proceedings consistent herewith.

FINLEY v. KEINNINGHAM.

(Filed March 8, 1904—Not to be reported.)

1. *Res judicata*.—A defense in an action against an executor in which he set up a claim for nursing and care of testator, which claim was rejected upon a former appeal, a demurrer to an amended answer setting up the same defense upon the return of the case to the lower court was properly sustained because that question was *res judicata*.

2. *Liability of executor*.—Where an executor without authority at law paid to another the estate to which the devisee under a will was entitled, the executor is responsible to the devisee, and he must undertake the trouble and expense of such litigation as may be necessary to recover the amount wrongfully paid out by him.

R. L. Crawford for appellant.

Hazelrigg, Chenault & Hazelrigg and John H. Wilson for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Settle.

This is the second appeal in this case. On the first appeal, which was taken by the present appellee, Jennie Moss Keininningham, this court in an opinion by Burnam, Chief Justice, held that appellee was entitled to recover of the appellant, H. F. Finley, as executor of the will of her deceased father, James L. Keininningham, the legacy bequeathed her thereby, and to that end the judgment of the lower court appealed from, whereby a demurrer had been sustained to the petition filed by her against appellant and the same dismissed, was reversed and cause remanded for proceedings consistent with the opinion. (*Keininningham v. Keininningham*, Ex'or, 24 Ky. Law Rep., 1830.)

On April 6, 1908, which was after the decision of the case by this court on the former appeal, but before the filing in the lower court of the mandate of this court, the appellant filed an amended answer in the case, wherein he sought to renew, and again set up the same defense relied on in his original answer filed with the demurrer to the petition, which this court held had been wrongfully sustained by the lower court. After the filing of the mandate of this court the appellee filed a general demurrer to the amended answer of appellant, which the lower court sustained. Thereupon appellee filed an amended petition in that court, conceding the right of appellant to certain credits, and questioning his right to a certain other credit, and calling for proof of same. Appellant then filed another amended answer containing two paragraphs. The matter of the first paragraph was but a repetition of the attempted defense contained in his original and first amended answer. The second paragraph relied upon the alleged fact that F. W. Finley, the appellant's son, and the residuary legatee under the will of James L. Keininningham, to whom appellant had wrongfully paid over the estate left by the testator which, under the will, should have been paid appellee, his daughter and direct legatee, had a claim against the estate of testator for nursing and care given him in his last illness, which was a valid, subsisting demand against the estate of the latter, exceeding in amount the estate left by him, and that appellant had, as executor, paid to F. W. Finley the estate left by the testator after the payment of his debts and costs of the administration, without requiring of him proof of the correctness of such claim, as he believed him to be entitled to the estate as residuary legatee.

The last amended answer was attempted to be made a cross petition against F. W. Finley and a counterclaim against appellee. A demurrer was filed by appellee to the second and last amended answer and counterclaim, and each paragraph thereof, which was also sustained by the court, and appellant failing to plead further, judgment was rendered by the lower court against him in appellee's behalf for \$1,185.86, with interest from May 6, 1890, and costs, that sum being the amount in his hands as executor found to be due appellee under her father's will, after deducting all credits claimed by appellant. Appellant now complains of that judgment, and prosecutes this appeal in the attempt to reverse it. The last two amended answers of appellant, except as to the alleged claim of F. W. Finley for nursing and care of the testator, contain nothing by way of defense that was not relied on in his original answer as amended, which was filed in the case before the taking of the first appeal. That defense was rejected and declared untenable by this court in the opinion upon the former appeal. It is, therefore, *res judicata*, and the lower court very properly sustained the demurrer to each of the last amended answers.

So much of the last amended answer as relies upon the claim of F. W. Finley for nursing and care of the testator, and that the payment to him by the executor of the estate left by the testator should go in satisfaction thereof, is utterly inconsistent with the defense originally relied on, and manifestly an afterthought. The original defense was that the payment to F. W. Finley was made solely because the appellee could not be made to comply with the terms of her father's will, and that such noncompliance on her part au-

thorized the executor to turn over the estate to his own son as residuary legatee by direction of the will. Now he contends that F. W. Finley had an additional claim upon the estate arising upon a contract made between him and the testator whereby he was to be paid for the nursing of and caring for the latter. If this is true, it is strange that the appellant did not require some proof of that claim before turning over the estate to his son; also strange that he did not make known this claim when his defense was first presented, and stranger still that the son has not volunteered, even since the institution of this suit in 1901, to come to the rescue of the father by urging his claim in this action.

James L. Keininningham died in 1890, and his will was probated at once. This action was instituted in 1901, something over ten years after his death, during the whole of which time nothing was heard of the claim of F. W. Finley for care and nursing, and no attempt was made by him to assert it as a legal demand against the estate of the testator. In fact, he has not yet done so, though the appellant attempts to assert it for him after it has been adjudged by this court that the defense first interposed by him in this case was without merit. If F. W. Finley ever had such a claim as is suggested by his father it has long since been barred by the statute of limitation, and would necessarily be rejected if sued for and the statute of limitation were pleaded against it.

That the setting up of this claim by appellant is apparently an afterthought is supported by the fact that though in the last amended answer in terms it is asked to be made a cross petition against F. W. Finley, it does not make him a party to the cross petition, or call upon him to assert his demand against the estate of the testator, nor was the court asked to make him a party to the action, or to award process against him. If appellant, without authority of law, paid to F. W. Finley the estate to which the appellee was entitled under her father's will, she can not be made to look to F. W. Finley for its repayment to her. The executor is responsible to her, and he must undertake the trouble and expense of such litigation as may be necessary to recover of F. W. Finley the amount wrongfully received by him.

The judgment of the lower court being in accord with the conclusions herein expressed, the same is affirmed.

JONES v. SIZEMORE.

(Filed March 8, 1904.)

1. Elections—A vacancy occurring in an office to be filled by election by the voters of a county within three months of the next succeeding annual election, no election can be held to fill the office until the regular November election of the next succeeding year.

2. Construction of statutes—Section 236 of the Constitution and sections 3759 and 3755 of the Kentucky Statutes refer to offices which are to be filled for the full constitutional or statutory terms.

3. Vacancy in office—Where one was appointed to fill a vacancy in the office of sheriff he was not appointed to serve during the remainder of the unexpired term of his predecessor, but only to fill the vacancy caused by the latter's death until an election could be held according to law, and when

elected the one so elected has the right to qualify and enter upon the performance of the duties of his office at once.

J. B. White, Sutton & Hurst, W. S. Pryor and Hazelrigg, Chenault & Hazelrigg for appellant.

A. F. Byrd, R. L. Greene and O. H. Pollard for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Settle.

This is a proceeding by rule in the nature of quo warranto to determine whether appellant or appellee is entitled to perform the duties of the office of sheriff of Lee county for the period intervening between the November election, 1903, and the first Monday in January, 1904.

At the November election, 1901, W. E. Jones was elected to the office of sheriff of Lee county, and entered upon the discharge of the duties thereof on the first Monday in January, 1902, and continued to act as sheriff until his death, which occurred in the month of September, 1902. On September 25, after his death, the appellant, John E. Jones, was appointed to fill the vacancy caused thereby, and after his qualification entered upon the performance of the duties of the office. As the vacancy caused by the death of W. E. Jones occurred within three months of the next succeeding annual election at which either city, town, county, district or State officers were to be elected, no election was, or could be, held to fill the vacancy in the office of sheriff until the regular November election, 1903, at which election the appellee was duly elected sheriff of Lee county, to fill the unexpired term for which W. E. Jones had been elected, and at once executed his official bond and took the oath of office as required by law. At the December term, 1903, of the Lee Circuit Court appellee appeared in court to perform his duties in waiting upon the court, and executing its processes and orders. Appellant thereupon presented himself in court and also insisted upon performing the duties of the office of sheriff at the same time, and objected to the appellee doing so. But appellee's right to the office was recognized by the court, whereupon appellant procured a rule against appellee to show cause why he should not give way to him until the first Monday in January following, to which the latter filed a response in which the facts of his election and qualification to the office in question were duly set forth, and upon the hearing of the rule and response the court rendered a judgment declaring appellee entitled to the office in dispute, and from that judgment this appeal was taken.

Section 152, State Constitution, contains the following provision: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then such vacancy shall be filled by election for the remainder of the term. If three months do not intervene between the happening of said vacancy and the next succeeding election at

which city, town, county, district or State officers are to be elected, the office shall be filled by appointment until the second succeeding annual election at which city, town, county, district or State officers are to be elected; and then if any part of the term remains unexpired, the office shall be filled by election until the regular time for the election of officers to fill said offices."

It will be observed that in every instance the vacancies provided for by section 152 of the Constitution supra are to be filled by appointment "until the next succeeding annual election" which does not take place within three months next after the vacancy occurs. This regulation is in deference to the representative character of our government and the policy of our laws, that the people are to choose those who are to serve them. The power to appoint exists under certain circumstances, but it is only delegated, and may be exercised only when it is impracticable for the people to exercise their choice.

Section 99 of the Constitution declares that the first term of county officers elected immediately following the adoption of the Constitution should be for three years, beginning on the first Monday in January, 1895, but as such officers were thereafter elected for terms of four years, the next term began with the first Monday in January, 1898, and ended with first Monday in January, 1902, and the next beginning with the first Monday in January, 1902, will end on the corresponding day in January, 1906, and so on, the election in each instance taking place in November of the preceding year. So the only regular term, as applied to county officers, sheriff included, is that of four years.

Section 236, Constitution, provides that the "general assembly shall, by law, prescribe the time when the several officers authorized or directed by this Constitution to be elected or appointed shall enter upon the duties of their respective offices, except where the time is fixed by this Constitution."

Section 3759, Kentucky Statutes, provides that "all officers other than those mentioned in the preceding section relating to commissioned officers, may enter upon the discharge of the duties of their offices respectively at the time prescribed by the Constitution or the statutes creating the office, upon taking the oath and executing the covenant required by law."

Section 3755 of the Statutes, supra, provides: "If the official bond is not given, and the oath of office taken, on or before the day on which the term of office to which the person has been elected begins, or in cases of persons appointed to office, within thirty days after such person has received notice of his appointment, the office shall be considered vacant, and he shall not be re-eligible thereto for two years."

We are of opinion that the provisions of the Constitution and statute supra all refer to offices which are to be filled for the full constitutional or statutory terms. There seems to be nothing in either the Constitution or statutes of this State fixing the time at which one elected, or appointed to fill a vacancy in office, shall assume the duties of such office. It would, however, have been impossible for the appellee to have entered upon the duties of the office, the vacancy in which he was elected to fill, at the beginning of a term, for the term began on the first Monday in January, 1902, nearly two years before his election. Except as the beginning or ending of

a full term of office, the first Monday in January has no more significance than the first Monday of any other month. The term of the office of sheriff is four years, no more and no less. The present term throughout the State began with the first Monday in January, 1902. The term had but one beginning, and will have but one ending, though there may be a dozen incumbents during the one term. The appellant was not appointed to serve during the remainder of the unexpired term of his predecessor, but only to fill the vacancy caused by the latter's death until an election could be held as provided by law to fill such vacancy for the remainder of the unexpired term, which election, as thus provided, could not take place until November of the year 1903. Therefore, upon the election and qualification of appellee the vacancy ceased, and it became the duty of appellant to retire at once from the office in favor of appellee, who was entitled to begin the immediate performance of the duties thereof, without waiting until the first Monday in January following, as would have been the case if he had been elected for a full term of four years.

The fact that the statute requires one elected to the office of sheriff for a full term to give bond by, and begin the duties of his office on, the first Monday in January following his election, and that his failure to do so shall forfeit his right to the office, does not compel one elected to fill a vacancy in that office to defer his qualification, or the commencement of his duties, until the first Monday in January, any more than does the statute providing that the failure of one appointed to such vacancy to qualify within thirty days after the date of his appointment shall forfeit his right to the office, require such appointee to defer his qualification for, and the taking of, his office until the end of the thirty days. Whether elected or appointed to such vacancy, the one so elected or appointed has the right to qualify and enter upon the performance of the duties of the office at once.

Being of the opinion that the lower court properly decided that appellee was entitled to the possession of the office of sheriff of Lee county immediately upon his election and qualification, the judgment is affirmed.

SMITH, ADM'R v. SMITH, &c.

(Filed March 9, 1904—Not to be reported.)

Mortgages—Interest in land—Where one had no interest in land during the life of his mother, as he died before she did, a mortgage by him conveying his remainder interest in her land was ineffectual to convey any interest in the land.

Lafferty & King and J. I. Blanton for appellant.

M. C. Swinford for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 29th of March Nathan O. Smith mortgaged to N. H. Carlisle, to secure the payment of a note for \$350, simultaneously executed and due six months after date, an alleged undivided one-fifth interest in remainder in a

farm occupied by his father and mother, known as the T. W. Smith farm in Harrison county, Kentucky. N. H. Carlisle assigned and delivered this note to Mary E. Giltner. After the execution of the note and mortgage, N. O. Smith died, and on the 12th of February 1902, his administrator and Mary E. Giltner instituted this suit in the Harrison Circuit Court against T. W. Smith and Martha Smith, the father and mother of decedent, his sisters, Anna Burgess, Martha Ware and Grace Claybrooke, and his brother, Thomas E. Smith, the only surviving children of T. W. and Martha Smith, seeking to subject the one undivided one-fifth interest in the Harrison county tract of land, alleged to belong to N. O. Smith, subject to a life estate of his mother, Martha A. Smith, to the payment of the note and interest. The defendants for answer denied that Natham O. Smith was the owner of one undivided one-fifth interest in the tract of land subject to the life estate of his mother, Martha Smith, or that he had any interest whatever in the property at the date of the execution of the mortgage to Carlisle, or at any time previous to his death, and alleged that the title to the property belonged to his mother during her life and at her death descended in fee simple to the children of Thos. W. and Martha A. Smith, who were alive at the death of Martha by virtue of a deed executed and delivered by Thomas W. Smith to his mother, Martha A. Smith, on the 29th of July, 1859. It appears from the pleadings and exhibits filed therewith that on the 29th of July, 1859, Thomas W. Smith, the father of N. O. Smith, conveyed the tract of land in controversy to his mother, Martha A. Smith, in trust, first, for the payment of certain debts due and owing by T. W. Smith.

The deed then provided that "after the above named debts shall be fully paid off and satisfied, the said Martha A. Smith is to hold the balance of the property hereby conveyed in trust for the sole use and benefit of Martha Smith, the wife of Thomas W. Smith, during her natural life, and at her death to be equally divided between the children of said Thomas W. Smith and Martha A. Smith, should they have any living at the time of said Martha's death; but if they should have no living children upon the death of said Martha, then, in that event, the title to said property is to vest absolutely in said Martha A. Smith for her sole use and benefit."

It appears from the recitations of this deed that the true name of both the mother and wife of Thomas W. Smith was Martha A. Smith, but that the letter "A" is left out of the name of the wife in certain parts of the deed. The Martha A. Smith named as the grantee therein was the mother of the grantor, T. W. Smith, and the conveyance of the property was to her primarily to secure the payment of certain indebtedness of the grantor. After this had been accomplished the mother was to hold the balance of the property in trust for the benefit of the wife of Thomas W. Smith during her natural life. If at the death of the wife of Thomas W. Smith they had living children, it was to be equally divided between them, but if at that time they had no living children, then the title to the property was to vest in the mother, Martha A. Smith, for her sole use and benefit.

On the 8th of February, 1875, after the death of Martha A. Smith, the mother of Thomas W. Smith, Thomas W. Smith and his wife conveyed the title to this tract of land to N. L. Hume, who immediately reconveyed it to Martha A. Smith, the wife, and her children by Thomas W. Smith. As the

title to the property passed under the deed of 1859 to Martha A. Smith, the wife of Thomas W. Smith, during her life, and at her death to her children, the deed made to Hume in 1837 was ineffectual for any purpose; but even if valid, it did not change the character of the title conveyed by the deed of 1859, as the title vested in the children of Martha A. Smith and Thomas W. Smith living at the death of Martha. Nathan O. Smith, therefore, had no interest therein during the life of his mother, and as he died before her, his mortgage to Carlisle was ineffectual to convey any interest in the land.

Judgment affirmed.

FENWICK v. WATKINS.

(Filed March 9, 1904—Not to be reported.)

Sales of real estate—Contracts—In an action by a real estate agent for the sale of lands he must specifically allege what he was employed to do, and facts showing that he had complied with his undertaking, and where he fails to state what he was employed to do, an action for commissions upon the sale of real estate can not be maintained by him.

J. W. Bush, C. C. Grassham and Blue & Nunn for appellee.

L. H. James, Ollie M. James and C. C. Moore for appellant.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Fenwick, sued the appellee, Watkins, for commissions alleged to be due to him as agent in the sale of a tract of land. The circuit judge sustained a general demurrer to his petition, and declining to plead further his petition was dismissed, and he has appealed.

The petition is as follows: "The plaintiff, B. S. Fenwick, says that the defendant, Harry Watkins, in the fall of 1902, was the owner and in possession of a certain tract of land situated in Crittenden county, Ky., known as the Austin tract; and having discovered some mineral indications thereon, and desiring to put the same upon the market for sale at mineral prices, did employ this plaintiff, making said contract in said county, agreeing and binding himself to pay to this plaintiff the sum of all that could be realized in the sale of said land over and above the sum of \$1,000, which contract was accepted and acted upon by this plaintiff; in the rendition of a great deal of services, loss of time and expense, looking up and bringing in touch with the defendant, upon the proposition of sale of said land, which thereafter, and on the — day of —, 1903, was consummated for and at the sum of \$6,000, cash in hand, and as the purchase price of said land paid to defendant which was accepted by the defendant for said land, and as the sum and price that he fixed upon same at the time he made and entered into the contract with this plaintiff, aforesaid; and executed and delivered to the purchaser thereof a deed of conveyance covering said tract of land, a copy of which deed will be filed herewith and made part hereof, and marked exhibit 'A,' if required. The plaintiff further states that after the sale of said land aforesaid, and after the defendant had received said sum therefor, he called upon him for his said commission, \$2,000, which he had agreed to pay this plaintiff aforesaid, that the defendant at which time refused and

failed, and still refuses and fails, to pay this plaintiff said sum, or any part thereof, which is now past due and wholly unpaid. Therefore, the plaintiff prays judgment against the defendant, Harry Watkins, for the sum of \$2,000, with interest thereon from the — day of —, for his cost and all proper relief."

In an action by a real estate agent for commissions in the sale of real estate he must allege specifically what he was employed to do, and the compensation which he was to receive therefor, and facts showing that he had complied with his undertaking and had procured a purchaser who was able and willing to take the property upon the terms agreed upon with his principal. In this case the plaintiff wholly fails to state what he was employed by the plaintiff to do in connection with the sale of the land in question. There is no averment that he had either effected the sale of the land or that it resulted from any service rendered under his employment.

For reasons indicated the judgment is affirmed.

GOFF, &c. v. WILBURN, &c.

(Filed March 9, 1904—Not to be reported.)

New trial—A new trial should be granted where an action was dismissed by the trial court after the court had stated to the attorneys on both sides that the case should remain upon the docket until the trial of another case in another county upon the same subject-matter, but dismissed the action having forgotten the statement made to the attorneys that the action should not be tried until the trial of the action in the other court.

Beckner & Jouett for appellants.

J. H. Hazelrigg for appellees.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Barker.

This is an action for a new trial under sections 518 and 520 of the Civil Code. There is a large body of land lying partly in Powell, Wolfe and Estill counties, title to and possession of which were claimed both by appellants and appellees.

Appellants had instituted an action in Powell county against appellees to quiet their title to this land, and had also an action pending in Wolfe against them for trespass upon it, which, incidentally, involved the title. Appellants moved the judge of the Wolfe Circuit Court to transfer the latter action to the Powell Circuit Court for trial with the former. This was overruled, but in consideration of the fact that the case in Powell had been advanced materially in preparation at considerable expense, the judge of the Wolfe Circuit Court stated to the attorneys for both sides that the case in Wolfe might be left as it was until the trial of the Powell county case; and upon this statement of the court appellants' counsel relied. Subsequently, without the knowledge of appellants or their counsel, the Wolfe county case was placed upon the trial docket, and the court having forgotten the statement made to counsel, it was dismissed. This judgment was not ascertained by appellants until too late to apply for a new trial, except under section

518 of the Code; whereupon they filed their petition, setting up the foregoing facts, and praying for a new trial, because of unavoidable casualty or misfortune preventing them from appearing.

The answer denied all the affirmative allegations of the petition, and, in addition, pleaded that in an action instituted in Estill county, between appellants (who were plaintiffs therein) and some of appellees' tenants, involving the title to the land in question, appellants "were defeated," and that the judgment was still in full force and effect. No denial was made of the allegations of the answer. The evidence fully establishes the allegations of unavoidable casualty. Judge Redwine's testimony places this beyond all question. The plea of *res judicata*, even if sufficiently stated, has no place in this case, but belongs to the action involving the merits of the controversy as to the land. But, conceding that it should be considered here, the allegations of the answer are not such as will bar appellants. No adjudication, except on the merits of the controversy, constitutes a bar to the defeated party. The admitted allegation that the plaintiffs "were defeated" in a law suit does not show that the case was decided on its merits. The same plea could have been truthfully made if the plaintiffs had been forced to dismiss without prejudice. Allegations are taken most strongly against the pleader.

Appellants have been prevented from preparing and trying their case on its merits by circumstances upon which any lawyer might have relied. It is not at all necessary to discuss in detail the means by which this result was brought about. Appellants must have their day in court, and this they have not yet had in this case. (*Cooley v. Barbourville Land and Improvement Co.*, 19 Ky. Law Rep., 1454.)

The court below dismissed the petition. This judgment is reversed, with directions to grant appellants a new trial.

MANN v. COMMONWEALTH.

(Filed March 9, 1904—Not to be reported.)

Accomplice—Evidence—Upon the trial of appellant evidence to the effect that he said to the arresting officer at the time of the arrest, "you are a good friend of mine; why didn't you give me a tip and let me get away," and other testimony incriminating him, was sufficient to corroborate the testimony of an accomplice, and a verdict of conviction will not be disturbed.

J. M. Collins for appellant.

N. B. Hays and Loralne Mix for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that Charles Saunders, Thomas Mann and Edward Morrison willfully, maliciously and feloniously shooting and wounding John B. Farrow. It is evident that Mann and Morrison, if not Saunders, went to Farrow's house to commit a robbery; that they broke into it, and when he refused to turn over his money appellant Mann shot him. Charles Saunders was introduced as a witness for the Commonwealth,

who testified that Mann procured a horse and buggy in the city of Maysville; that they drove to Farrow's house, hitched the horse and entered the house as we have stated. Saunders claims that Mann and Morrison did not disclose their real purpose to him, but claimed that they were going there to see some girls. For the appellant it is contended that Saunders was an accomplice; that the evidence of Saunders is not corroborated, therefore, as the law will not allow the conviction of one charged with a crime upon the uncorroborated testimony of an accomplice, the court should have directed the jury to acquit the defendant.

We will assume that Saunders was an accomplice, and hold that if his testimony had not been corroborated it would have been proper for the court to have directed an acquittal. (Miller & Smith v. Commonwealth, 78 Ky., 15; Craft v. Commonwealth, 80 Ky., 349; Commonwealth v. Barker, 23 Ky. Law Rep., 368.) If there is any evidence tending to corroborate an accomplice, it is sufficient to support a verdict. The evidence tends to support Saunders' testimony as to the circumstances attending the entrance into the house and the shooting and wounding of Farrow. It also tends to show that a horse's tracks were found, indicating that a horse had been hitched where Saunders said they had hitched the horse. It likewise tended to show that the horse had been shod by a blacksmith by the name of Crawford, who did it in a peculiar way, and the tracks indicated that it had been made by such a shoe. A hat was found near Farrow's house, and Simon Nelson testified that he had sold it, or one like it, to Mann. R. R. Thompson testified that when he made the arrest Mann said to him "you are a good friend of mine; why didn't you give me a tip and let me get away." There was other testimony tending to corroborate Saunders.

The judgment is affirmed.

CARSEY & CO. v. FARMER & DAVIS.

(Filed March 9, 1904.)

1. Contracts—Sales of tobacco—In an action by tobacco warehousemen against a firm of tobacco dealers to recover a balance on advances, the evidence showing that the dealers had fallen behind in their shipments, it was error upon the trial in the lower court to allow them damages upon a counterclaim setting up losses resulting from the failure of the warehousemen to continue advancements to them.

2. Breach of agreement to lend money—The breach of an agreement to lend money furnishes no grounds for a recovery of damages for injury to the reputation of the borrower in not getting it.

John K. Hendrick, Dancy Fort, H. M. Scales and W. F. Peterson for appellants.

Linn, Greer & Reid and Farmer & Davis for appellees.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Hobson.

W. H. Carsey & Co. are tobacco warehousemen at Clarksville, Tenn. Farmer & Davis are tobacco dealers at Murray, Ky. In the year 1899 Farmer

& Davis shipped their tobacco to Carsey & Co., the latter making them advances from time to time thereon, to secure which Davis executed to them a mortgage on a tract of land owned by him. When the tobacco was all sold there was a balance, as shown by the books of Carsey & Co., due them from Farmer & Davis of \$488, and it not having been paid, they instituted this suit to recover the money and enforce the mortgage. The defendants filed an answer in three paragraphs, as follows:

"1st. The agreement between the plaintiffs and the defendants was that the defendants were to buy tobacco in the country and ship it to the plaintiffs' warehouse in Clarksville, Tenn., to be sold by the plaintiffs for the customary charges; and in consideration of this the plaintiffs agreed that they would from time to time advance to the defendants money with which to pay for the tobacco they so bought, and would keep in their hands a sufficient amount of money to pay for all the tobacco purchased by them, which was to be, and was, shipped to plaintiffs' warehouse; that plaintiffs failed to keep their contract and refused to furnish the defendants the money to pay for the tobacco purchased by them when they had contracted for 42,000 pounds of tobacco in the country; that by reason of this they were unable to buy the tobacco so contracted for, and lost the profits which they would have made on the 42,000 pounds of tobacco, they being unable to get the money elsewhere; that they contracted for the tobacco at \$5 or \$6 a hundred, and could have made a net profit on it of at least \$1.50 a hundred; that in addition to this they were at trouble and expense to the amount of \$50 in making the contracts with the farmers, and to the amount of \$75 in rescinding these contracts when the plaintiff refused to furnish them the money to pay for the tobacco after it had been contracted for, making in all \$820.

"2d. The defendants shipped to the plaintiffs for sale 111,891 pounds of tobacco of the value of \$8,896, which was sold by the plaintiffs for that sum, but the plaintiffs failed to account to the defendants for at least \$1,366 of the purchase price.

"3d. By reason of the plaintiffs not furnishing the money as agreed the defendants had been unable to use a barn which they had rented to put the tobacco in, and thus lost the rent, \$100, and they had also been damaged \$500 in their reputation as tobacco dealers by their inability to carry out the contracts they had made by reason of the plaintiffs' refusal to advance them the money."

All these sums were pleaded as a counterclaim. The plaintiffs demurred to the answer, and their demurrer being overruled filed a reply controverting its allegations. Proof was taken and on final hearing the court allowed the defendants on their counterclaim \$494.73, setting off against this the plaintiffs' debts of \$433, and entering judgment in favor of the defendant for \$66.73. The plaintiffs appeal.

While the reply of the plaintiffs is not in the usual form, we think it substantially sufficient as a denial of the allegations of the answer. The proof is wholly insufficient to warrant the judgment for the defendants on the second paragraph of the answer, alleging that the plaintiff had not accounted for the price received for the tobacco which was sold by them on account of the defendants. The proof by the plaintiffs is unequivocal that all the money received was accounted for, and an itemized statement of the sales is

filed, also an itemized statement of the plaintiffs' account, which is testified to be correct. There is no contrary evidence except the following: The defendants state that they weighed the tobacco bought by them from the farmers and that their scales were correct; they also show that the weights of the hogsheads as given by the plaintiffs in the reports of their sales were 8,800 pounds less than the weights of the tobacco for which they paid the farmers. They also show that they shipped to the plaintiffs sixty-one hogsheads, and only fifty-nine hogsheads were reported by the plaintiffs in their account. But it is shown on the cross examination of the defendants, and not controverted, that two hogsheads of the tobacco shipped in their name was ordered to be sold by them in the name of a customer, W. Adams, and that these hogsheads were reported in Adams' name. It is further shown that the defendants shipped three hogsheads of their tobacco to another warehouse which sold it, and while the weight of these hogsheads is not definitely established by the proof, judging from the weight of the other hogsheads, we think they may be safely put at about 4,800 pounds. This leaves only about 4,000 pounds of deficiency between the weights made by the defendants to the farmers and those made by the warehousemen when the tobacco was sold in Clarksville. The defendants sold during the season also eleven hogsheads at another warehouse, and the deficiency of 4,000 pounds must be considered with reference to these hogsheads as well as those shipped to the plaintiffs. Some of the tobacco was broken twice, not being sold when first offered. It was sold during the summer, and the loss is greater in dry weather than in damp, as the tobacco dries out. The proof warrants the conclusion that a loss of twenty-five pounds to the hogshead is not an unreasonable allowance on this tobacco. This would make a loss of nearly 2,000 pounds; and if there was this much loss at the warehouse, it would seem reasonable there was as much loss in the handling and prizing of the tobacco at the defendants' barn. But, however this may be, the proof is satisfactory that the plaintiffs accounted for all the money they received for the tobacco, and there is nothing in the evidence to warrant a judgment against them for anything beyond the money they received.

The other two paragraphs of the answer will be considered together as they both depend upon the allegation that the plaintiffs agreed to make advances and broke the agreement. The only proof of the agreement is the evidence of the defendant Farmer, as to a conversation between him and the plaintiff, W. H. Carsey, which is denied by Carsey. Both the conduct of the parties and the circumstances sustain Carsey, and while we are satisfied it was contemplated and understood between the parties that Carsey & Co. would make advances to the defendants, we are also satisfied that it was understood they were to do this only as long as things were satisfactory. When Carsey & Co. refused to make further advances the defendants had fallen behind, and their attention was called to the condition of their account. Carsey & Co. can not be held, under the loose evidence in this record, to have agreed to continue to make advances after the defendants fell behind. They were not satisfied with the way things were going. The defendants had the right to terminate the arrangement with Carsey & Co., and it hard to conceive that the parties contemplated that Carsey & Co. were compelled to furnish money when the defendants did not keep up their account.

There was no writing evidencing the contract. There is nothing in the letters passing between the parties sustaining in any degree the defendants' contention. When Carsey & Co. informed them that no further advances would be made in view of the condition of the account, no complaint was made that the plaintiffs were breaking any contract, and nothing was said about the contract now relied on. A few months later one of the defendants wrote Carsey & Co. telling them that he and his partner had dissolved, but he was going to carry on the business, and asking them to make advances to him, but making no complaint of any mistreatment in the past. When Carsey & Co. sent an attorney to Murray to get a settlement of their account, the only objection made by either of the defendants was the alleged shortage in the weights, and it was agreed that if the weights were shown to be correct by the buyers who had gotten the tobacco, the defendants would settle. The attorney returned a second time after getting certificates from the buyers as to the correctness of the weights, and still nothing was said about any agreement to make advances which had been broken by Carsey & Co. This claim was never set up until after the suit was brought, and can not be maintained.

Besides, whether the defendants would have made a profit on the 42,000 pounds of tobacco which they had contracted for, if Carsey & Co. had advanced the money to pay for it, would depend on whether or not tobacco advanced or declined in price in the interim before it could be prized and put on the market. It appears from the evidence that the defendants lost money on the tobacco they did buy and ship; and if the 42,000 pounds was sold at the prices got for the other there would have been no profit. What the price of tobacco would have been when this 42,000 pounds were prized and put on the market was entirely conjectural. The price might have been so low as to entail a great loss. Profits which the defendants might have made if the money had been advanced are too precarious to constitute an element of damage. (*Kentucky Tobacco Association v. Ashby*, 9 Ky. Law Rep., 109.) The cases relied on for appellee are essentially different, for there the profits or gain might be reasonably estimated, but here there is no basis for estimating the profits except the unknown contingencies of the future. It is not alleged or shown that the defendants had contracted for the tobacco at less than its market price, or that it was at the time worth any more than they had agreed to pay for it. The breach of an agreement to lend money furnishes no grounds for a recovery of damages for injury to the reputation of the borrower from not getting it. On the whole case we conclude that no allowance should be made on account of any part of the counterclaim, and that judgment should be entered for the plaintiffs for their debt and the enforcement of their mortgage.

Judgment reversed and cause remanded for a judgment as herein indicated.

COMBS, &c. v. DUFF, JR., &c.

(Filed March 9, 1904—Not to be reported.)

Patents—Adverse possession—Where a tract of land has been held adversely by those in possession and those through whom they claim for more than fifty years, such possession and holding will be upheld.

Hall & Baker and W. F. Hall for appellants.

J. J. C. Bach and W. H. Miller for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Paynter.

The appellees claim the land in controversy through John A. Duff, who lived at the mouth of Grapevine creek for more than sixty years, within a boundary containing twenty-one or twenty-two hundred acres, two hundred of which was in cultivation. The boundary so claimed is within the Pickett and Marshall patent for 23,100 acres granted by the governor of Virginia in 1792. About 1856 Cotton and Ketchum, claiming under the Pickett and Marshall patent, had a suit pending against John A. Duff to recover the land he had in his possession. Pending the suit E. C. Strong, who claimed to have acquired the right to the land under the Pickett and Marshall patent, sold his claim to Duff, and afterwards, on July 8, 1882, made him a deed therefor. Duff continued to occupy and claim the land until his death; since that time the appellees have so done, except for the interruption of the possession by appellants. The appellants claim the land in controversy under two Kentucky grants. They cover land which had been previously patented to Pickett and Marshall, and are void. In 1898 appellants entered within their respective boundaries and built little cabins and attempted to take possession of the land. They were trespassers, as their patents did not give them any right of entry. (*Terry v. Johnson*, 96 Ky., 95; *Crate, &c. v. Strong, &c.*, 24 Ky. Law Rep., 710; *Dineen v. Hall, &c.*, 28 Ky. Law Rep., 1615.) The appellees were in the actual possession of the land at the time, and they and the party through whom they claim had been for many years; especially had they been in the actual possession from the time Strong made the deed, claiming it to a well-defined boundary designated in the deed, which was for more than fifty years before appellants entered upon the land.

When the patentees applied to the register of the land office for the patents under which appellants claim, John A. Duff obtained a caveat against their issuance. It was certified to the circuit court for trial, and the court sustained a demurrer to and dismissed the proceedings. The office of a caveat is to have the question determined which of two claimants are entitled to have a patent issued for the unappropriated land. (*Preston v. Preston, &c.*, 85 Ky., 16; *Alexander v. Noland*, 88 Ky., 143.) If a judgment in such a proceeding could operate as a bar in a future controversy over the title to the land, we could not so hold as the transcript does not contain the record of the proceeding, hence we can not hold that the court below erred in deciding it did not operate as a bar.

The judgment is affirmed.

PLANTERS BANK AND TRUST CO. v. MAJOR, &c.

(Filed March 9, 1904—Not to be reported.)

Husband and wife—In an action by appellant, to attach a fund due the husband, the claim of the wife to the fund as her property was improperly sustained, the evidence conducing to show that at the time of the transac-

tion the husband discounted his own paper to a bank procuring the money; that the amount paid over which the controversy arose was something like a year before the time the wife claims to have come into possession of her money, and all the circumstances going to show fraud of the husband and wife to defeat the claim of appellant.

Landes & Allensworth and Downer & Russell for appellant.

J. W. Hopkins for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Barker.

This is a controversy between appellant, a creditor of Mat. S. Major, and appellee, his wife, over a fund of \$1,608.95, attached in the case of Means, &c. v. Major, &c., Christian Circuit Court.

In 1893 L. W. Means purchased at judicial sale, in the case of Savage, &c. v. Gaither, &c., Christian Circuit Court, a tract of land known as the Over-shiner place, containing two hundred and twenty-three and two-thirds acres of land in Christian county, Kentucky. For the purchase price he executed bond, with Mrs. Lottie L. Shipp as surety. When this obligation fell due it was not paid, Means being unable, and his surety unwilling, to do so. Being pressed for payment, the principal obligor applied to his brother-in-law, Mat. S. Major, for a loan of the money with which to pay the bond; this Major refused to do, but agreed to pay the bond, take the conveyance of the land to himself, and give Means three months in which to redeem it; if this was not done within the time limited, the farm was to be the property of Major. This was agreed to, and, on the 16th day of December, 1895, Major paid over to the commissioner the sum of \$1,608.95, that being the full amount of the purchase bond due from Means, with interest; and thereupon the commissioner executed and delivered to Major an absolute conveyance for the farm.

Means was left in possession, notwithstanding he failed to redeem the property, until October 14, 1899, when Major and his wife sold it to W. M. Girard for the sum of \$2,236.66, for which the latter executed and delivered his five equal notes to Major, due, respectively, in one, two, three, four and five years from date. After receiving this conveyance Girard instituted forcible detainer proceedings against Means to obtain possession, and about the same time Means instituted an equitable action in the Christian Circuit Court for the purpose of having the conveyance from the commissioner to Major declared to be a mortgage, and the deed to Girard set aside. These two proceedings were finally consolidated, and on the 21st day of June, 1901, a judgment was entered by the chancellor, awarding to Means the relief prayed for by him in his petition, vacating the deed to Girard, cancelling the notes of the latter to Major, and giving Means until the first day of September, 1901, in which to repay to Major the money paid by him to the commissioner in satisfaction of Means' purchase bond; in default of which payment the property was to be again sold, and Major repaid out of the proceeds.

Means failed to pay in the time given him, and on the 23d of September, 1901, the property was again sold at judicial sale, and purchased by his wife, Mrs. Harriet E. Means, for the sum of \$2,401, for which she executed bond

with surety, and finally paid into court this money, constituting the subject-matter of this controversy.

After the rendition of the judgment of June 21, 1901, vacating the deed to Girard, Major executed and filed in the case of Means, &c. v. Major, &c. the following transfer:

"Whereas, Mrs. Kittie H. Major is the legal holder of the notes executed by W. M. Girard for the purchase price of the L. W. Means farm; and whereas the conveyance for which said notes were executed has been set aside by the Christian Circuit Court and the said notes are canceled; therefore, in order to place the said Mrs. Major in possession of all interest I have in said farm, per lien thereupon, and in consideration of the sum of \$1 this day paid me, I hereby assign and transfer to the said Mrs. Major all the claim I have upon the said farm, the deed I hold against same, and the judgment rendered in the Christian Circuit Court against L. W. Means for the unpaid purchase money on said farm.

"This June 20, 1901.

MAT. S. MAJOR.

"Witnessed by: J. T. EDMONDS."

In the meantime the appellant had instituted two actions against Mat. S. Major in the Christian Circuit Court, which were afterwards consolidated, and judgments rendered against him for sums aggregating largely in excess of the fund in controversy. Upon these judgments executions were issued, and returned "no property found." Whereupon these two actions were instituted under section 489 of the Code, for the purpose of discovery and attachment of funds, or other property, belonging to Mat. S. Major, or in which he had an interest; and in both the fund in court in the case of Means, &c. v. Major, &c., was attached in the manner provided by the Code, and the assignment to appellee sought to be set aside on the ground of fraud and want of consideration.

To this action Mat. S. Major and appellee, his wife, filed separate answers, denying all the allegations of fraud in the petition; and the appellee in her answer pleading title to the fund in court independent of the assignment from her husband. In substance, she states that she furnished the money which originally went to satisfy Means' purchase bond, and that it was then and there agreed between her and her husband that the conveyance was to be made to her, but that through accident, inadvertence or fraud, it was made to her husband; that she did not know of this until the conveyance from her husband and herself to Girard, when her husband undertook to ratify the error by assigning to her Girard's notes for the purchase price of the land; and afterwards, when the conveyance to Girard was set aside by a judgment of the court, and her husband given a judgment for the money advanced by him to Means, that this fund then became hers, and the assignment from her husband to herself was merely the legal evidence of her title to property which was already equitably hers.

These allegations were placed in issue, and without going minutely into the details of the pleadings, the question as to whether or not the fund in court was the property of appellee, or whether, on the contrary, the assignment to her by her husband was fraudulent and void, was aptly raised, and is now the question for adjudication. It will be observed that appellee seeks to establish a resulting trust to the fund in court, making allegations,

which, if true, would bring the transaction within the exception of section 3353, Kentucky Statutes, enacted for the purpose of abrogating resulting trusts. But in her testimony she places the time when she gave her husband the money with which to pay for the farm as "early as 1896," and her father, who testifies for her, places the time as late as March or April in 1894, whereas the record shows the husband paid the commissioner, and took the deed to himself on December 16, 1895; so that the record contradicts her statement as to this, and makes it impossible that her theory could have been true. She also overlooks the fact that it is indisputably shown that the transaction between her husband and Means was not to be a purchase by the former of the property, but only a loan; and the conveyance was taken to himself to secure his debt, provided it was paid within three months. This is entirely inconsistent with appellee's theory that the original transaction was to be a purchase by her with her own money as an investment. She states in her testimony that her father advised her not to invest her money in the Overshiner place, but to use it in paying for another tract of land belonging to her, known as the Herndon place, and she gives as a reason for not taking the advice of her father that her husband said to her that by investing her money in the Means property she would double it. But, as said before, this entirely ignores the fact that the original transaction was not to be a purchase of the land, but a loan to Means; and the only way that the title to the property could vest in the Majors would be through the misfortune of Means, in being unable to redeem it. Her statement that she furnished the money which her husband advanced to Means is contradicted by the officers of the city bank of Hopkinsville, who show that the husband raised the money by discounting his individual note at their bank; that the proceeds were carried to his credit, and that he gave his own check to the commissioner. The check itself is placed in evidence, and the testimony of the commissioner, Judge Winfrey, places this matter beyond question.

It is unreasonable to believe that appellee did not ascertain that the conveyance was not made to her (if it should have been) in the long time elapsing between December 16, 1895, when it was made to her husband, and October 14, 1899, when the land was conveyed to Girard. During all this period Means was permitted to remain in possession, and, so far as the record shows, she obtained no profit of any kind from her property. Assuming that the property was hers, according to her understanding, she must have regarded it as peculiar, to say the least, that, during the four years mentioned, Means was permitted to remain in possession, without rendering her any account, or profit, by reason of his tenancy. When, however, the conveyance was made to Girard she admits to having discovered the error against her, and states that her husband rectified his mistake by assigning all of the Girard notes to her. But again she is contradicted by the record. Girard, in his testimony, shows that before the judgment vacating the conveyance to him was rendered Major brought to him two of the notes theretofore given for the purchase price of the land, and requested that he (Girard) would take them up, and give to him (Major) duplicate notes therefor, stating that he desired to have a different endorsement on the new notes from that upon the old. This Girard, after consulting his attorney, did,

delivering duplicates for the old notes as requested. He says that Major requested him to destroy the old notes, but that his attorney advised him not to do so, and in compliance with this legal advice he retained them. These are placed in evidence, and show, by the endorsements upon them, that they were assigned to appellee, not absolutely, as she testifies and as would have been the case had she been the owner, but only as collateral security to indemnify her from loss by reason of her suretyship of a debt due by her husband to the Planters Bank and Trust Co.

The evidence of appellee, that she paid over to her husband the \$1,608.95 in controversy, in money, at their home, when no one was present but themselves, without the intervention of any of the business forms or ceremony usually attending such large transactions, of itself excites the utmost incredulity. This transaction took place in Hopkinsville, a city of banks, and where financial transactions are carried on in modern style, and it is highly improbable that this large sum of money would have been kept in the house, and paid over without the intervention of a check, or other receipt. It is not believed that ladies usually keep such large sums about their homes. If a fraud was intended, just such a transaction would necessarily have been resorted to. On the other hand, J. T. Edmonds, the attorney who drew up the assignment from Major to his wife, testifies that at the time it was done Major declared to him that it was for the purpose of deluding his creditors; that he had originally assigned the Girard notes to his wife for that purpose, and, now that the court had vacated them, he wished to assign the judgment to his wife, in order that his creditors might not finally obtain the money. Both Edmonds and Girard testified to conversations with her husband in the presence of appellee, which excluded the idea that she had any interest in the Means property. On the other hand, there is no competent testimony that supports appellee's claim to the fund in controversy. Without going into the details, it may be said that the evidence which would have any tendency to uphold her case is incompetent, either because it is in direct violation of the provision of the Code which forbids the introduction as evidence of communications between husband or wife, or of those elementary rules which forbid the introduction of hearsay testimony, and especially of that class of hearsay which consists of declarations in the interest of the declarant. But it is immaterial for the purposes of this case whether this incompetent evidence be excluded or not. Taken as a whole, we think it is indubitably shown, that the assignment from Means to his wife was a mere fraudulent ruse to conceal his property from his creditors. All of the evidence which is shown by writing, or which is established beyond contradiction, refutes appellee's claim, and while entertaining for the finding of the chancellor on the facts the highest regard, we are constrained to the conclusion that his judgment, awarding the fund to appellee instead of to appellant, was erroneous, and for this reason it is reversed for proceedings consistent with this opinion.

DANVILLE COAL AND ICE CO. v. VILTNER MFG. CO.

(Filed March 9, 1904—Not to be reported.)

1. Contracts—Where the owners of an ice plant, a month or so after they began to operate it, stated in a letter to the contractor that the machinery was fulfilling the contract, and some time after this, without objection, executed notes for the remainder of the contract price for putting in the plant, and finally asked indulgence on the notes, promising payment, such statements and representations bound the owners in an action by the contractor for the recovery of the balance of his demand for putting in the machinery for the ice plant.

2. Warranty—In an action for the recovery of the balance due for putting in an ice plant, a defense relying upon a warranty could not be maintained beyond the year when the plant was constructed, as it could not be operated for an indefinite time and losses of profits claimed for an indefinite period.

A. C. VanWinkle, Robt. Harding and Chas. E. Rodes for appellant.

Rawling C. Voris and C. C. Bagby for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hobson.

In the spring of the year 1899 the Viltner Manufacturing Co. put in an ice plant for appellant at Danville, Ky. After the plant had been put up and turned over to appellant and they had operated it for some time, on September 1, 1899, they executed two notes to the Viltner Co. for \$1,886.16, each payable in three months. They paid \$3,000 on the notes December 20, 1899, but failed to pay the balance, and this suit was brought by the Viltner Co. to recover therefor; also on an open account accruing after the execution of the notes. The defendants by their answer denied that certain charges in the account were reasonable, or that certain items charged were ordered by them or sold to them. They also pleaded that at the time the plaintiff sold them the ice plant it guaranteed that the plant should be capable of producing ten tons of crystal, clear ice every twenty-four hours of continuous running; that the plant was not capable of producing this ice in the year 1899, but owing to some defect in the construction or erection of the machinery about one-third of each cake of ice produced in the year 1899 was impure and useless; that thereby the defendants sustained a loss of 500 tons of ice, worth \$5 a ton, to their damage in the sum of \$2,500. In another paragraph the same allegations were made as to the year 1900. In a fourth paragraph of the answer they pleaded that plaintiff having failed to make the plant do what they had guaranteed it would do, defendants notified plaintiff that they desired to change the location of the plant, and to this end plaintiff sent an engineer named Afflick to make the transfer and start the plant so as to make it as guaranteed; but Afflick was drunk and failed to make the plant produce the ice guaranteed, and yet they were charged with the board of Afflick in the account. The court sustained a demurrer to the third and fourth paragraphs of the answer setting up the defectiveness of the plant in the years 1900 and 1901. An amended answer was filed as to the year 1900, in which it was pleaded that the ice plant having proven to be defective in the year 1899, before the season of 1900 opened the plaintiffs undertook to remedy the defect and agreed to make the plant as guar-

anteed, and when the work was done assured defendants that all defects in the plant had been remedied, and thus induced them to continue its operation, but that it was as defective as before. This amended answer was controverted of record. In another amended answer the defendants pleaded that in the spring of 1901, before the plant was put in operation, they requested plaintiff to move the plant from its location to another point, and to reconstruct it so as to make it as guaranteed; that in pursuance to this demand the plaintiff undertook to move the plant and make it as guaranteed; that it did move it and reconstruct it, but from the time it began operation, about April 1, it was not as guaranteed until July 1, and during this time one-third of the ice was a total loss. The court sustained a demurrer to this pleading. Issue was joined on the allegations of the answer and an estoppel was pleaded. The case was heard before a jury, which found for the plaintiff, subject to a credit of \$410 on the account. The defendants appeal from the judgment entered on the verdict. At the conclusion of the evidence the court instructed the jury as follows:

"3d. If you believe from the evidence that in the year 1899 the ice plant, because of a defect either in the construction or the erection of the machinery composing said plant, did not produce, and was incapable of producing, on reasonably skillful management, ten tons of clear, crystal ice every twenty-four hours, and that any part of the ice produced for that year was not clear or crystal because of such defect, and that defendants suffered damage thereby, then you will find for defendants on their counterclaim for such damage the reasonable profits defendants would have realized on their ice that year if the entire output had been clear, crystal ice. Unless you so believe, find nothing on their counterclaim.

"4th. The counterclaim of defendants for damages accruing from the operation of the plant in the year 1900 is based on what defendants claim to be another contract made between the parties before the opening of the ice-making season in said year 1900, and after the close of the season 1899.

"If you believe from the evidence that before the opening of the ice-making season in the year 1900, and after the close of the season of 1899, the plaintiff and defendants, the former acting through his authorized agent, made a contract by which the plaintiff agreed to undertake to remedy all defects in said ice plant and to make it capable of producing ten tons of clear, crystal ice every twenty-four hours; that plaintiff under said contract made changes, repairs and alterations in said plant, and then guaranteed to defendants that the plant was capable of making ten tons of clear, crystal ice every twenty-four hours; and if you further believe from the evidence that upon reasonably efficient and reasonably skillful management, said plant, as repaired or altered or changed, was not capable of producing, and did not produce, ten tons of clear, crystal ice every twenty-four hours, and that the defendants suffered damage thereby, then you find for the defendants on their counterclaim for the year 1900, the reasonable profits defendants would have realized on their ice that year if the entire output had been clear, crystal ice. Unless you so believe, you will find nothing for defendants on this counterclaim. * * *

"5th. If you believe from the evidence that after the close of the season of 1900, and before the opening of the season of 1901, the defendants, in order

to and for the purpose of obtaining from plaintiff the aid of an expert in removing and reconstructing its ice plant, and for the purpose of inducing plaintiff to open a new account with them, proposed to plaintiff that if plaintiff would so furnish said expert and so open a new account with them, they would settle their entire indebtedness to plaintiff, meaning and intending thereby to cause plaintiff to understand that they would pay off the account sued on and the unpaid balance of the notes sued on, provided the plant on reconstruction should be capable of making pure, clear ice; and if you further believe from the evidence that the plaintiff accepted this proposition, opened a new account, furnished the expert, and that the plant under the management and direction of said expert was so reconstructed that it was capable under reasonably skillful handling to make clear, pure ice, then you can not consider any defense which the defendants make to this action, and your verdict must be for the plaintiff on the notes and account sued on. Unless you so believe, then you can not find that the defendants are estopped from contesting plaintiff's claims."

The form of the verdict of the jury shows that they allowed a credit of \$410, because they regarded certain charges in the account unreasonably high. The evidence also warrants this conclusion. The finding of the jury was in effect a finding against the defendants on account of defects in the plant for the years 1899 and 1900. The defendants complain that the demurrer was sustained to their amended answer setting up the claim for damages for the year 1901, and that the court restricted them to a recovery under their warranty for the damages sustained in the year 1899. They also complain that the verdict of the jury is palpably against the evidence.

The evidence for the defendants was to the effect that the plant from the start did not make ice up to the warranty, it being conceded that the plant was warranted to make ten tons of clear, crystal ice a day as alleged by the defendants; that this trouble continued through the second season and into the third until about the 1st of July, when defendants employed a man from Cincinnati who did some work upon it, and after this they had no trouble. On the other hand, it was shown that the plant was started in the spring of 1899, and about a month after it was started the defendants sent the Viltner Co. a letter by the man who put it up, stating that the machinery, so far as they were able to judge, fulfilled the contract. Two months or more after this the notes sued on were executed without objection, and after the season was over, on December 8, when payment of the notes was demanded, the defendants wrote, asking indulgence on the notes and promising payment. On December 20 \$3,000 was paid on the debt, and the defendants themselves admitted on cross-examination that as late as March of the next year they had not concluded to make a claim for damages on the warranty. There was some trouble about the machinery from the time the man who put it up left; but the correspondence would indicate that the trouble then complained of was from the odor and taste of the ice. The damage claimed on the trial was on the ground that the plant would not make clear, crystal ice, and that about one-third of what was frozen was colored and had to be thrown away. Without minutely setting out the facts, we conclude that the trouble with the plant, from the evidence, was that none of the men handling it understood the business, and the reason there was no trouble

after July, 1901, was that they then got a good man to operate it. The jury seems to have come to this conclusion from the proof. The warranty which appellee gave was in writing, but the written contract, although referred to by the witnesses, was not read to the jury, and is not before us on the appeal. But aside from this, we think the court properly restricted the recovery under the warranty to the damages sustained in the year 1899. The defendants operated the plant during that entire season. If it did not come up to the warranty the defendants were entitled to recover the difference in value between the plant they got and the plant they contracted for, and, in addition to this, they might recover such special damages as they suffered, which were within the reasonable contemplation of the parties; but they could not continue to operate the plant indefinitely, and claim the loss of profits for this indefinite period. The finding of the jury was that there was no breach of warranty in the year 1899, and if the warranty was not broken in the year 1899 there could be no recovery on it for the years 1900 and 1901; for if the machinery filled the warranty in 1899, and during that season, it would be an unreasonable construction of the contract to hold the plaintiff liable upon it for subsequent years.

The court submitted to the jury aptly whether a new contract was made in the spring of 1900, and allowed a recovery if this contract was not complied with. The letters of the plaintiff, which were read in evidence to the jury, established the contract beyond question, and so the finding of the jury under this instruction was that the plant in the season of 1900 came up to the warranty. The condition of the plant was the same in 1901; for, so far as appears, the man from Cincinnati made no substantial changes. We, therefore, conclude that on the real merits of their case the defendants had a fair trial before the jury, and that no reason exists for disturbing their verdict.

Judgment affirmed.

BALDRICK, &c. v. GAST, &c.

(Filed March 10, 1904—Not to be reported.)

1. Street construction—Apportionment warrant—Where the pleadings and evidence in an action to enforce the payment of an apportionment warrant set out the enactment of the ordinance authorizing the construction, the names of the owners of the abutting property, the letting of the contract and the performance of the work, and the acceptance by the board of public works, a judgment enforcing the lien will be upheld.

2. Same—Evidence—Where the owner of a lot upon which a lien for street improvements was sought to be enforced testified that he had left a writing with a member of his family to be handed to the inspector of the work, his testimony amounts to nothing more than that he failed to see the inspection of the work, and can not outweigh the positive statements of the engineer that he did inspect and accept the work.

J. W. S. Clements and H. H. Cocke for appellants.

Wm. Furlong and J. L. Woodbury for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle.

This is an appeal from the judgment of the Jefferson Circuit Court, Second Division, subjecting the appellant, M. E. Baldrick's, lot of ground in the city of Louisville, under an apportionment warrant, to the payment of a lien of \$51.08, for the improvement of an alley from Avery to Brandies avenues, between Second and Third streets. The petition is in the customary form, and sets out in appropriate language the enactment of the ordinance for the construction of the alley, the names of the owners of the abutting property, the letting of the contract for the work to appellees, their performance of the work according to the ordinance and specifications, the acceptance thereof by board of public works of the city of Louisville, the apportionment of the cost of the improvement among the property owners, and the issual to appellees of the apportionment warrant therefor. The answer traversed in part the averments of the petition, and, in addition, averred that the work of constructing the alley was defectively done, contrary to the ordinance and contract; that it had never been received by the city; and finally, that the apportionment of the cost of improvement had not been correctly made.

The material averments of the answer were controverted by reply. The lower court held that the defense interposed was without merit, and rendered judgment subjecting the lot to the payment of appellees' lien debt, and from that judgment this appeal is prosecuted. It appears from the record that the work of constructing the alley was done under an ordinance duly enacted and according to certain specifications contained therein, and that it was performed by appellees under contract with the city, awarded them after proper advertisement; and further, that the work was duly inspected and accepted by the board of public works of the city. The appellant, after the acceptance of the work by the proper authorities of the city, will not be permitted to escape paying for it by mere proof that the work was not done in accordance with the ordinance. (*Eversole v. Walsh*, 25 Ky. Law Rep., 784; *Purdy v. Drake*, 17 Ky. Law Rep., 819.)

It is insisted for appellants that there was no inspection or acceptance of the work by the city in this case. There seems to have been two notices for the inspection and acceptance of the work, both of which were duly advertised in a daily paper of the city as required by law. The first notice was for November 28, 1901; the second for December 11, following. The purpose of such notice is to give an opportunity to the property owners upon whom will fall the cost of the improvement, to be present at its inspection by the city officials, that they may call attention to such defects in the work as may exist, and object to its acceptance.

Parsons, the city enigneer, who was deputed by the city's board of public works to inspect and accept this work, testified that it was not accepted on November 28, the date fixed by the first notice, as certain defects of a slight character were found in the work, which he required to be remedied before he would accept it, for which reason the notice for December 11 was given, and that on that day the work, upon a second inspection, was found satisfactory, and was then accepted, of which he gave the board of public works due notice by formal written report and by letter. The report bears date December 5, which is probably a mistake of the copyist, as the instrument contains the statement that the work on the alley was inspected and received

on December 11, as provided by the notice. We are unprepared to believe, in the absence of proof of such intention, that the city engineer would have wantonly and fraudulently reported an inspection and acceptance, neither of which was in fact made, and that, too, in advance of the date fixed for such inspection. Besides, in addition to the report mentioned, which also contains the apportionment of the cost of the work, there appears in the record a letter from the engineer to the board of public works, notifying it of his inspection and acceptance of the work, which was written on and bears date December 11, 1901.

The engineer testified with positiveness that the inspection and acceptance of the work were made on that day, and at the hour fixed by the notice, and it appears from the record that the apportionment warrant was issued to appellees by the city December 17, 1901. The appellant's denial that the work was ever inspected or accepted is supported by only one witness, the appellant, Samuel Baldrick, but upon cross-examination he admitted that on the day fixed for the inspection of the alley he stood around a few minutes on his back premises, his wife's lot being about equally removed from either end of the alley, for the purpose of objecting to the acceptance of the work when the inspector came to examine it, but as it was cold weather that he returned to his house without seeing him, and left a written statement with some member of his family to be handed the inspector upon his arrival, in which writing he objected to the work and the city's acceptance of it. The witness did not know, however, whether the writing was or not delivered to the inspector, nor did he introduce any member of his family to corroborate his statements. His testimony amounts to nothing more than that he failed to see the inspection of the work if it was made. Such testimony can not be allowed to outweigh the evidence furnished by the report and letter and positive statements of the engineer that he did inspect and accept the work. It has been decided by this court that when the work has been accepted by the proper authorities of the city, and there is no allegation of fraud or collusion, such acceptance is conclusive evidence that the work was performed according to the requirements of the contract. (*Barker v. Tennessee Paving Co.*, 24 Ky. Law Rep., 1524.)

The answer in this case does not allege either fraud or collusion, nor is either shown by the evidence. The attempted defense that the apportionment was not legally or correctly made can not be relied on by appellants in this case, as they have neither averred nor proved that under another or corrected apportionment the cost of the improvement charged against their lot would have been lessened. (*Schuster v. Barber Asphalt Paving Co.*, 24 Ky. Law Rep., 2446.)

For the reasons herein indicated the judgment is affirmed.

MULLINS v. VANARSDALL.

(Filed March 10, 1904—Not to be reported.)

Compromise—Settlement—Where parties made a settlement of their accounts and in pursuance thereof one of them executed to the other two notes, without any allegation of fraud or mistake in the settlement, he can not in an action go behind it. Such a settlement when made should be conclusive

of all matters between the parties when not impeached on the ground of fraud or mistake.

E. H. Galther for appellant.

J. F. Vanarsdall for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that prior to May 1, 1901, the appellee, Jackson Vanarsdall, instituted an action against appellant, A. R. Mullins, and others for a settlement of all matters between them, and that A. R. Mullins was the real defendant in that action. On May 1, 1901, they compromised and settled, and on that settlement A. R. Mullins, appellant, executed two notes to appellee for \$363.50 each, due in one and two years, with interest after maturity until paid. Appellee sold and assigned these notes before maturity to the First National Bank of Harrodsburg, Ky. On July 27, 1903, after both notes became due, the bank instituted suit upon them against A. R. Mullins, appellant, and Jackson Vanarsdall, appellee. The appellant, Mullins, filed his answer to this action. He did not contest the bank's right to a judgment, but made his answer a cross action against his codefendant and appellee, Vanarsdall, and stated in substance that the notes sued on by the bank were executed to Vanarsdall in settlement and compromise of a suit then pending in the Mercer Circuit Court, wherein the said Vanarsdall was plaintiff, and this appellant was the real defendant; that the purpose of that suit was a settlement of the accounts between them, and alleged that at the time of this compromise and settlement and the execution of the two notes by him to the appellee he then held four promissory notes of appellee, all dated in the year 1886 and due within that year, and all amounting to the sum of \$2,100, with their interest, and that this appellant, at the time of the settlement and the execution of the notes, failed to credit the notes he held by the amount of the two notes he executed to appellee; that at that time his notes were lost or misplaced, and by an oversight on his part he failed to credit appellee for the amount of the two notes sued on, and that appellee is indebted to him in the sum of \$2,100, less the amount of the two notes. The court sustained a demurrer to the pleading of appellant, and he has appealed from that judgment.

The appellee contends that the judgment of the lower court is right for the reason that the notes claimed by appellant show upon their face that they are barred by the statute of limitations. We deem it unnecessary to pass upon this question for the reason that there is another question conclusive of the case. The appellant shows by his pleadings that the appellee, in 1901, sued him for a settlement of all matters between them, and that they did in fact, on May 1, 1901, settle and compromise that action, and in pursuance of that compromise and settlement he executed to appellee the two notes sued on, and in this cross action he seeks to go behind that settlement and compromise and recover of appellee the amount of four notes that were in existence at that time, without an allegation of any fraud or mistake in arriving at the settlement or compromise. He contents himself with the allegation that he neglected to credit these notes with the amount of the notes he executed to the appellee. Settlements and compromises are favored in law,

and a compromise implies the surrendering of some conceived right on the part of both, a giving or surrendering of something by each to obtain the settlement. It may have been that appellee, at the time of the compromise, had full knowledge of the notes now claimed by appellant, and understanding that by this settlement these notes were to be abrogated, he accepted the amount of the two notes sued on, presumably, on his part, surrendering claims of equal dignity. When a settlement between parties, intended and understood to be final, is made, the same should be considered conclusive of all matters antedating the settlement or compromise, unless impeached on the ground of fraud or mistake or undue advantage, or some improper means used in procuring it. No such impeachment has been made in the pleadings of appellant, and the lower court was right in sustaining the demurrer. (8 Dana, 46; 6 Mon., 98; 2 Bush, 252; 12 Ky. Law Rep., 620; 7 Ky. Law Rep., 40.)

Wherefore, the judgment of the lower court is affirmed.

ABNER, &c. v. CREECH, &c.

(Filed March 10, 1904—Not to be reported.)

Deeds—Where a paper purporting to be a deed was never acknowledged as required by law, and the signature was by mark, the record containing no proof of its execution, it was not sufficient to pass title.

Riddell & Riddell and H. L. Wheeler for appellants.

Hazelrigg, Chenault & Hazelrigg for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Burnam.

This case is before this court for the second time. The opinion delivered upon the former appeal (20 Ky. Law Rep., 1812), sets out the condition of the pleadings at that time. The judgment of the trial court upon the former appeal was reversed on the ground that the pleadings in the case did not authorize the judgment, and the case was remanded, with instructions to allow both parties to reform and amend their pleadings. Upon the return of the case the appellants, William and John Abner, filed an amended petition against the appellees, E. G. Creech, Enoch Creech and Emily Parsons, in which they allege in substance that on the 21st day of April, 1890, the appellee, E. G. Creech, had executed to them his promissory note, due on the 21st day of April, 1891, for \$300 for loaned money, and to secure its payment had executed a mortgage upon a tract of one hundred acres of land occupied by him on the waters of the Kentucky river. They further allege that the appellee, Enoch Creech, had conveyed the title to this land by quit deed on the 27th of December, 1883, for value received; and that E. G. Creech was then, and had ever since been, in the possession of it, claiming it as his own against all the world, and was so claiming and residing upon it at the date of the mortgage to them in 1890, but that he had failed and refused to have the deed recorded; that the appellees, Parsons, E. G. Creech and Enoch Creech, had entered into a fraudulent conspiracy to claim the land as the property of Enoch Creech for the purpose of defeating the collection of their

judgment, and asked that the court adjudge the land the property of E. G. Creech, and decree its sale. Both Enoch and E. G. Creech in their answers deny the execution or delivery of the alleged deed from Enoch to E. G. Creech, as of the 27th of September, 1882, and Enoch Creech denied that the possession of E. G. Creech was adverse to his title; admitted that he had lived on the land and used it, but alleged that he did so as his tenant. He further alleges that when E. G. Creech moved on the land that he had a verbal promise to sell it to him, but denied that E. G. Creech had ever paid him anything for it. The pleadings were made up by reply.

The evidence for appellants is to the effect that Enoch Creech bought a tract of land, of which the one hundred acres in controversy formed a part, from one Crawford in 1872; and that a division of the land was about that time agreed upon between Enoch and E. G. Creech; and that shortly afterwards E. G. Creech took possession of the part which fell to him in the division, and had ever since resided upon it, claiming to be its owner; that he had cultivated it, cut timber on it, built fences and exercised every conceivable act of ownership over it. A number of witnesses testified that both Enoch and E. G. Creech told them that they had purchased the land together, and divided it. A number of witnesses also testified that both Creeches had always spoken of the land in controversy as the property of E. G. Creech. Other witnesses testified that E. G. Creech claimed to have in his possession a deed to the land from his brother Enoch. W. O. Smallwood and O. H. Davis testified that he had in his possession a deed dated the 27th of September, 1882, to the land from Enoch Creech, a copy of which is filed with his deposition. Smallwood testifies that he took this paper out of a box belonging to E. G. Creech, and made a copy of it; and that E. G. Creech had repeatedly informed him that it had been executed to him by Enoch, and that he had long before fully paid for the land. This alleged deed, however, was never acknowledged by Enoch Creech as required by law, and he denied ever having executed it. His signature was by mark, and the record contains no proof of its execution by him. We think, therefore, that appellants failed to establish the authenticity of the paper. But it seems to us the evidence in the case conclusively establishes the adverse possession of this land by E. G. Creech for more than fifteen years before the execution of the note for \$360, and the mortgage to secure it. E. G. Creech has not testified, and the testimony of Enoch Creech that his brother, E. G. Creech, took possession of the land under a parol contract of purchase in 1872, and had ever since admitted his title, is wholly inconsistent with the conduct, acts and claims of E. G. Creech with reference to the land for more than twenty years before he borrowed appellant's money.

Whilst there must be a written contract signed by the vendor to enable the vendee to hold by virtue of the written contract, "a different question is presented when a vendee or donee has taken possession of land under a verbal contract, saying to the vendor or donor and all the world this is my land and not yours, and has held it for more than fifteen years. The moment the vendee, or donee, does this the vendor or donor has the right to sue for the land; and the adverse holding begins, and having continued for the statutory period, this possession ripens into a possessory title. (*Commonwealth v. Gibson, &c.*, 85 Ky., 689; *Wood on Limitations*, 539.)"

Section 2509 of the Kentucky Statutes provides that "no continual claim upon or near real property shall preserve a right to bring an action."

Even if it be conceded that Enoch Creech claimed the land in controversy from the time E. G. Creech took possession of it in 1872, such claim under the statute would be ineffectual to entitle him to institute a suit for its possession in the face of an adverse claim of ownership therein by E. G. Creech for more than fifteen years. As a matter of fact, however, in this case the overwhelming weight of the proof tends to show that prior to the time when E. G. Creech borrowed appellant's money and executed the mortgage on the land Enoch Creech asserted no claim of ownership in himself.

For reasons indicated the judgment is reversed and cause remanded, with instruction to subject the one hundred acres of the land in controversy, or so much thereof as may be necessary, to the payment of the \$300 loaned by appellants to E. G. Creech in April, 1880, with 6 per cent. interest thereon from that time until paid.

CITY OF COVINGTON v. JONES.

(Filed March 10, 1904—Not to be reported.)

Damages—In an action against a city for damages sustained by falling into a hole in a pavement, where the city admitted in its evidence that it learned of the condition of the street on the morning before the accident happened at night, the street being considerably traveled, the court properly overruled a motion by the city for a peremptory instruction, and a verdict against the city being reasonable, the injuries of appellee being serious, will not be disturbed.

F. J. Hanlon for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

The evidence shows that appellee fell into a hole in the pavement on one of appellant's streets, in the night time, and was injured. The hole was about two feet deep, about three feet wide, and extended across the pavement. The place was not lighted. Appellee sustained a fractured rib, perforating or damaging a lung. She was confined to her room for about a month, and continued for some months after to suffer from the injuries. Her physician's bill was \$50. The jury awarded her \$500 damages against the city. Appellant contends that it should have had a peremptory instruction at the close of plaintiff's case, because it was not then shown that the city knew of the hole, or ought to have known of it by ordinary diligence. The proof of the plaintiff showed that the pavement had caved in early Saturday morning or Friday night. Appellee was injured Saturday night. The street was considerably traveled. Whether defendant could have learned of the condition by ordinary diligence was a question properly for the jury, and the court was right in overruling the motion for a peremptory instruction against plaintiff. Without resting its case there appellant introduced its evidence showing that it did learn of the condition Saturday morning, but did not put a light at the hole till about 10 o'clock Saturday night after

appellee's injury. Even if the peremptory instruction should have gone at the close of plaintiff's case, defendant's evidence cured the deficiency in the evidence.

It is not prejudicial in this case that the court's instruction as to appellant's duty apparently required the city to keep its sidewalk in "safe" condition for travel, instead of "reasonably safe," for it is manifest that a hole, such as this one in a sidewalk, was not "reasonably safe." It was not possible for the jury to have a difference of opinion on that point. The only question, under the evidence, about which they might have differed were whether the city had notice or reasonable time to learn of the conditions, and if so the amount necessary to compensate plaintiff for her injury, pain, loss of time and expense in causing the injury. The verdict is not excessive.

Judgment affirmed.

CARR v. LOUDEN & CO.

(Filed March 10, 1904—Not to be reported.)

Sales—Contracts—Where a commission merchant purchased wheat to be paid for upon its delivery at Chicago, a letter from the shipper to the commission merchant at the time of the shipment stating, "I am sure will stand the test as it goes 61 and 62 here," obviously meant that the wheat was to be inspected and graded, and in an action against the seller by the commission merchant for the amount of value of shortage, a judgment in favor of the merchant for the amount of the shortage will not be disturbed.

W. B. Cochran for appellant.

Thos. M. Wood for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Mason Circuit Court against the appellant, R. A. Carr, by the appellee, J. A. Loudon, a grain commission merchant of Cincinnati, O., doing business in the name of J. A. Loudon & Co. It is averred in the petition that appellee, in May, 1898, purchased of appellant, at the price of \$1.50 per bushel, 4,000 bushels of No. 2 red winter wheat, to grade No. 2, and to be accepted and paid for by Chicago weights and inspection; that it was, however, agreed between them that appellant upon shipment of the wheat at Maysville, Ky., should draw upon appellee, with bills of lading attached, for the price of the wheat to the amount of \$1.40 per bushel, leaving 10 cents per bushel unpaid until final settlement, which was supposed to be a sufficient margin to make good appellant's contract in Chicago; that pursuant to the terms of the contract the appellant shipped to appellee at Chicago four carloads of wheat, each invoiced at 1,000 bushels, Chicago weights and grade No. 2, at \$1.50 per bushel, each car amounting to \$1,500, with sight draft and bill of lading attached for each car for \$1,400; that appellee, relying on the contract with appellant as to Chicago weights and inspection, paid each of the drafts as presented before the wheat reached Chicago, or had been weighed or inspected there, which payments amounted in the aggregate to \$5,600; that when weighed

and inspected in Chicago two car loads of the wheat shipped him by appellant graded No. 2 according to contract, but fell short in weight, the two cars containing only 1,961 80-100 bushels, instead of 2,000 bushels as per invoice; that the other two car loads of wheat failed in quality, and by Chicago inspection only graded as No. 3, instead of No. 2 wheat as required by the contract, and that upon the failure of the wheat to grade No. 2 by Chicago inspection appellee immediately notified appellant of the fact of his (appellee's) refusal to accept it, and asked him for instructions; whereupon the appellant instructed appellee to appeal on the inspection of the wheat, which he did at a cost of \$16 inspection fees, but with the result that the wheat still graded No. 3, by reason of which appellee still refused to accept the same upon his contract with appellant, and so notified him, and offered to return him the wheat upon his making good his contract with appellee, which appellant refused to do, and left the wheat in appellee's hands.

It is further averred in the petition that appellee, after immediately notifying appellant that he would hold the No. 3 wheat at his risk and order it sold for his account, and look to him for the difference between the net amount realized for the wheat and the amount advanced by appellee thereon, viz., \$2,810, and that without delay the wheat was sold at the best market price in Chicago. For one of the cars of No. 3 wheat, which contained 994 40-100 bushels, a net price of \$1,041.57 was realized, and for the other, containing 995 bushels, \$1,092.10 net was realized, both of which sums were duly credited to appellant's account, and that after crediting appellant with these sums, and charging him with the shortage in the two car loads of No. 2 wheat, and the \$10 paid for him on the appeal on inspection, the aggregate amounted to \$484.08 less than the entire sum that was advanced him by appellee upon the wheat by the payment of the drafts attached to the way bills, and for this sum of \$484.08 appellee prayed judgment against the appellant.

The answer of appellant contains a specific denial of the averments of the petition, except as to the fact that he sold appellee 4,000 bushels of No. 2 red wheat at \$1.50 per bushel; but it is alleged in the answer that the wheat was to be delivered to appellee on the cars at Maysville, and then and there paid for by him without regard to Chicago weights or inspection; that the wheat was so delivered, and was guaranteed to weigh 56 pounds to the bushel; and further, that appellee was yet indebted to appellant upon the wheat to the extent of 10 cents per bushel, amounting in the aggregate to \$400, for which sum judgment was asked by appellant, and to that end his answer made a counterclaim against appellee. Appellee filed reply traversing the affirmative averments of the answer.

Upon the trial a verdict was returned by the jury in appellee's favor for the amount claimed by him, and judgment entered therefor in his behalf. Of which judgment, and the action of the lower court in refusing him a new trial, the appellant now complains. After a careful examination of the record we are satisfied that the trial court properly refused to disturb the verdict of the jury. It is true that the evidence is conflicting, and if in attempting to reach a verdict the jury had been confined to the testimony as detailed by the witnesses in view of its contradictory character, we can well

Imagine how difficult of solution would have been the questions of fact in issue. But our examination of the record has disclosed three facts, which, in our opinion, so completely support the appellee's version of the contract between the parties as to leave practically no doubt of his right to recover.

These are the facts referred to: On May 14, 1898, the day on which some of the wheat purchased by appellee was shipped by appellant, he wrote appellee the following letter:

"Messrs. Louden & Co.,

"Cincinnati, O.:

"Gentlemen—I have this day sent forward one car of wheat which I am sure will stand the test, as it goes 61 and 62 here. I will send the balance as soon as I can.

"R. A. CARR."

If there was to be no inspection or grading of the wheat when it reached Chicago, what test was it to be subjected to, and where? Obviously the test referred to in the letter was the inspection and grading which appellee contends was to be given at Chicago. The bills of lading for the four carloads of wheat accompanied by the drafts for the cash payments thereon at the rate of \$1.40 per bushel reached appellee through a Cincinnati bank, the invoices he received by mail. The appellant being then in Cincinnati, appellee, in view of the fact that the wheat had not then arrived at Chicago, and to prevent any future misunderstanding about the terms of the contract, asked appellant to write on the invoices "guaranteed Chicago weights and grades," which he did.

Would he have given such a guaranty if he had not agreed when the wheat was sold that it was to be inspected and graded in Chicago? Appellee had not then paid the drafts, but he paid them immediately after the guaranty on the invoices was given. Finally, the request or direction from appellant that appellee take an appeal from the action of the Chicago inspecting board that first inspected his wheat and placed two car loads of it in the third grade, is conclusive evidence of the fact that it was to be paid for by appellee according to Chicago weights and inspection. Otherwise, appellant would not have cared how or when it was inspected or graded, or whether it was graded at all. We are unable to find any just grounds for the objections urged by counsel for appellant to the instructions given by the trial court; they seem to be entirely free from error, and to express with more than ordinary conciseness and clearness the whole law of the case. Consequently none of the refused instructions asked by appellant were necessary, or would have been proper.

Believing that the verdict was authorized by the evidence, and that the record is free from prejudicial error, the judgment is affirmed.

GREGORY v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 10, 1904—Not to be reported.)

1. Railroads—Damages—In an action against a railroad company for damages resulting from being struck by its train and injured, where the evidence showed that at the time of the accident the morning was so foggy as

to make the train visible for only thirty or forty yards, and where it was at a public highway, and there was ample space between the tracks to walk upon, the injury resulted from his own negligence, and a peremptory instruction to find for the railroad company was proper.

2. Same—In an action against a railroad company for damages for being run over by its train, where there was no crossing near the place where the accident occurred nor houses where people would likely be passing, there was no occasion for the giving of a signal at such a point.

B. B. Golden for appellant.

B. D. Warfield, James D. Black, J. W. Alcorn and Edward W. Hines for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was in the employ of appellee as a member of a section gang. He lived on the railroad, one to two miles south of Artemus station, in Knox county. On the morning of October 10, as he was going along the railroad track from his home to the section tool house north of the station where he was to begin his day's work, he was struck by a rapidly moving train upon the main track and thrown partially under a moving train on the parallel side track, by which latter train his foot was mangled, and he was otherwise hurt. The injury occurred about 2,000 feet south of the station. The morning was very foggy. The track at that point curved. The long freight train on the side track, by reason of the curve, and possibly to some extent by reason of the fog, obstructed the view on the main track so that in the direction from which the train was coming it could not be seen more than thirty or forty yards distant. Appellant was going toward the train that hit him, but failed, for the reasons stated, to see it in time to get off the track to avoid being struck.

Artemus is a small unincorporated village, having some twenty or thirty families living in it. It is built stragglingly along the railway right of way and about the depot. Running about parallel with the railroad and from ten to twenty yards distant was a public highway that crossed the railroad track north of the depot and near the tool house. Appellant's course was north. Between the main and side tracks was a space of nine to eleven feet, where one could have walked with perfect safety from passing trains. The locomotive that struck appellant had whistled for the station, and had slowed up there. After passing the station some 100 or 150 yards it increased its speed, suddenly and considerably, until when it struck appellant it was running twenty-five or thirty miles an hour. At the point where appellant was struck there were no houses. The limits of the village had been passed. It is not claimed that the engineer or other person on the train striking appellant saw him in time to have possibly averted the injury. The following matters are claimed as negligence: First, that in running the train through the "town" it was run at a recklessly high and dangerous rate of speed, the railway company's servants knowing that the track at that point was frequently used by footmen as a passway; second, that there was no adequate signal of the approach of the train; and, third, that the engineer on the other train had just a moment before the accident seen appellant walking

on the main track meeting the coming train, and failed to warn him of his danger.

As for the first contention, the train was not at the time of the injury running through a town or village. The speed of a train in the country is not a matter that can be negligence to trespassers on the track whose presence is unknown. (Brown's Adm'r v. L. & N. R. R. Co., 17 Ky. Law Rep., 145; Ky. Cent. R. R. Co. v. Gastineau's Adm'r, 88 Ky., 119.) The fact that footmen sometimes and very frequently used the tracks everywhere can not be held to give them any right to do so, nor can that fact lessen the right of the company to run its trains over its tracks without taking their possible presence into consideration. The proof in this case shows a state of facts of common existence. Many people in small villages along railways, and those living near the railway, are constantly using the tracks to walk along. There is no way to keep them from it. Appellant's contention, that the railway company should run its trains having in view the safety of these trespassers, would be to practically abandon the road to them. If at every curve, bridge, tunnel, cut and fill not plainly in view for a long distance the train would have to slow up, give signals and warnings, and take extraordinary precautions on account of possible trespassers, because other trespassers were in the habit of using the track, it would so retard as to practically destroy the railroad business. On the contrary, it is the duty of these common carriers to serve the public by the diligent use of their tracks and means. Their duties are onerous, and they are necessarily held to a high standard of strict performance in their discharge to the public with whom they must deal. To impose upon them this additional and extraordinary burden of policing their whole line of tracks, or to run their trains so slow and with such frequent warnings as to guard the safety of trespassers, would be equivalent to turning the right of way into a public highway for footmen. Such a rule would be against the public policy, that considers alike the welfare of the public in securing to it rapid and safe service from the carrier, as well as the preservation of human life. The public, by such unauthorized use, acquires no right to use the railway as a highway. (Hoskins' Adm'r v. L. & N. R. R. Co., 17 Ky. Law Rep., 73; Brown's Adm'r v. L. & N. R. R. Co., supra.) In Roseberry's Adm'r v. N. N. & M. V. R. R. Co., 19 Ky. Law Rep., 194, this court, speaking of the duty of a railroad company as to keeping a lookout, for those using the streets of a village of 150 or 200 people, said: "We do not think that the rule which has been established as to cities, with regard to accidents in the corporate limits, applies to a hamlet like Denton, having no streets or alleys."

The localities in which the public may be said to acquire such right of passing over the company's tracks by license must be understood to be those communities so populous and where the use is so general, as reasonably apprise the company that in every probability some one is likely to be found on the tracks at such point. Whether there was a signal or warning of the approach of the train was not proven. The most that was said on that point was by appellant, who said he did not hear any signal. But he also said that, owing to the noise being made by the locomotive of the train on the side track, which was only a few feet distant from him, he could not have heard the signal if it had been given. Nor does the situation, as proven

In the record, show any necessity for the giving of a signal at that point. There was no road or street crossing near, and no houses where people would likely be passing from across the track.

Of the third ground of negligence relied on it may be said there was no evidence to show that the engineer of the freight train on the side track knew that the other train was about to pass there at that moment; nor that he knew that appellant was unaware of its approach; nor that he suspected that appellant was going to continue on the main track in the face of an approaching train.

We do not mean to hold that the servants of a railroad company may not use its tracks in going to and from their proper places of employment, and that they are licensed to do so to a necessary extent. However, this would not relieve them from the duty to care for their own safety, by taking the safer of two or more ways equally accessible to them. There was no proof of negligence whatever against the appellee. Even if there had been proof of such negligence, appellant shows such contributory negligence that precludes his recovering in this case. Not only did he have the public highway to walk upon, but there was ample safe space between the tracks for him to have traveled. He, for his own convenience, left his proper place of travel, and took up a dangerous one instead, knowing that it was dangerous, and knowing that the track was being constantly used by trains. But for his own negligence his injury could not have occurred. There can not be two ways of looking at that. The peremptory instruction at the close of plaintiff's evidence was proper.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. AND LOUISVILLE BRIDGE CO. v.
CROCKETT.

(Filed March 11, 1904—Not to be reported.)

Railroads—Damages—A verdict for \$7,500 against appellant in an action by appellee against them for injuries sustained by being run over by appellant's engine, he being fastened to its track by catching his heel in a frog, will not be disturbed, the evidence conducing to show negligence on the part of the bridge company in suffering the dangerous condition of the frog, and negligence on the part of the servants of the railroad company in running its engine over him.

Pirtle, Trabue & Cox and Gibson, Marshall & Gibson for I. C. R. R. Co.
Charles H. Gibson for Louisville Bridge Co.

Kinney & Fitzgerald and Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Barker.

The appellant, Louisville Bridge Co., owns and maintains a railroad track along the center of Fourteenth street, connecting with its railroad bridge, which spans the Ohio river between Indiana and Kentucky. Under a contract with the bridge company, appellant, Illinois Central R. R. Co., operates

its engines and cars over the bridge and along Fourteenth street, using the tracks of its co-appellant.

Appellee, Albert G. Crockett, on the night of the 17th of January, 1902, was run over at, or near, the intersection of Esquire and Fourteenth streets, in Louisville, Ky., by one of the engines of the railroad corporation, receiving injuries which made necessary the amputation of his left leg between the knee and the ankle; to recover damages for which he instituted this action.

In his petition he states in substance that on the night in question, between the hours of ten and eleven o'clock, he undertook to cross Fourteenth street diagonally from the east to the west side at, or near, where Esquire street intersects it; that in the western line of its road the bridge company kept and maintained a railroad frog, or switch, which was in an unblocked and dangerous condition to pedestrians; that in passing over this frog, or switch, he inadvertently stepped upon it in such a way that his heel was caught in the unblocked part of the frog, and became fastened, so that it was impossible for him to extricate it therefrom; that while he was in this condition, and attempting to remove his foot, two of the engines of the railroad corporation, which were coupled together and in charge of its employees, were backed along the line of the railroad on Fourteenth street and over his foot, mashing and crushing it in such manner as to necessitate its amputation. The negligence of the bridge company is alleged to have been the dangerous condition of the frog in which appellee's foot was caught; that of the railroad, in running its engines over him, when his presence on the track was either known to it, or could have been known by the exercise of reasonable diligence.

Appellants filed separate answers, denying all of the material allegations of the petition, and affirmatively pleading the contributory negligence of the appellee. The replies of the appellee, controverting the allegations of negligence on his part, made up the issues. The trial resulted in a verdict in favor of appellee against the appellants jointly for the sum of \$7,500, of which they are now complaining. As to the condition of the frog at the time of the accident, it was shown by appellee's testimony that it was sufficiently open to admit his heel, and that he did get his heel fastened therein in such a way as to make it impossible for him to extricate it in time to avoid the approaching engines which ran over him. His witness, Robert Young, who is the engineer for the K. & I. Bridge Co., and who shows himself to be an expert civil engineer, examined the frog, found it sufficiently open to admit his heel being caught therein, and states in his testimony that it might have been kept in such a condition as to make the accident, which happened to appellee, impossible.

On the part of the bridge company it is shown that the frog in question was of the most modern and expensive character and quality; that it was blocked at either end, and in such condition as to make it highly improbable, if not impossible, that the accident to appellee could have occurred in the way he states. In appellee's deposition, which seems to have been taken by appellant some time before the trial (for what purpose does not definitely appear), he is made to say that he saw the frog before he stepped into it, knew it was dangerous, and, with this knowledge, stepped upon it and was

caught; but in his testimony before the jury he materially qualifies these statements, and shows that he did not see the frog until his foot was upon it, and he was caught. The evidence upon this question is exceedingly voluminous, and it is neither necessary nor profitable to enter into a detailed statement or analysis of it. The question was one of fact, and eminently suited to the determination of the jury.

On the issue of the negligence of the railroad corporation, while there was much testimony, the most material was that of appellee for himself, and the pilot, John Noonan, for appellant. Appellee states that when he crossed the railroad track he saw the engines some two hundred feet away; that when he became fastened in the frog, the distance then having been reduced to one hundred feet, he took off his hat (being an experienced railroad man), and waived it in such a way as to give the signal to stop; that he was in plain view, and there was nothing to obstruct the vision of Noonan, who permitted the engines to run over his foot without even having given any signal of danger to those in charge of the engines which he was piloting. On the contrary, Noonan states that he did not see appellee until within ten or fifteen feet of him, when he at once gave the signal of danger, but it was impossible to stop the engines in time to save appellee from injury. All of the employes in charge of the engines corroborate Noonan in his statement that he did signal them to stop, but too late to prevent the injury to appellee; and the evidence is overwhelming that those in charge of the engines did all that they could, after receiving the signal, to stop. But this still leaves the question as to whether Noonan saw, or could have seen, by the exercise of ordinary diligence, the unfortunate plight of appellee in time to have saved him. The bill of evidence, as made out, makes Noonan say that the engines ran from 120 to 130 yards after he gave the signal of danger. When appellant's counsel, in order to extricate him from the consequences of this evident mistake, asked him if he meant 130 yards, and how many feet that was, he answered: "I don't know;" and when asked how many feet in a yard, he answered: "I don't know exactly; I never figured it out."

These answers were evidently given under the influence of mental confusion; they are not mentioned here to reflect upon him, but to illustrate the importance of leaving pure questions of fact to the elucidation of the jury, who have witnesses before them, see their demeanor, and hear them depose. It may be conceded that the evidence in volume was overwhelming in favor of appellants, but after all the jury constitutes the tribunal established by law for the ascertainment of fact in actions such as this; and while the court may feel that if we were weighing the testimony, in place of the jury, we would have reached a different conclusion from them, it is not for us to lightly set aside their verdict, based upon a determination of fact so peculiarly within their province to reach.

We readily admit that it is impossible for us to perceive how appellee, with his heel fastened in the frog, as he claims, could have had his foot mashed in the way it was, without the heel itself being crushed; but we can not undertake to say what happened in the few frantic seconds transpiring immediately before the injury; we must either accept appellee's theory or reach the conclusion that he deliberately placed his foot under

the wheels of the engine to have it crushed off, for the purpose of bringing this action. This, we reject as incredible. He was not trying to board the engine, because Noonan testifies that he saw him in front of the engine before the accident. This precludes the idea that his injury was caused by a misstep in undertaking to board the engine; and with this theory out of the way, we are thrown back to the alternative of accepting his statements as true, or concluding that his injury was self-inflicted, for the purpose of gain. Appellant complains of the admission of evidence on the subject of whether or not the engines which were being backed along the highway had a headlight on the forward tender. Admitting this to be incompetent under the pleadings, an examination of the evidence shows that most of the questions were not objected to, and that the answers, which were made on cross-examination of appellant's witnesses, were not detrimental to their interest. It is also complained that the instructions of the court, so far as they present the contributory negligence of appellee, were too abstract in their nature. These instructions have been approved so often by this court as to almost become stereotyped, and we are unable to agree with counsel in their adverse criticism of them.

Judgment affirmed.

MUTUAL BENEFIT LIFE INS. CO. v. HARVEY, &c.

(Filed March 11, 1904.)

1. Insurance—Beneficiary—Where by the terms of a policy of insurance application for extended insurance must be made and policy surrendered in order to obtain a paid-up policy, such application and surrender of policy is a condition precedent to the issue of paid-up insurance.

2. Same—Infants—Where a policy of insurance containing a provision for its surrender when a paid-up policy should be issued was assigned to infants, such surrender, together with an application, being a condition precedent to the issue of a paid up policy, the fact that they were infants without a statutory guardian did not change the rule lapsing the policy, and they were not entitled to wait five years after attaining full age to make their election and sue for the amount due upon the policy.

W. L. Dulaney and W. O. Harris for appellant.

Geo. H. Galloway for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 4th of November, 1887, the appellant, the Mutual Benefit Life Ins. Co., issued a policy of insurance on the life of Hiram H. Harvey for \$3,000, payable at his death to his executors, administrators or assigns, in consideration of an annual premium of \$107.82, which was to be due and payable on the 4th of November in every year during the continuance of the policy. On the 10th of October, 1888, Hiram Harvey assigned the benefit of this policy to his three daughters, Vashti, Roxianna and Rebecca Harvey, who were at that time infants of the respective ages of 18, 10 and 8 years. The insured paid or secured to the satisfaction of the company the first five annual premiums, but failed to pay the premium due November 24, 1892, and the policy

lapsed in accordance with its terms at that date. Harvey died on the 2d of April, 1902. On the 6th of April, 1903, this suit was instituted by his children, to whom the policy was assigned on October 10, 1888, who alleged that "said policy lapsed because the premium was not paid on the 4th day of November, 1892; that at the time of said lapse there was fully paid-up insurance under said policy to the amount of \$507, which became due and payable to them as assignees at the death of the insured on the 2d day of April, 1902, and for which they pray judgment."

The defendant filed a general demurrer to plaintiff's petition, which was overruled. It then answered, pleading the following stipulation of the policy by way of defense:

"Provided that in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof at the office of the company in the city of Newark, or to agents, when they produce receipts signed by the president or treasurer, then in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system, as hereon endorsed with accompanying tables.

"NONFORFEITURE PROVISIONS.

"When two full premiums shall have been paid on this policy it shall cease or become void solely by the nonpayment of any premium when due, its net reserve by the American Experience Mortality and Interest at 4 per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy; or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy, payable at the time this policy would be payable if continued in force."

And allege that three months after the lapse of the policy for nonpayment of premium on the 4th of November, 1892, no written application having been made, accompanied by a surrender of the policy for paid-up insurance, the company in accordance with the provisions of the policy gave to appellee's nonparticipating term insurance for the full amount of the policy for three years and 134 days, this being the extended insurance which the net reserve due upon the policy at the time of its lapse, after deducting therefrom the premium loan indebtedness for \$102.75, with accrued interest thereon, was sufficient to purchase. To this answer appellees replied, denying that they had elected to take extended term insurance for the full amount of the policy, and claimed that they were entitled to the amount due upon a paid-up policy which the net reserve would have purchased. The defendant demurred to the reply, which was overruled, and a jury trial resulted in a verdict and judgment for appellees for \$295, of which the company now complains.

The case involves the interest of the assured in that portion of the premium of the policy, with interest thereon, which is required to be reserved or set aside as a fund for the payment of the policy when it becomes due, which the uncontradicted testimony of the "actuary" of the company shows

was \$152.68, after deducting the indebtedness of the assured to the company, on the 4th of November, 1892, the day of the lapse of the policy, which would purchase at the company's rates first term insurance for three years and one hundred and thirty-four days for \$3,000; second, a paid-up policy payable at death for \$295. It will be observed that the nonforfeiture provisions of the policy provide that the assured shall be entitled to the first named or term insurance for the full amount of the policy, unless he makes application and surrenders his policy, in which case he may take the second, or paid-up, policy, payable at his death. There is no contention or proof that the assured made application for or elected to take a paid-up policy of insurance for \$295. There can be no question under the terms of the policy that such application and surrender by the beneficiaries of the policy is a condition precedent to the issual of paid-up insurance. Otherwise it became the duty of the company, without application or request, to set aside for the benefit of the assured extended insurance for the full amount of the policy. The only question, therefore, for consideration is the power of the company to contract for these alternate benefits in case of a lapse. This exact question was before this court in the recent case of *Crutchfield v. Union Central Life Ins. Co.*, 28 Ky. Law Rep., 2800. It was there decided that the failure of the assured to surrender the policy, or demand a paid up policy, was an election on his part under the contract of insurance to take the term insurance provided by the contract. In *Drury's Adm'x v. New York Life Ins. Co.*, 26 Ky. Law Rep., 68, the principle announced in the *Crutchfield* case was reaffirmed. In that case the company contended that the insured was only entitled to a life policy for paid-up insurance, instead of extended insurance.

It is insisted for the appellees, however, that as they were infants without statutory guardian when the policy lapsed they were not bound by these conditions of the policy, and are entitled to five years after attaining full age to make their election, and sue for the amount due upon a paid-up policy. No authorities are cited to support their contention. While, on the other hand, it was decided in *O'Loughlin v. Union Central Life Ins. Co.*, 11 Fed. Rep., 280, Judge McCreary delivering the opinion, that the fact that the beneficiaries named in the policy were minors would not prevent the enforcement of conditions of this character. In discussing this question the court said: "It is said that because the beneficiaries are minors that, therefore, the condition can not be enforced. I have been unable to find any authority to support this proposition, and it seems counsel instanced none. The guardian can bring the suit, and is bound to bring it under and according to the contract. It is not a suit that can not be brought. It is not a suit that the parties by reason of their disability can not bring. But it is a suit which the guardian can bring, and is bound to bring, I think, in accordance with the terms of the contract."

In *Suggs v. Ins. Co.*, 71 Texas, 579, the policy contained the following clause: "No suit or proceeding in law or equity shall be brought to recover any sum hereby insured unless the same is commenced within one year from the time the right of action accrued."

The contention was there made that this clause did not apply to minors

who were beneficiaries. The court decided that the exception in the statute did not affect the agreement.

The contract of the insurance company was with Hiram H. Harvey. By the express terms of the contract he had the right at any time during the continuance of the policy to change the beneficiaries. The mere fact that he transferred the benefit from his estate to his three daughters could not change the express stipulations of the contract of insurance between them. His assigns were equally bound thereby. It is not contended that the assignees subsequent to the assignment paid the premium installments, or any new contract was made with them by the company, and it can not be doubted for a moment that if the assured had died within the period of extended insurance that appellees would have been prompt to have asserted their right under the terms of the contract to the full amount of the policy. We have reached the conclusion that the trial court erred in overruling the demurrer to the petition, and also in failing to give the jury a peremptory instruction to find for the defendant upon final trial.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CHESAPEAKE & OHIO RY. CO. v. SEE'S ADM'R.

(Filed March 11, 1904—Not to be reported.)

1. Railroads—It is a well-settled rule in this State that those in charge of a train owe no duty to a trespasser, except when his presence is discovered on the track to use reasonable care to avoid injuring him.

2. Same—Damages—Where one while walking along the track of a railroad was run over and killed by a train, the evidence conducing to show that the fireman and engineer were in their proper places; that the deceased was walking on the track in the same direction in which the train was going; that the accident did not happen in any incorporated town or city, nor any village, where there were streets or crossings, and the presence of the decedent not being discovered on the track in time to prevent the accident, a verdict and judgment against the company was erroneous.

3. Same—The fact that a railroad company may have acquiesced in the use of its track by pedestrians does not amount to a permission or license to so use it.

E. L. Worthington and W. H. Wadsworth for appellant.

James Andrew Scott, R. S. Dinkle and W. C. Marshall for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Paynter.

Between 5 and 6 o'clock, p. m., November 26, 1900, James G. See, while walking along the track of appellant about 400 feet east of Norman, a station between Ashland and Catlettsburg, was struck by one of appellant's "shuttle trains," and killed. This action was instituted to recover damages for the loss of his life. The alleged negligence consisted in the failure of appellant to give signals, by sounding the bell or blowing the whistle, of the train's approach; in not having a headlight on the front of the train, and in failing to have some one in a position to see and warn persons who might be on the track of the train's approach. The shuttle train consisted

of a tender, engine and two cars. It was going east from Ashland at the rate of twenty-five or thirty miles an hour. The engine was backing, so the tender was in front of the engine. The uncontradicted evidence shows that the cars were lighted, and that the fireman and engineer were in their proper places. The evidence conduces to show that the decedent was walking along the track in the same direction in which the train was going, and while so doing was struck by the train.

It appears that in 1874 Williams, as owner of the land, had made and put upon record a plat of a town designated as "East Ashland." It covered a distance from Keyes creek, about 1,000 feet, to a point east of there. Winchester avenue was shown to run about 1,000 feet eastwardly. Bell street was the first street east of Keyes creek intersecting Winchester avenue. Next was Ann street, and the next was Elizabeth street. There were other streets laid out running parallel with Winchester avenue, but they were never opened as streets, neither was Bell nor Elizabeth streets. Ann street seems to be used for crossing appellant's road at its station called "Normal." The town was never incorporated. A line drawn from the south side of the land plotted to the bank of the Ohio river is about one-third of a mile in length. Vansant's sawmill is situated on or near Keyes creek, but it does not appear whether or not it is on the land plotted. About a quarter of a mile east of the east line of the land plotted is a mill. Situated within the plotted territory is a planing mill, working ten to twenty men. One witness testifies that there are fifty houses situated between the hills on the south, the Ohio river on the north, Keyes creek on the west and the mill referred to, as being situated east of the plotted territory, and that there are four or five hundred people living within boundary just given, but the witness fails to state how many houses are within the plotted territory. One witness testifies that there are five houses fronting toward the railroad on the south side of it between Normal and the place where the accident happened and two back of them. There seems to have been no houses on the north side of the railroad, between "Normal" and the place where See was killed, because the evidence shows that the lots or territory fronting the railroad had a road or drive way over it which was considerably used. Immediately south of the railroad was a street car line, and immediately south of that was the turnpike road, both of which were between the houses situated on the south side and the railroad. The appellant had two tracks along the so-called Winchester avenue, one of which seems to have been elevated two feet above the surface of the ground. There was no travel over the so-called Winchester avenue, except persons who walked on the track or along the side of it. There was no road crossing within the plotted territory except at Normal, though east of that point there was a path over which persons walked. Williams' property seems to have passed into the hands of others, and the land covered by the so-called Winchester avenue was condemned for the right of way for the railroad, and it had been so using it for about twenty years before the accident happened. The west line of the plotted territory was a mile and a quarter east of Ashland and the east line was three-quarters of a mile west of Cattlettsburg. Quite a good many people walked over the track through the plot of ground described. The court has endeavored to give the local situation at the time of the accident as

shown by the record. East Ashland was never incorporated. The plan to lay out a city was ineffectual. There was no one representing the public to accept the proposed dedication. The public never evinced any purpose to accept it; so far as the record shows it was never used by the public as a street. On the contrary, the only inference to be drawn from the testimony is that Williams, his successors in ownership, and the public acquiesced in the appropriation of the strip of land by the railroad company. It necessarily follows that the appellant was a trespasser upon the right of way at the place of the accident. The well-settled rule in this State is that those in charge of a train owe no duty to a trespasser, except when his presence is discovered upon the track, to use reasonable care to avoid injuring him. This rule has been so repeatedly enunciated by this court that it would be labor lost to cite cases in its support. There is no duty resting upon those in charge of a train to sound whistles or ring bells or to carry headlights to give warning to trespassers. They did not have to anticipate their presence upon the track. The fact that the railroad company may have acquiesced in the use of its track by pedestrians does not amount to a permission or license to so use it. (Brown v. Louisville & Nashville R. R. Co., 97 Ky., 228; Dials v. C. & O. Ry. Co., 25 Ky. Law Rep., 1349; C. & O. Ry. Co. v. Perkins, 20 Ky. Law Rep., 608.) The rule we have announced is recognized by counsel for appellee, but it is contended that it does not apply to this case because of the place where the accident happened. It is contended that the rule which applies to the movement of trains in cities and towns should apply to this case. The well-settled rule of this court requires that the agents and employes of a railroad company in operating trains through the streets of a city or town shall keep a lookout along the line of railway where people are likely to be found upon the right of way. In cities and towns there are streets and street crossings. Frequently the railroad tracks are along a street, some places so constructed that vehicles may be driven over them at any point; at others vehicles are required to cross the tracks at street intersections. So in towns and cities the travelling public use the streets in common with the railroad company. In addition to that persons may be expected at any time to be walking on the space in the street occupied by the railroad company with its track. Due regard for human life requires that those operating trains in cities and towns should keep a lookout for persons on the track with the purpose of avoiding injuring them, as well as to protect the property and lives in their keeping. In the case at bar the railroad tracks were not on a street; they were not on a strip of land upon which the public had the right to travel; there was no roadway on it for the use of public travel. There were no streets intersecting; it no road crossings over it, except at the station called "Normal," and the approach to it seems to be a road over the strip of land designated as Ann street on the plot. There was neither a roadway nor street used at the point where the accident happened. The duty to sound bells and whistles to give warning to those who were upon the track did not exist, because no one could rightfully be on the track at the place of the accident. If the law imposed the duty upon those in charge of the train to have sounded the bell and whistled before approaching "Normal," it did so for the protection of those who might be, and had the right to be, at that crossing, not for the protection of a tres-

passer on the track east of there. In the case of Cahill v. Cincinnati, &c., Railway Co., 92 Ky., 345, the court held there was a breach of duty in failing to whistle at a public crossing, because Cahill, who had the right to the use of a private crossing, also had the right to rely upon the railroad company's performance of its duty in whistling at the public crossing. It was thus guilty of a breach of duty to the public and to Cahill, the latter because of his right to the use of the private crossing. The Conley case, 89 Ky., 402; the Shelby case, 85 Ky., 224, and the Keelin case, 22 Ky. Law Rep., 1943, are cited to support the recovery in the case. In the Shelby case the court found the party killed by the railroad was not a trespasser; that he had the right to be where the accident happened, and that the railroad company owed him a duty, and that his death resulted from a breach of its duty. The facts of the Conley case are very dissimilar to the case at bar, and this court does not understand that the case does or was intended to change the rule which we adhere to and apply in this case. Neither is the Keelin case a departure therefrom. The accident under consideration in that case happened in a city, with a population of more than three thousand, with streets and street crossings over the railroad tracks. We are asked to apply to this case the doctrine which imposes a duty on those operating railroad trains through cities and towns to keep a lookout and sound bells and whistles to notify persons of the approach of the train. The accident did not happen in an incorporated town or city; it did not occur in a village or community where there were streets or street crossings; not on the right of way of a railroad where the public was licensed to use it, or where the public could use it as a street or roadway, because there were two tracks on it, one elevated about two feet above the surface of the earth. We decline to extend the doctrine so as to apply it to this case. The only duty which appellant's servants owed the intestate was to use reasonable care to avoid injuring him after discovering his peril, and the record fails to show there was such breach of duty. The well-settled rule which applies to trespassers is applicable to this case.

The judgment is reversed for proceedings consistent with this opinion.
Whole court sitting.

CONN v. CITY OF LOUISVILLE.

(Filed March 11, 1904—Not to be reported.)

Street Improvements—Damages—In an action by appellant against appellee, alleging that his lot was damaged by the raising by appellee of a street in front of it, and defense was made that the property was enhanced by the street construction, a verdict for appellee will not be disturbed, the record presenting only a question of fact, which was the province of the jury to determine.

Edwards & Ogden for appellant.

N. R. Peckinpaugh for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The appellant, Walter Conn., was the owner of a lot fronting on Everitt avenue 80 feet and 180 feet deep, on which there was a four-room frame dwelling. The lot was on a hillside and the front of his premises was on a level with the street, which was a dirt road. In 1900 the appellee, the city of Louisville, graded and paved Everitt avenue with vitrified brick, and in so doing the street in front of appellant's house was raised from two to three feet above the surface of his lot. He was compelled to fill in the lot and raise the dwelling house to a level with the new grade of the street. He thereupon brought this suit against the city, fixing his damages at \$600. The answer of the city is a traverse of plaintiff's right to recover. A jury trial resulted in a verdict and judgment in favor of the defendant, and the plaintiff prosecutes this appeal.

The only ground relied on for reversal is that the verdict in favor of the defendant is not sustained by the evidence, and is contrary to law. The plaintiffs introduced four witnesses, whose testimony conduces to show that the plaintiff's property had been diminished in value about \$600 by the raising of the grade of the street. While defendant introduced four witnesses, who testified that the market value of appellant's property immediately after the construction of the street was enhanced from \$100 to \$400 in value, in consequence of the work done by the city in grading and macadamizing the street. There is nothing in either the pleadings or testimony to show whether the cost of improving Everitt avenue was paid by the city or by the abutting property holders, or what expense, if any, appellant was subjected to on this account. Only one instruction was given to the jury, and this one was not excepted to, and is not complained of upon this appeal. The record, therefore, presents only a question of fact, which it was the province of the jury to determine, and in view of the sharp conflict in the testimony on this issue we do not feel warranted in reversing the judgment.

Judgment affirmed.

CLARKE, &c. v. GARRISON, &c.

(Filed March 11, 1904—Not to be reported.)

Attorneys—Fees—In this action for the recovery of an attorney's fee where the services rendered were for executors in the suit to settle an estate, no proof being taken in the case and it going off on the pleadings and commissioner's report, the action of the chancellor in allowing a fee of \$150 will not be disturbed, he being on the ground and knowing the scale of fees usual in his court and knowing better what took place than this court can determine from the record, will not be disturbed.

J. B. Clarke for appellants.

S. Holmes for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hobson.

William Garrison died a resident of Bracken county in the year 1894, leaving a will by which he devised his estate to his wife for life, with the remainder to his children. At the time of the making of the will he owned a tract of land, but before his death he sold the land to his son, George, for

something over \$3,000, and took his notes therefor. These notes constituted substantially his only estate at his death. After his death the widow bought from a Mrs. Roberts a piece of land near by and moved upon it, executing to Mrs. Roberts her notes for the price. When her notes fell due she had no means of paying them except her interest in her husband's estate; her two sons, George and Sam, had qualified as executors, and George wanted time on his notes which he had executed to his father, so the three assigned these notes to Mrs. Roberts as collateral security to the notes she held on Mrs. Garrison, and Mrs. Roberts agreed to wait on her debt. At the end of the time agreed upon Mrs. Roberts filed suit against Mrs. Garrison on her notes and to foreclose her vendor's lien on the land she had sold her. She also brought suit against George Garrison on his notes which had been assigned to her. In this condition of things the executors employed J. B. Clarke as their attorney. There were debts of William Garrison unpaid amounting to \$600 or \$700. Mrs. Roberts had sold Mrs. Garrison her land for much more than it was then worth. Clarke filed an answer in the suit against Mrs. Garrison, seeking to have the sale of the land by Mrs. Roberts to her rescinded. The court sustained a demurrer to his answer and gave judgment in favor of the plaintiff. Clarke also filed an answer for George Garrison in the suit against him on his notes, but the court also sustained a demurrer to this and gave judgment for the sale of the land. Appeals were granted from these judgments, but were not taken. Before a sale was made Clarke filed a suit to settle up the estate of William Garrison, making Mrs. Roberts a defendant, charging that the George Garrison notes were the assets of the estate; that the debts were unpaid; that Mrs. Garrison had only a life estate in the notes, and that Mrs. Roberts took no interest in the fund by reason of the assignment to her. He obtained an injunction restraining Mrs. Roberts from the further prosecution of her claim, except in that action. He also had an appraisal made of the estate. Some of the creditors had obtained judgments against the executors and sought to recover on their bond. This alarmed the sureties, who had them removed on failure to give a new bond, and an administrator with the will annexed was appointed, who took charge of the proceedings Clarke had instituted, continuing Clarke as his attorney. Two small suits were filed against the executors which Clarke had dismissed for want of demand and verification. The estate was settled up, the debts amounting to about \$700. The land was sold and brought \$2,100, which left about \$1,300 after paying the court cost to be divided among the heirs. Clarke then moved the court to allow him a fee as attorney for the executors of \$600. The court allowed him \$150, and from this judgment he appeals.

In his suit to settle the estate of William Garrison, Clarke, who drew the petition, inserted an allegation that Laura Garrison, the wife of George Garrison, held a lien on the land for \$1,000, which was inferior to the creditors of William Garrison. When the case was referred to the commissioner to report the debts of the estate he presented to the commissioner a claim of Laura Garrison for \$500 against the estate. The other heirs contested the validity of these claims of Laura Garrison and employed attorneys to resist them and look after their interests in the estate. The commissioner rejected Laura Garrison's \$500 claim, and an agreement was made between Clarke

and the attorneys who had been employed by the heirs by which both these claims were abandoned. These attorneys afterwards co-operated with Clarke in the conduct of the suit. During its pendency Clarke compromised with Mrs. Roberts by getting her representative to take back the land sold Mrs. Garrison by George Garrison paying him a certain amount of money; and Mrs. Garrison moved back from the Roberts' place to her old home, with her daughter Martha, who lived with her.

While at first blush the allowance made by the circuit court seems small for the services rendered by Clarke, in view of all the facts in the record we conclude that we ought not to disturb the chancellor's judgment. He is on the ground; he knows the scale of fees usual in the court, and also knows better than we can tell from the record much that took place in court. The services which Clarke rendered in the suits brought by Mrs. Roberts, or in the compromise of those suits which he subsequently made, were chargeable to his clients in those cases, Mrs. Garrison and George W. Garrison. The executors were not parties to those suits, and the estate of the decedent in their hands is not liable to Clarke therefor. The only services for which Clarke should be allowed are his services for the executors in the suit to settle the estate and in some other small matters incidental thereto. No proof was taken in this case; it went off on the pleadings and the commissioner's report, which was short. Some of the children employed other attorneys to look after the case who assisted in its management. Part of the services of Clarke in the action were apparently rendered for George Garrison and his wife, Laura, and when the land was sold, as well as when the commissioner was making up his report, it would appear from the proof that Clarke was looking after the interests of Laura Garrison as well as the estate of the decedent, and that part of his services ought to be paid for by her or by her husband, George Garrison. In determining what is a reasonable attorney's fee the court must take into consideration not only the amount of the estate, the character of the services rendered, and the amount of work done, but also in a case like this the fact that part of the services are not chargeable to the estate. On the whole case we can not say the chancellor erred in fixing the fee at \$150, giving to his finding that weight which ought to be given to it in cases of this sort.

Judgment affirmed.

DUNEKAKE v. BEYER, BY, &c.

(Filed March 11, 1904—Not to be reported.)

1. Pleading—Where a pleading was vague and indefinite, but no motion being made to make it more specific, and no demurrer interposed, it was cured by verdict.

2. Damages—Where an employe was ordered by the master to assist another employe in packing glass, and in making boxes pursuant to directions he was cut by a circular saw, sustaining serious injuries, a verdict in his favor will not be disturbed, the record showing a state of fact sufficient to support it.

Joyes & Jarvis for appellant.

Leiber & Lincoln for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Barker.

The appellant, at the time of the occurrence from which this litigation arose, was engaged in the business of manufacturing mirrors and beveled glass in Louisville, Ky. Appellee was in his employment, his duty being to grind the glass on an iron wheel, being what is technically called a "rougher." He claims that on the day he was hurt he had been ordered by the appellant, his employer, to assist Isaac Foust, whose business it was to pack the glass and mirrors for shipment, and to do whatever Foust told him. In order to properly ship mirrors and glass it was necessary to make rough boxes, into which they were placed to prevent breakage. Appellee states that he was ordered by Foust to saw some light lumber in order to make a box for the shipment of a mirror he was about to pack; that in pursuance of this order he undertook to use a circular saw, which was there for that purpose, and that in doing so his hand was caught by the saw, and two of his fingers cut off, to recover damages for which he instituted this action, alleging that his misfortune was caused by the gross negligence of appellant, his employes and servants.

The answer placed in issue the material allegations of the petition, and pleaded the contributory negligence of appellee. A trial resulted in a verdict for appellee for the sum of \$1,000, of which appellant now complains.

Two grounds are relied upon for reversal: First, that the petition does not state a cause of action; and, second, the admission of incompetent testimony.

The petition is exceedingly vague and indefinite, and would certainly have been held to be bad on demurrer, but no motion was made to require the plaintiff to make it more specific, nor was a demurrer interposed, and we are of opinion that the defects were cured by the verdict. Newman, in his work on Pleading and Practice, page 739, says: "The verdict will not only aid a defective allegation, but it extends sometimes even to cure an omission altogether to make a necessary allegation. Where there are defects or imperfections in the pleading, yet the issue joined is such as necessarily required on the trial the proof of the facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume that a jury would have given a verdict for the party, such deficiency is cured by the verdict. (Vaughn's Ex'or v. Gardner, 7 B. Mon., 327.)"

The recent case of Hill v. Ragland, 24 Ky. Law Rep., 1053, contains a thorough discussion of this question, reviews all the authorities, and makes it unnecessary to further extend the opinion on this point.

In the case at bar the court submitted to the jury in the instructions the issues as if the allegations which were omitted had been in the petition. The case of Bogenschutz v. Smith, 84 Ky., 330, is not inconsistent with the view here expressed. In that case the court did not in its instructions submit the question to the jury in such manner as to necessarily involve their passing upon the facts omitted in the pleading, and, by reason of this failure of the court to so frame the instructions, it was held that the defective pleading was not cured by the verdict. Appellant also complains that

the court erred in admitting the evidence of two witnesses, Frank Riehm and John Kavanaugh, as to the condition of the saw from four to six months prior to the time of the accident. In addition to this testimony there was evidence in the case to show that the condition of the saw remained the same from the time of which those two witnesses testified until the accident. The evidence that the condition of the saw remained unchanged during the interim made the evidence of Riehm and Kavanaugh competent. There is no complaint of the instructions, and we think they properly presented the issues to the jury.

Perceiving no error in the record the judgment is affirmed.

CITY OF LOUISVILLE v. KEHER.

(Filed March 11, 1904.)

1. Damages—Obstruction of streets—Where appellee in passing along a street of appellant on a bicycle, at night, it being in a dark place, struck a large stone that extended out beyond the middle of the street and was thrown on some rocks, such obstructions having been placed there by workmen engaged in building a structure, and so injured as to lose an eye and sustain other serious injuries, a judgment for \$7,500 against the city will be upheld, the obstructions being beyond the point in the street where the city was authorized to permit them to extend, and the place not being guarded or indicated by lights at the time of the accident.

2. Instructions—In civil cases the circuit court is not required to give the whole law of the case to the jury in his instructions, it being incumbent upon the litigants to ask such instructions as they deem proper.

3. Same—Where an obstruction had existed in a city for weeks with the knowledge of the officers of the city, it was not prejudiced by the failure of the court to submit the question as to whether or not it had notice of such obstruction.

Henry L. Stone for appellant.

Kohn, Baird & Spindle, O'Neal & O'Neal and R. L. Greene for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Hobson.

Between 9 and 10 o'clock on the night of July 11, 1899, appellee Keher was riding on a tandem bicycle with a young lady (the lady being in front) along Jackson street, near Green, in Louisville, Ky. They were riding a little to the east of the middle of the street; the place was dark from the shade trees obstructing the electric light. The front wheel of the bicycle struck a rock, eight by fourteen by twenty inches; the wheel was crushed, and both riders were thrown down. The stone was at the edge of a mortar bed; the young lady was thrown over in the mortar bed, and the appellee, who was on the rear seat, was thrown into a pile of rock, fracturing the arch over his right eye, severely cutting the scalp, and injuring his ear drum. By reason of an internal hemorrhage the optic nerve of the right eye was destroyed; his ear inflamed and gave him great pain. The right arm was also affected; but gradually this got right, and the hearing in the ear

was not permanently impaired; but the right eye is entirely blind. The left eye also became inflamed and is much impaired, although this appears from the evidence to be due to another cause. The plaintiff was studying medicine, but as his sight got so that he could not read, he had to give that up. His sufferings from the injury to his ear and the atrophy of the optic nerve were very great. He filed this suit against the city and others to recover for his injuries. The jury found a verdict against the city for \$7,500, on which the court entered judgment, and the city appeals.

On February 23, 1899, the city issued a permit to St. Boniface Church to build a one-story brick and stone church on Green street near Jackson, and on May 12, 1899, it issued a permit for the building of a three-story brick monastery on the northeast corner of Jackson and Green. By an ordinance of the city regulating the use of public ways it is provided in substance that for the purpose of erecting houses or other improvements adjacent to any street the person making the erection may use not more "than one-third of the width of the said street fronting said improvement for material for making and conducting said improvements," all such obstructions to "be safely guarded in such manner and with sufficient necessary red lights at night as to protect all those travelling or passing upon such street." (Compilation of ordinances, 1901, 830-821.) In erecting the buildings referred to the contractors had placed in Jackson street a pile of bricks and rocks, also a mortar bed which extended out nearly to the center of the street, and had placed around the mortar bed foundation stones of the dimensions above given to protect it from wagons passing along the street. The proof for the plaintiff by a number of witnesses was that there were no lights of any sort on the obstruction or about it; that it had existed in the street for several weeks, with the knowledge of the officers of the city, and that for two or three nights at least before the plaintiff was hurt it was lighted in no way. It was a public and much used street of the city, paved with granite; the plaintiff was ignorant of the obstruction and unable to see it from the want of light. He was riding along about four or five miles an hour when his wheel struck the stone. The proof for the city tended to show that the boys in the neighborhood had given trouble about the lanterns; that a few nights before one of its officers had gotten a lantern and put it on the obstruction, and that on the night in question the lights were in position and burning. On the question of light, however, the great weight of the evidence was with the plaintiff. As to who placed the obstruction in the street and left it unlighted the evidence is very unsatisfactory. There were separate contractors for the stone work, the brick work, the plastering and the putting in of the furnace and engine. Each of these denied that the mortar bed was his, or each tried to put the blame on somebody else. The contractor for the furnace and engine was not sued. The action was dismissed as to the contractors for the stone work and the plastering. The jury found in favor of Hoertz, the contractor for the brick work. This threw the entire liability on the city. The court, of its own motion, instructed the jury as follows:

"1st. The court instructs the jury that it is the duty of the defendant, the city of Louisville, to keep the streets and highways in a reasonably safe condition for use by the public, and if it is necessary that a part of the

street be used as a place of deposit for material for the erection of a building adjacent to the said street, it is the duty of the person using the street as a place of deposit for such material to protect persons using the said street at night from injury, by giving notice or warning of the obstruction to the street by placing sufficient lights upon or near the said material to give timely warning to other persons using the said street; and it is the duty of the defendant, the city of Louisville, to exercise ordinary care in causing the said warning to be given by persons to whom it may have given a license to use a portion of a public street as a place of deposit for such material. And if the jury shall believe from the evidence that the defendant, Fred Hoertz, placed the material in Jackson street with which the plaintiff came in contact and which caused his injury, and the presence of said material in the street was not indicated by sufficient lights to give reasonable and timely warning to persons using the street as the plaintiff was then using it, and by reason thereof he was caused the injuries of which he complains, and he did not, by negligence upon his part, help to cause or bring about his injury, but for which contributory negligence, if any there was, he would not have been injured, then the law is for the plaintiff as against the defendant, Hoertz, and they should so find.

"2d. If the jury find that the defendant, Hoertz, or his employees, placed the said obstruction in the street and failed to give warning of its presence as mentioned in instruction No. 1, and they find for the plaintiff; and they shall believe from the evidence that the defendant, the city of Louisville, did not exercise ordinary care to have the said notice or warning given of the obstruction to the said street, then the law is for the plaintiff against the city as well as against the said Hoertz.

"3d. But unless the defendant, Hoertz, or some of his agents or employees, placed the said obstruction in the street and failed to give notice of its presence as mentioned in instruction No. 1, the law is for the defendant, Hoertz, and the jury should so find. Or if the plaintiff was negligent, and thereby helped to cause or bring about his injuries, and he would not have been injured but for his contributory negligence, if any there was, the law is for the defendants.

"4th. If the jury shall find from the evidence that the defendant, Hoertz, did not place the obstruction in the street, but they shall believe from the evidence that it was placed there by some other person, and the defendant, the city, did not use ordinary care to give notice of the said obstruction as mentioned in instruction No. 1, the law is for the plaintiff as against the city, and they should so find."

Over the objection of the city, the court gave the two following instructions asked by the plaintiff:

"5th. If the jury find their verdict for the plaintiff they shall award him against both of the defendants, or against the city of Louisville alone, such a sum of money as they believe from the evidence will fairly and reasonably compensate the plaintiff for the pain and suffering, mental and physical, sustained by him, directly resulting from the injuries complained of, and also for the permanent impairment of his power to earn money in the loss of his right eye, not exceeding the sum of \$10,000, the amount claimed in

the petition. If they find a verdict for the defendants they shall say so, and no more.

"6th. By negligence is meant in these instructions the failure to observe ordinary care.

"By ordinary care is meant a failure to observe such care and prudence as persons of ordinary care usually exercise under the same or similar circumstances.

"By contributory negligence is meant the failure on the part of the plaintiff to use ordinary care for his own safety, and by reason of which he helped to cause or bring about the injuries complained of, and but for such contributory negligence, if any there was, he would not have been injured.

"But the plaintiff could not be guilty of contributory negligence at the time and place complained of unless by the exercise of ordinary care on his part he could have seen the obstructions or materials in connection with which he was injured, before striking the same, in time to have avoided the injuries complained of. Unless the plaintiff knew the obstructions were in the street, or unless they were marked by some light as hereinbefore defined, the plaintiff in traveling the street was compelled to use only such care as persons of ordinary care would use, presuming the street to be safe under the same or similar circumstances."

It is insisted for the city that the two first instructions taken together make the right of the appellee to recover a verdict against the city turn solely on the fact that the city did not exercise ordinary care to have warning given of the obstruction of the street, and that the jury should have been told that the city was liable only if the city knew of the obstruction, or by ordinary care should have known of it, and also knew that at the time and place of the accident the obstruction was not sufficiently lighted, or by the exercise of ordinary care should have known this. It is also complained that the court did not submit to the jury the question whether the city, at the time and place of the accident, kept its street in a reasonably safe condition for persons riding thereon with ordinary care for their own safety. In support of the instructions of the court we are referred to the cases of *District of Columbia v. Woodbury*, 136 U. S., 450; *Boucher v. City New Haven*, 40 Conn., 456; *Sutton v. Snohomish*, 11 Wash., 28; *Anderson v. City of Wilmington*, 19 Atl., 509; *Stevens v. City of Macon*, 83 Mo., 345; *McAllister v. City of Albany*, 18 Ore., 426, all of which are much alike and hold that where a city authorizes an excavation to be made in one of its streets and a traveler on the street is injured by the negligence of the person making the excavation in not sufficiently covering the hole, or not giving sufficient warning of the danger, the city is liable to the person injured by reason of the act which it has licensed without notice to it of the dangerous condition of the excavation. The rule on which these opinions rests is that the city having exclusive control over its streets, and being charged with the duty of maintaining them, must keep its streets in a reasonably safe condition for public travel, and for a failure to do this is primarily liable, although the defect in the highway may be due to the act of some contractor or third person done by authority of the city. (*Glasgow v. Gillenwaters*, 28 Ky. Law Rep., 2875; 2 Smith on Municipal Corporations, sections 1289-90; 2 Dillon on Municipal Corporations, section 1027, 4th edition.)

The city asked no instructions on the trial. The permit for the erection of the building was, under the ordinance, permission for the contractors to use one-third of the width of the street fronting the improvement for material for making and conducting the improvement, and while the ordinance required the contractor or person so using the street to guard the obstruction in such manner and with such light at night as to protect all those traveling upon the street, the primary duty of the city to the public to keep its streets reasonably safe rested on it. But the obstruction in the case before us extended out nearly to the middle of the street, and the plaintiff was injured, according to the uncontradicted testimony, thirteen or fourteen feet from the curb, which placed him beyond the point to which the obstruction should have extended under the ordinance. Yet the obstruction had thus existed in the street, according to the uncontradicted testimony, with the knowledge of the officers of the city, for several weeks, and under the evidence the city was at least not prejudiced by the failure of the court to submit to the jury the question whether the city had notice of the obstruction. It was a much traveled highway paved with granite, and for the city to permit such an obvious obstruction to remain for the length of time shown by the evidence in such a street, when its officers, whose duty it was to report on such matters, knew all about it, can not but evidence acquiescence on the part of the city in this use of the highway by the contractors. (2 Smith on Municipal Corporations, sections 1298-1300.) Instructions 1 and 2 aptly informed the jury that Hoertz was liable if he placed the obstruction in the street, and failed to indicate it by sufficient light to give reasonable warning to persons using the street. By them the jury were also properly told that it was the duty of the city to keep its streets in a reasonably safe condition for use by the public, and that it was its duty to exercise ordinary care in causing warning to be given by persons licensed by it to use a portion of the public street as a place of deposit for building material, and that it was liable as well as Hoertz if it failed to exercise such care. The jury were properly told that Hoertz was not liable unless he or his agents placed the obstruction in the street, and that if it was placed there by some other person, and the city did not use ordinary care to give notice of it, the city alone was liable. While the form of instruction 5, if taken alone, would be objectionable, the meaning, when it is read in connection with 3 and 4, is perfectly plain. The instruction begins with the words "If the jury find their verdict for the plaintiff." Hoertz and the city were the only defendants to the action at the time the instruction was given. If the jury did not find against Hoertz they could not find for the plaintiff unless they found against the city. The instruction was not, therefore, an intimation from the court that the jury should find against the city. It only gave the measure of damages in case "the jury find their verdict for the plaintiff." The obstruction of the street, as the uncontradicted testimony showed it to be, manifestly made the street not reasonably safe for the traveling public, and no good could have come to the city from the giving of an instruction on this point which neither party asked on the trial. The rule is that only errors prejudicial to the substantial rights of the party complaining are grounds for reversal. In civil cases the circuit court is not required to give the whole law of the case to the jury in his instructions, but it is incumbent

on the litigants to ask such instructions as they deem proper. No good would come from giving to the jury instructions on every conceivable question not desired by either party on the trial because deemed of no value before the jury under the evidence. The court after laying down in instruction No. 1 correctly the rule that it was the duty of the city to keep its streets reasonably safe for use by the public, undertook in No. 4 to bring the mind of the jury directly to the question of fact whether ordinary care had been exercised by the city to give notice of the obstruction, all the evidence introduced by it on the trial being on this question, and there being no conflict of evidence as to the nature of the obstruction. The instruction could not have been prejudicial unless, as maintained for appellant, the city was not liable without notice to it that the obstruction was not lighted. To so hold would be to relieve the city entirely of its primary duty to keep its streets in a reasonably safe condition. It had authorized or acquiesced in the obstruction of the street, and, therefore, had notice of the obstruction. Knowing the obstruction, it was bound to exercise ordinary care for the protection of the traveling public in giving warning of the danger. It was not liable if, notwithstanding this, an accident happened; but the instructions of the court only required of it ordinary care in this regard. In *District of Columbia v. Woodbury*, above cited on this point, it is said: "If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted." To the same effect are the other cases referred to; also 2 *Dillon on Municipal Corporations*, section 1027; *Deering on Negligence*, section 163; 1 *Shearman and Redfield on Negligence*, section 367, note 6, 5th edition.

Instruction 6 properly defined contributory negligence, for as the plaintiff did not know of the obstruction of the street, unless he might by ordinary care have discovered it in time to have avoided injury, he might recover; and he had a right, in the absence of anything indicating the contrary, to assume that the street was safe, or reasonably so. (*Glasgow v. Gillenwaters*, 23 Ky. Law Rep., 2875; *Pettingill v. Yonkers*, 116 N. Y., 564.)

One of the grounds assigned for new trial is that the city attorney who was familiar with the facts was not present at the trial. But there was no motion by the city to continue the case on account of the absence of the city attorney, and in the absence of such a motion it can not complain that the circuit court proceeded with the trial. A litigant can not go on with a trial without objection in the absence of its leading counsel, and then, when defeated, ask a new trial because he was not present. (Besides, we know judicially there are six divisions of the circuit court in Jefferson county, and it is impracticable for one man to be present in all the trials in all of these divisions, to say nothing of the cases in this court or the United States courts.)

While the verdict is large, we can not say, under the evidence, it is so large as to indicate passion or prejudice. The plaintiff is a young man at the opening of life; his right eye is entirely destroyed, his left is so affected he can not read with it, he suffered for months most intensely, and his intended career in life is destroyed. The city did not seek by any pleading to recover against the negligent contractor. The authorities seem to be that in such

cases the person using the street under the permit is liable to the city for any damages the city may sustain by reason of his neglect or failure to comply with the terms of the ordinance. (2 Dillon on Municipal Corporations, sections 1034-1035; 2 Smith on Municipal Corporations, section 1805.) But as the city asserted no claim against the contractors, this question is not here presented.

On the whole case we perceive no substantial error to the prejudice of appellant, wherefore, the judgment complained of is affirmed.

Whole court sitting.

Judges Barker and O'Rear dissent.

LEONARD v. HOLLAND.

(Filed March 15, 1904—Not to be reported.)

1. Sale of timber—Injunction—Where appellant entered into a contract for the sale of timber, providing that "all timber that can be made into railroad cross ties, consisting of white oak, post oak and chestnut oak, no limit in size of post oak and chestnut oak, that will measure in diameter of not over twelve inches and down to the smallest that can be worked into ties," in an action by him against appellee to enjoin him from the further cutting of timber and for damages for the violation of the contract, it is apparent that the words "no limit in size of post oak and chestnut oak" are parenthetical, and that only white oak trees not over twelve inches in diameter were sold, and where appellee was cutting oak trees in excess of twelve inches in diameter he was violating his contract and the court erred in not perpetuating the injunction, with costs.

P. H. Darby for appellant.

Mulloy & Utley for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Hobson.

Appellant Leonard filed this suit on March 9 1899, alleging in his petition that he was the owner of a tract of land in Lyon county containing 1,853 acres; that on September 12, 1898, he entered into a contract with the appellee, Holland, as follows: "This contract and agreement made and entered into this 12th day of September, 1898, by and between S. N. Leonard, of the county of Lyon and State of Kentucky, of the first part, and W. W. Holland, of the same county and State, of the second part, witnesseth: The party of the first part has bargained and sold to the party of the second part all timber that can be made into railroad cross ties, consisting of white oak, post oak, and chestnut oak, no limit in size of post oak and chestnut oak, that will measure in diameter not over twelve inches and down to the smallest that can be worked into ties, that is now growing on what is known as the McPhail land lying on Cumberland river, in Lyon county, Kentucky, and aggregating about 1,853 acres; also the second party is to have the privilege of working, and agrees to work, all laps of the large growth that will be cut by the first party for other purposes, that can be worked into ties, for all such ties cut and made by said second party on said land the second party hereby agrees to pay 5 cents per tie. It is further agreed that after

the parties to this agreement, or some one acting for them, shall have gone over said land and made as close an estimate of the number of the ties, the second party will probably get off of the land, the said second party will pay to the first party an amount in cash in advance equal to the worth of said timber according to said estimate; and that upon final settlement between the parties proper adjustment will be made according as the estimate may go over or under the number of ties actually obtained."

He alleged that the defendant, Holland, was cutting in violation of the contract, measuring white oak trees over twelve inches in diameter at the stump, to his damage in the sum of \$500, and that Holland was insolvent. He obtained an injunction restraining Holland from cutting any white oak trees larger than twelve inches in diameter at the stump. Holland, by his answer, filed on May 8, 1899, denied that he was insolvent, and claimed that he had the right under the contract to cut white oak trees not measuring more than twelve inches in diameter at the top according to the customary rule for measuring trees. In another paragraph he pleaded that the plaintiff had entered on the land after the contract was made and cut from it a large number of trees belonging to him under the contract, to his damage in the sum of \$1,000. In an amended answer, filed on May 22, 1900, he alleged that the plaintiff had cut and removed from the land since his former answer was filed post oak timber sufficient to make 5,000 cross ties, and for this he prayed damages in the sum of \$500. In his reply the plaintiff pleaded that immediately after the commencement of the action the defendant had abandoned his contract and refused to cut any more timber on the land, or to work it into cross ties, and still refused to do so. By his rejoinder the defendant denied that he had abandoned his contract, and alleged that he had been prevented by the injunction from going on with it and cutting the timber, as he did not know what to cut, and could not, without loss, cut part and leave part, and afterwards come back for it. In this condition of the pleadings the court transferred the case to the common-law docket on the issues whether the timber had been cut, and as to the damage resulting from the cutting. The jury to whom the case was submitted found the following special verdict: "We, the jury find from the evidence that W. W. Holland cut from the land 28,000 feet of white oak timber more than twelve inches in diameter at the stump, valued at \$3.50 per 1,000 feet, and find that plaintiff has cut from same land 200,000 feet post oak timber, valued at \$3 per 1,000 feet, and find that same was cut by S. N. Leonard from May, 1899, to July, 1900."

The case being then submitted, the court adjudged that the conduct of Holland did not constitute an abandonment of his contract, and entered judgment in his favor for \$600, subject to a credit of \$98 and his costs; but made no disposition of the injunction. From this judgment Leonard appeals.

It is apparent from the contract that the words "no limit in size of post oak and chestnut oak" are parenthetical, and that only white oak trees measuring in diameter not over twelve inches were sold. For there being no limit as to the post oak and the chestnut oak, unless the words limiting the diameter to not over twelve inches refer to white oak trees, they were meaningless. The trees were sold to be cut into cross ties. A standing tree

must be measured at the stump. It can not be measured at the top until it is cut, and there is no fixed point for measuring trees at the top. Nearly any tree, if you go up the trunk high enough, will measure less than twelve inches. The plain meaning of the contract is that only the smaller white oak trees were sold. This is shown by the reference to the laps of the large growth, which, by the contract, are to be worked into ties. The plaintiff was, therefore, right in his construction of the contract, and the court erred in not perpetuating the injunction with costs.

The special finding of the jury is not sufficient to warrant a judgment in favor of Holland for any sum. It simply finds the amount of timber cut by Leonard, and the value of it. If Holland had cut this timber himself, he would have had to pay Leonard at the rate of 5 cents a tie for it. There was no time fixed in the contract within which Holland was to cut the timber, and from the agreed facts we concur with the chancellor in the conclusion that Holland did not intend to abandon his contract. Still the injunction was no reason for his not going on with the cutting of the timber. His being enjoined from cutting what he had no right to cut under the contract was no reason for his not going ahead with what he had a right to do. This he should have done, and under all the circumstances, in view of the lapse of time, we conclude that Leonard, in cutting the timber, should in equity be regarded as cutting it to get his money out of it.

On the return of the case the circuit court will charge Leonard with the value of the post oak timber cut as fixed by the jury, and credit him by the value of the white oak as fixed by them; also by the amount which he would have received from Holland for the cross ties if Holland had cut the timber. The verdict of the jury not being sufficient to warrant a judgment, the court on the return of the case will allow the parties to take proof and make an adjustment between them on the question of damages. The parties may be allowed to amend their pleadings, if they desire to do so.

Judgment reversed and cause remanded for a judgment sustaining plaintiff's injunction with costs, and for further proceedings on the counterclaim as herein indicated. The cost upon the counterclaim will depend upon the result.

STEVENSON'S ADM'R v. ILLINOIS CENTRAL R. R. CO., &c.

(Filed March 15, 1904.)

Removal to Federal court—Nonresident corporation sued jointly with resident citizen—Jurisdiction of State court—Appellant brought suit in the McCracken Circuit Court against the Illinois Central R. R. Co., Robert Bean, engineer, and A. T. Cole, conductor, for damages in the alleged negligent killing of plaintiff's intestate. The suit was removed to the United States Circuit Court by defendants against the objection of appellant. Plaintiff appeared in that court and made a motion to have it remanded to the State court, which was overruled. Defendants then filed their answer in the Federal court. Subsequently this action was dismissed by plaintiffs without prejudice. Plaintiff also prosecuted an appeal to this court from the judgment of the McCracken Circuit Court, and it was decided upon that appeal that the order of removal to the Federal court was improperly made because there was no denial of the averment that one of the defendants was

a resident of this State, but that this error was waived by plaintiff going into the Federal court and dismissing that action without prejudice, and that, as a consequence thereof, plaintiff had no action pending in either court. On July 23, 1903, and within one year after the accrual of his cause of action, plaintiff brought this suit against the same defendants and Roy Christian, fireman. The railroad company again filed its petition and bond for removal, and also a special plea to the jurisdiction of the McCracken Circuit Court, relying on the facts recited in bar of plaintiff's right to sue. To this plea of jurisdiction the plaintiff filed a demurrer, which was overruled, the plea sustained and action dismissed. Held—That the trial court erred in sustaining the plea to the jurisdiction of the State court.

Taylor & Lucas for appellant.

Wheeler & Hughes and Pirtle, Trabue, Doolan & Cox for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 6th of August, 1902, Lucy Stevenson was killed by a railroad train upon the tracks of the Illinois Central R. R. Co., and thereafter, on the 10th of October, 1902, her administrator instituted an action in the McCracken Circuit Court against the Illinois Central R. R. Co., Robert Bean, the engineer of the train, and A. T. Cole, the conductor, for damages, alleging that the death of his intestate was attributable to the negligence of Bean and Cole. This suit was removed to the United States Circuit Court upon the application of the railroad company, on the ground of diverse citizenship. Cole, the conductor, was not before the court. The administrator subsequently dismissed the suit without prejudice. Subsequently, on the 30th of November, 1902, he brought a second action against the same parties in the McCracken Circuit Court upon the same cause of action. The railroad company and Robert Bean again filed their petition and bond, asking a transfer of the case to the Federal court. Plaintiff objected to the order of transfer to the Federal court, which was overruled. The defendants in that case filed a transcript of the record in the United States Court at Paducah, and the plaintiffs appeared in the court and made a motion to have the case remanded to the State court, which was overruled. The defendants thereupon filed their answer to the petition in the Federal court, which, upon the motion of plaintiff, was controverted of record. Subsequently this action was dismissed without prejudice on the motion of plaintiff. Plaintiff also prosecuted an appeal to this court from the judgment of the McCracken Circuit Court, and it was decided upon that appeal that the order of removal to the Federal court was improperly made, because there was no denial of the averment that one of the defendants, Cole, was a resident of the State of Kentucky, but that this error was waived by plaintiff going into the Federal court and dismissing that action without prejudice; and that as a consequence thereof they had no action pending in either court. But the opinion in that case states that the plaintiff could bring another suit upon the same cause of action in the State court if not barred by the lapse of time. (Stevenson's Adm'r v. Illinois Central R. R. Co., 24 Ky. Law Rep., 442.) On the 23d of July, 1903, and within one year after the accrual of his cause of action, the administrator of Lucy Stevenson brought this action against the Illinois Central R. R. Co., A. T. Cole, Robert Bean

and Roy Christian, who, they allege, were, respectively, the conductor, engineer and fireman of the train which killed his intestate, and to whose negligence her death was attributable. They also make additional allegation of negligence to those relied on in the former suits. The railroad company again filed its petition and bond for a removal of the action to the United States Court for the Western District of Kentucky, and also filed a special plea to the jurisdiction of the McCracken Circuit Court, relying upon the facts recited supra in bar of plaintiff's right to prosecute the suit. To this plea of jurisdiction the plaintiff filed a general demurrer, which was overruled, the plea sustained and action dismissed; and to reverse that judgment this appeal is prosecuted.

It is the contention of appellee that the Federal court, having acquired jurisdiction of the cause of action upon the former removals, it was exclusive and continuous, and no suit could thereafter be instituted or maintained for the same cause of action in the State court, and in support of this contention rely upon the case of *Cox v. R. R. Co.*, 68 Ga., 446; *R. R. Co. v. Fulton*, 59 Ohio St., 575, and *Chesapeake & Ohio Ry. Co. v. Riddell's Adm'r*, 24 Ky. Law Rep., 1687.

In the Georgia case it was decided that where a case has been removed from the State court into the Federal court the jurisdiction of the former ceases; and that after a nonsuit in the Federal court the case could not be renewed in the State court, and to support the conclusion there reached, relied upon the case of *Kern v. Huldekoper*, 103 U. S., 485. An examination of that case discloses that a party to a suit who was entitled to its removal from the State court, wherein it was brought, filed in due time his petition and requisite bond, asking for a transfer to the Federal court, and his petition was denied. The parties asking the removal nevertheless filed a transcript of the proceedings of the State court in the Federal court. The State court, however, proceeded to try and render judgment against the parties asking the removal. Afterwards the cause was tried in the Federal court, and the parties who had removed the case secured judgment in their favor. This latter judgment went to the Supreme Court by writ of error, and was affirmed, the Supreme Court holding that being entitled to removal, the Federal court acquired jurisdiction; and that all subsequent proceedings in the State court were void. We are unable to discover that the decision in *Kern v. Huldekoper* has any bearing upon the question at bar, or supports the judgment of the Georgia case. The case of *R. R. Co. v. Fulton*, 59 Ohio St., 575, seems simply to have adopted the reasoning and conclusion of the Georgia court. In the *Chesapeake & Ohio Ry. Co. v. Riddell's Adm'r* the court distinguished that case from the Georgia and Ohio cases above referred to. In that case the suit had been originally instituted in the Federal court by plaintiff, and afterwards dismissed without prejudice, and renewed in the State court. The jurisdiction of the State court was upheld, but the opinion seems to have recognized as authority the Georgia and Ohio. This was mere dicta, unnecessary to the decision of the case and in conflict with the conclusion reached herein, and is now withdrawn. In *Adams Express Co. v. Scofield*, 23 Ky. Law Rep., 1120, the same contention relied on by appellee in this case was made by the express company, and it was decided that an action which had been removed to the United States Court from the

State court stood upon the same footing as one originally brought in the Federal court, and that either might be dismissed without prejudice to a future action within the statutory period. The decision in this case finds abundant support in *Grassman v. Jarvis*, 100 Fed. Rep., 146, in which both the Georgia and Ohio cases are construed, and is decisive of the case at bar.

It follows that the trial court erred in sustaining the plea to the jurisdiction of the State court.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

SMITH v. PETREE.

(Filed March 15, 1904—Not to be reported.)

1. Lands—Sheriff's sale—Liens—Where a ditch under the drainage act of July 10, 1893, was constructed, the contractor upon a purchase of the land at a sheriff's sale for the purpose of enforcing his lien acquired no title to the land. Such purchaser was only entitled to a lien and costs for the construction of the ditch and the enforcement of his lien with legal interest.

2. Same—The cost of the drainage ditch is a lien upon the specific land assessed even in the hands of a purchaser, and the lien for the construction of the ditch is properly adjudged a lien upon the land.

Sweeney, Ellis & Sweeney for appellant.

R. G. Hill for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

On October 8, 1897, a proceeding was instituted in the Daviess County Court for the construction of a ditch at the cost of the adjoining land owners under the act of July 10, 1893 (Acts 1891-2-3, page 15(2)). On October 18 viewers were appointed and were directed to act on October 21. On November 3 they filed their report, by which they charged the land of James Carter's heirs with \$102.98 for the construction of the ditch. The land was correctly described in the report. Notice of the proceeding was given by posting notices as provided by the act. In these notices the course of the ditch was given, and the owners of this land were designated as James Carter's heirs. The land referred to was deeded to Mary Carter, the wife of James Carter. She had married the second time, and her second husband, Eaty, was one of the applicants. She had two children by Carter, none by Eaty. Young Carter was present at the survey. Before the report was filed they sold and conveyed the land to appellant Smith, and Smith paid them for it; but he had notice of the proceeding to establish the ditch before he bought, as shown by the evidence. The deed to Smith was lodged for record after the report was filed. This section of the ditch was not constructed, and the digging of it under the act was sold to the lowest bidder. Appellee Petree took the contract, and when the work was done obtained his certificate from the county clerk, which was listed with the sheriff for collection, the act providing that such claims should be collected by the sheriff as taxes are collected. The sheriff sold the land, and Petree, the purchaser, then filed this suit to recover it. The court sustained a demurrer to his petition so far

as he sought to recover the land, but adjudged him a lien on it for his money, giving him interest at 30 per cent. for two years, and after that certain interest and penalties. Smith appeals.

We concur with the circuit court in the conclusion that no title to the land passed by the sheriff's sale. It has been held in several cases that no title passes under a sale for taxes where the land is assessed in the name of B's heirs, and we see no reason why the same rule should not be applied to proceedings under the act referred to. But section 4636, Kentucky Statutes, provides: "Whenever any person shall purchase property sold for delinquent taxes and the sale shall be set aside because of any irregularity, the purchaser shall have a lien on the property for the amount of taxes and costs paid by him and for which the property is liable, with legal interest from the time of such payment, which may be recovered from the owner of the property or person owning the same."

The report of the viewers properly described the land. It was a proceeding in rem based upon notices posted up at three places in the vicinity of the land. The person in possession of the land was one of the applicants, and from the facts shown we think it a fair presumption the other Carter heirs had actual notice of the proceeding. Smith, the purchaser, had such notice. This is shown by the testimony of the witness who told him about it, and by his own statements to his attorney who prepared the deed for him, proven by him on cross examination, when examined as a witness for Smith. The purpose of the posting up of the notices is that the owners may know of the proceeding. The owners should be properly given by name in the notices; but where the land is correctly described, and the owners have actual notice of the proceeding, the fact that the owners of the land are designated in the notice by general terms, instead of their Christian names, is an irregularity merely in the proceeding within the meaning of section 4636, Kentucky Statutes.

In *Scherm v. Short*, 25 Ky. Law Rep., 1103, it was held that the cost of a drainage ditch is a lien upon the specific land assessed even in the hands of a purchaser, and that the sheriff has no authority to subject first the personal property of the person who owns the land at the time of the assessment. The court, therefore, properly adjudged a lien upon the land, but the judgment should have been limited to the amount of the taxes and costs paid by the purchaser, with legal interest from the time of payment.

Judgment reversed and cause remanded for a judgment as herein indicated.

COLLINS v. STODGHILL.

(Filed March 15, 1904—Not to be reported.)

Lands—Sales by the acre—Where two tracts of land were sold by general warranty deed, the first tract purported to contain 125 acres, more or less, and the latter four acres, more or less, the two tracts in reality only containing 113 acres, the purchaser was entitled to credit for the deficit at the date of the execution of the note, the sale being in fact by the acre, and so understood by the parties.

J. C. Beckham & Son for appellant.

Gilbert, Peak & Gilbert for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 5th of March, 1886, the appellant, W. T. Collins, sold and conveyed to the appellee, J. D. Stodghill, by general warranty deed two tracts of land in Shelby county, Ky., which were described by metes and bounds, courses and distances. The first tract purported to contain 125 acres, more or less. The second four acres, more or less. The recited consideration was \$4,900, \$1,250 of which was paid in cash, and a note for \$382.68, payable on the 5th of March, 1897, one for \$382.67, payable on the 5th of March, 1898, and a third for \$382.67, payable on the 5th of March, 1899, bearing interest at 6 per cent. from date, with a lien reserved to secure the payment of the note was executed by the vendees. This action was instituted by the appellant in the court below to enforce the payment of the note due on the 5th of March, 1899, less a credit of \$170 endorsed thereon on the 22d of December, 1899. The other notes were all fully paid. The defendant for answer set out that the two tracts of land represented to contain 129 acres, in reality contained 118 acres; that he bought the land by the acre at the price of \$30 an acre, and was entitled to a credit for the deficit at the date of the execution of the note at this rate. Plaintiff replied, denying that the defendant purchased the land at \$30 per acre, but alleging that the sale was gross, and that the alleged deficit was immaterial.

The testimony of a number of witnesses was taken to support the respective contentions of the parties. The trial court adjudged defendant a credit for the deficit at the rate of \$30 per acre, amounting in the aggregate to \$354. The defendant appealed, and plaintiff has appealed. The question involved upon the appeal has been frequently before this court and was very fully considered by Judge Robertson in *Harrison v. Talbot*, 12 Ky., 253, where all the Virginia and Kentucky authorities upon the question are reviewed. He sums up his conclusions in these words: "From an analysis of the cases, thus chronologically reviewed, the following principles may be deduced: First, when it is evident that there has been a gross mistake as to quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, he may be entitled to relief from the technical legal effect of his contract, whether it be executed or only executory. . . . The relative extent of the surplus or deficit can not per se furnish an infallible criterion. The conduct of the parties, the date of the contract, the value and extent and locality of the land, the price and other nameless circumstances, are always important and generally decisive. Sales in gross may be subdivided into various subordinate classifications: First, sales strictly and essentially by the tract, without reference in the negotiations or in the consideration to any estimated or designated quantity of acres; second, sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might exceed or fall

hort of that which was mentioned in the contract; third, sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversation of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar case, or than such as might be reasonably calculated on within the range of ordinary contingency; fourth, sales which, though technically deemed and denominated sales in gross, are in fact sales by the acre, and so understood by the parties."

The evidence in this case brings it within the fourth subdivision above enumerated. There is a deficit of approximately 14 per cent. of the land actually included in the boundary. The trial court, therefore, properly allowed a credit for this deficit at the average price per acre which the total contract price bore to the number of acres of land supposed to have been covered by the conveyance.

Judgment affirmed.

JONES, &c. v. CONWAY, &c.

(Filed March 15, 1904—Not to be reported.)

1. Practice—Appeals—Upon an appeal in an action to set aside a judgment where no part of the record of the suit in which the judgment sought to be opened is copied in the transcript, it is impossible to determine whether there was any error committed by the trial court or not.

2. Same—Presumption—The rule is that the circuit court is presumed to have ruled properly and where a new trial is sought the record of the old action should be brought up on appeal in order that this court may see as to the things complained of.

Harreld & Willis and N. T. Howard for appellants.

R. L. Greene and M. M. Logan for appellees.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Hobson.

Appellees were the executors of J. A. Jones. The estate amounted to something over \$20,000. They made two settlements in the county court and then filed suit in the circuit court for the settlement of their accounts, and in that suit two more settlements were made. Finally an order of the court was entered by which the exceptions to their last settlement were withdrawn and a judgment was entered finally settling their accounts. Appellants subsequently filed this suit to set aside the judgment and obtained a new trial on the ground that it was entered without authority by consent of attorneys, and that certain errors had been made by which appellees had not been charged with part of the estate they received.

On final hearing the court dismissed the petition and the appellants have brought the case here. But no part of the record of the suit in which the judgment sought to be opened was rendered is copied in the transcript. The four settlements referred to which were made part of the petition are not copied. In this condition of the record it is impossible for us to see that the court erred in dismissing the petition; for if the old record was here it might show that all the property referred to was accounted for by the ex-

ecutors in that case, and that these very matters were there looked into and determined. The rule is that the circuit court is presumed to have ruled properly, and where a new trial is sought the record of the old action should be brought up on appeal in order that this court may see as to the things complained of. (*Overstreet, &c. v. Brown, &c.*, 23 Ky. Law Rep., 317.)

Judgment affirmed.

MONTGOMERY v. MONTGOMERY.

(Filed March 15, 1904.)

Jurisdiction—Where the Court of Appeals is without jurisdiction to entertain an appeal it is likewise without jurisdiction to enter judgment upon supersedeas bond.

Jas. Bradley and B. M. Lee for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

The judgment appealed from in this case was superseded. The appeal was dismissed because this court had not jurisdiction of the appeal. The case now comes upon the motion of the appellee for judgment for damages on the supersedeas bond. The court is of opinion that as the court has not the jurisdiction to entertain the appeal, we are likewise without jurisdiction to enter a judgment upon the supersedeas bond.

Motion overruled.

CRAVENS v. DESPAIN.

(Filed March 16, 1904—Not to be reported.)

1. **Trespass to lands**—Evidence—Judgment—In an action for trespass to lands, the bill of exceptions not containing the evidence, it is presumed that the evidence would have sustained the action.

2. **Pleading**—Where appellee alleged that he was the owner of lands, and appellant denied this and pleaded that he was the owner, this affirmative was but an affirmative denial which did not require a reply.

C. S. Hill and G. C. Avritt for appellant.

L. S. Pence and R. L. Greene for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee brought this suit in trespass against appellant, alleging that he (appellee) was the owner and in the possession of a certain tract of land, and that appellant had wrongfully and unlawfully entered within the boundary and cut therefrom certain trees of a certain value.

Appellant's answer denied that appellee was the owner of the land, and denied that the cutting of the trees was unlawful or wrongful. In a second paragraph appellant further pleaded that he was the owner by title of record of a large boundary of land, including the tract in controversy. There was

no reply to this answer. Upon proof heard the circuit court adjudged the title in favor of appellee. Appellant has prosecuted this appeal on a transcript, including the pleadings, certain deeds filed with his answer, a copy of the surveyor's report and the judgment. He insists that upon the pleadings he was entitled to a judgment because of the failure to controvert the affirmative allegation of his answer.

We are of the opinion that the answer presented only one issue, that was the ownership of the strip of land described by the plaintiff. When appellee alleged that he was the owner, and when appellant denied that appellee was the owner, but alleged that he (appellant) was the owner, the last-named affirmation was but an affirmative denial which did not require a reply to put the matter in issue. (Ellis' Adm'r v. Blackerby, ante, 1557.)

The pleadings as they stand present the controverted point, that is, which of the two litigants was the owner of the strip of land in dispute. In the absence of the evidence heard by the circuit judge we must presume that it supports his judgment. An amended petition filed by the plaintiff before trial stated that another person named owned an undivided one-sixth of the land, and that he would enter his appearance to the suit. The record brought up does not show whether this person was brought before the court or not, but we must presume that he was, or the court would not have rendered its judgment. Upon such partial transcript we must presume in the absence of a schedule, as permitted by the Code, that the omitted part would sustain the judgment rendered.

Perceiving no error the judgment is affirmed.

DE WITT v. CHESAPEAKE & OHIO R. R. CO., &c.

(Filed March 16, 1904—Not to be reported.)

Railroads—Jurisdiction—In an action against a railroad company and one of its employes for damages, the fact that appellant had brought a suit against the railroad company alone, which he dismissed without prejudice upon an order being made to transfer it to the Federal court, the lower court was not without jurisdiction because of the removal of the first suit to the Federal court where it was dismissed, and it was error to overrule appellant's demurrer to the answer of appellees, and to sustain the plea to the jurisdiction.

Byron & Hargell for appellant.

E. L. Worthington and W. H. Wadsworth for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellant in the Bracken Circuit Court to recover of appellee, Chesapeake & Ohio R. R. Co., and two of its employes \$5,000 in damages for an alleged assault and battery committed upon him by the two employes mentioned while he was a passenger upon the train of the appellee railroad company.

Some time prior to the bringing of this action appellant had brought in the same court a similar suit against appellee Chesapeake & Ohio R. R. Co.,

alone, upon the same cause of action, and to recover the same amount. The first suit was upon the petition of appellee Chesapeake & Ohio R. R. Co., a foreign corporation, transferred to the Federal court, whereupon the appellant appeared in that court, dismissed the action without prejudice, and thereafter brought the present action in the Bracken Circuit Court. Appellee railroad company again filed its petition in the State court and moved to transfer the cause to the Federal court upon the ground of diverse citizenship, which motion was overruled by the lower court. Appellees then filed a joint answer, but nearly a year later they filed an amended answer, containing a plea to the jurisdiction of the court, setting up the proceeding in the former action in the Federal court in the matter of the removal, and relying upon such removal and the proceeding in the Federal court as a bar to the last or present action.

The appellant demurred to the amended answer, which demurrer was overruled and the petition dismissed. From that judgment this appeal is prosecuted. The question presented for decision by the appeal is, did the transfer of the first case to the Federal court, notwithstanding the dismissal of the case in that court without prejudice by appellant, oust the lower court of jurisdiction in this action, and operate as a bar to its renewal in the court?

In *Chesapeake & Ohio R. R. Co. v. Riddell's Adm'r*, 24 Ky. Law Rep., 1687, it was apparently so held by this court. But in *Lucy Stevenson's Adm'r v. I. C. C. R. R. Co.*, ante, 2011, the court in an opinion by Chief Justice Burnam, referring to the case of *C. & O. R. R. v. Riddell's Adm'r*, supra, said: "In that case the suit had been originally instituted in the Federal court by plaintiff, and afterwards dismissed without prejudice and renewed in the State court. The jurisdiction of the State was upheld, but the opinion seems to have recognized as authority the Georgia and Ohio cases. (69 Georgia, 446; 59 Ohio, 575.) This was mere dicta, unnecessary to the decision of the case, and in conflict with the conclusion reached therein, and is now withdrawn."

Continuing the discussion of the question of jurisdiction here involved the court further said: "In *Adams Express Co. v. Scofield*, 23 Ky. Law Rep., 1120, the same contention relied on by appellee in this case was made by the express company, and it was decided that an action which had been removed to the United States Court from the State court stood upon the same footing as one originally brought in the Federal court, and that either might be dismissed without prejudice to a future action within the statutory period.

The decision in this case finds abundant support in *Grassman v. Jarvis*, 100 Fed. Rep., 146, in which both the Georgia and Ohio case are construed, and is decisive of the case at bar. It follows that the trial court erred in sustaining the plea to the jurisdiction of the State court."

From the foregoing authorities it is manifest that the lower court was not deprived of jurisdiction in this case by the removal of the first suit to the Federal court, where it was dismissed. The lower court, therefore, erred in overruling the demurrer of appellant to the amended answer, in sustaining appellee's plea to the jurisdiction, and in dismissing the petition.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

DAVIS v. CITY OF CLINTON.

(Filed March 16, 1904—Not to be reported.)

1. Streets—Action to recover possession of—Pleading—In an action by a city for the recovery of possession of a street which had been enclosed, the fact that the petition did not allege that notice had been given requiring the removal of the fence did not render it defective. If defendant had admitted title in plaintiff and pleaded tenancy at will or by sufferance, then notice would have been necessary.

2. Same—Evidence—In an action for the recovery of real property it is competent to read from deed book tracing title, the deed books being original evidence and competent for the purpose for which they were introduced.

Brummal & Son and J. H. Shelton for appellant.

Bullock & Smith for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the city of Clinton against the appellant, John Davis, to recover the possession of a part of Water street, which had been without right taken possession of and enclosed by the defendant. The defendant's answer was a traverse and plea of the statute of limitation.

A jury trial resulted in a verdict and judgment in favor of the city, and the defendant has appealed. The first ground relied on for a reversal is that the trial court erred in overruling a demurrer to the petition on the ground that it failed to allege that the city had given the defendant one month's written notice requiring him to remove his fence, as required by section 2326 of the Kentucky Statutes. If the defendant had admitted the title of plaintiff, and plead a tenancy at will or by sufferance, he would have been entitled to this notice; but no such notice is required or contemplated where the defendant claimed a title to the property by prescription.

The next ground of complaint is that the trial court permitted the clerk of the Hickman Circuit Court to read to the jury from the deed books in his office deeds tracing the title to the tract of land in dispute to the city, it being insisted that only certified copies of these records attested by the clerk were competent evidence. We can not concur in this contention. The deed books were original evidence, and competent for the purpose for which they were introduced.

3d. It is also complained that the court erred to the defendant's prejudice in permitting the defendant to introduce as evidence a plat of the city of Clinton, certified by the clerk of the county court to have been pasted in the back of the deed book A., the first book of record in the office, on the ground that no evidence was offered to show that it had been adopted as the official plat of the city by the city authorities. It is shown that the town was incorporated in 1829, and the fact that this plat was pasted in the first official deed book of the county, which had remained continually in the possession of the clerk, certainly made it competent as an ancient document for the purpose for which it was introduced.

4th. It is claimed that the lower court erred in refusing to peremptorily instruct the jury to find for the defendant on the ground that the plaintiff had failed to trace title to the strip of land in controversy back to the Com-

monwealth. It appears that on the 19th of March, 1829, Stephen Ray and wife conveyed to the trustees appointed by the general assembly to locate a seat of justice for Hickman county a tract of 160 acres of land in consideration of an undertaking on their part to locate the county seat there. It further appears that the town of Clinton was laid out with streets, alleys, lots, etc., on this tract of land; and that it became the county seat of Hickman county. The record discloses that both the plaintiff and the defendant have recognized by deeds and conveyance of real estate this plat; and that the land enclosed by the defendant constituted a section of Water street as originally platted. Tracing to a common vendor, it was unnecessary for the city in this proceeding to trace Ray's title back to the Commonwealth.

Plaintiff also complains that the court erred in the instruction given to the jury and in refusing to give those offered by the defendant. Instruction No. 1, given to the jury, is as follows: "The court instructs the jury that the strip of ground in contest belonged to the corporation of Clinton under the deed from Stephen Ray, and they are instructed to find for the plaintiff, city of Clinton, in this case unless they shall believe from the evidence that the defendant, John Davis, and those under whom he claims had the actual, peaceful, adverse and continuous possession of said strip of land for more than fifteen years next before December, 1878, in which event the law is for the defendant, and the jury should so find."

Section 2546 of the Kentucky Statutes was enacted by the general assembly in December, 1873, and provides that the "limitations mentioned in the first article of this chapter shall not begin to run in respect to actions by any town or city for the recovery of any street, alley or other public easement, or any part of either, or the use thereof in such town or city, until the trustees or the council or the corporation, by whatever name known or called, have been notified in writing by the party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title to such town or city. Until such notice is given all possession of streets, alleys and public easements, or any part of either, in any town or city, shall be deemed amicable, and the person in possession the tenant at will of such town or city."

There is no claim that the notice required by this statute was ever given. The testimony is conflicting as to the length of time defendant had had the street enclosed, and it was, therefore, properly a question for the jury. And we think the first instruction embraced the whole law.

Perceiving no error prejudicial to the right of the defendant the judgment is affirmed.

HEWITT, TRUSTEE v. HENSLEY.

(Filed March 16, 1904—Not to be reported.)

Lands—Action to quiet title—In an action to quiet title the lands of one not a party to the action can not be affected, and where it was admitted by the adverse party that a certain boundary of land belonged to the claimant, the court properly adjudged it to the latter.

H. C. Clay for appellant.

W. F. Hall for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Nunn.

This suit was brought in the Harlan Circuit Court by appellee against appellant to quiet his title as against the claim of the appellant, whom he alleged was making a claim to his land and casting a cloud upon his title. In his petition he set out a boundary containing 200 acres.

The appellant answered and denied that he was casting any cloud upon the title of appellee, and admitted that appellee was the owner of the lower half of the boundary described in the petition, but stated that he was the owner of the upper half. Appellee then filed an amended petition, and alleged that he had, by mistake, bounded and described the 200-acre survey as his land; that he had, prior to the bringing of this action, sold and conveyed to his son, George Hensley, all the land described in his original petition except 51 acres of the lower end of the survey, which 51 acres he described in his amended petition by metes and bounds, courses and distances.

The court adjudged that the appellee was the owner of this piece of land described in the amended petition containing 51 acres. From this judgment appellant has appealed. The judgment of the lower court was right. This part of the land adjudged to the appellee is a part of the 100 acres admitted by appellant in his answer as belonging to him. George Hensley, the owner of the balance of the 200-acre survey, as alleged in the amended petition, was not a party to this action, and the court did not undertake to settle his and appellant's rights and claims to the 149 acres of this 200-acre survey.

Wherefore, the judgment of the lower court is affirmed.

HILL, EX'OR, &c. v. MAYES, GUARDIAN.

(Filed March 16, 1904.)

1. Settlement of estates—Liens—Where one holding a lien note assigned it to another who in action to settle the estate which the lien note affected remained silent as to having the note, made no claim against the estate and permitted the suit to settle it to go off the docket without presenting the claim, is limited in an attempt to recover the value of the note to an action against the legatees and distributees of the estate.

2. Constructions of statutes—By sections 428, 430, 432 and 434, Civil Code, requiring in an action brought to settle an estate that all persons having liens be made parties, and the making of an order directing all such persons to appear before the commissioner to prove claims, and that creditors who fail to so appear and prove their claims shall be concluded by the final judgment, all of these provisions being complied with a judgment of distribution is binding, whether a creditor has notice of the pendency of the action or not.

H. W. Rives for appellants.

T. S. Mayes for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Nunn.

T. J. West died in Marion county, Kentucky, in the year 1895, and left a

small amount of personal property and three tracts of land. On one of the tracts there was a lien in favor of one Bricken, who had died, upon whose estate J. M. Knott had administered. One of the tracts was purchased by T. J. West of Adeline Mackin for the price of \$700, for which he executed two notes, one for \$300, the other for \$400. This last note Mrs. Mackin, prior to 1895, sold and assigned to one Rosetta Johnson, testate of appellant herein. Mrs. Mackin, when she transferred this note to Rosetta Johnson, failed to note this fact on the margin of the deed book as required by section 498a of the Kentucky Statutes. The record stood as showing that she was still the holder of the lien notes.

One Robert Parrott qualified as the administrator of T. J. West, and on December 30, 1895, he instituted an action, by virtue of section 423 of the Code of Practice, to settle decedent's estate. He made, as defendants, the children of decedent West and the creditors, Adeline Mackin, J. M. Knott and J. M. Bricken, administrators of Alex. Bricken, Martin Horan and Catherine Horan. He alleged in his petition that these were all the creditors of the decedent known to him. He also alleged that the decedent was the statutory guardian of his children, and as such was indebted to them, as shown by his last settlement, which settlement was made part of his petition, in the sum of \$973, with interest from the year 1890. It also appears that J. M. Knott, some time in the month of February 1896, was appointed by the county court as guardian for the children of the decedent, West, who were made defendants in the action. But before he was summoned and made a party to the action as guardian, and on the 21st of February, 1896, the court rendered a judgment for the sale of the three tracts of land mentioned. The court first directed the commissioner to offer the three tracts separately and then as a whole, accepting the bid or bids which result in the most money to the estate and closed the judgment with these words: "All valid claims and liens against the land, or either of said tracts, shall attach to the proceeds thereof, and said lienholders shall not be prejudiced by the sale of this land as herein offered." The commissioner reported that he offered the three tracts separately. The bid offered for one was \$323, another \$162, and the other, or the Mackin land, \$126. He then offered the whole, and John Horan bid the sum of \$1,800, which bid was accepted and the court confirmed this report. Horan paid all the purchase price, and the deed was made to him.

The court, by an order made at its February term, by virtue of section 430 of the Code, referred the action to the master commissioner to advertise, take proof and report all claims against the estate. At the next term of the court he made his report, in which he reported a claim due Mrs. Mackin for something over \$200, and reported it as a preferred claim on the land, and sold by her to West, and reported the claim due the Bricken estate of \$150 as a preferred lien on one of the other tracts, and reported that the children of West had a preferred claim against their father's estate of \$1,242; that this money had been expended by their father in purchasing the two tracts of land other than the Mackin survey. He reported that he had advertised for claims, as required by section 430 of the Code and the order of court, and no claims were filed which were preferred claims other than those mentioned; that five or six persons, holding general claims, amounting in all to

about \$200, had proven and filed their claims, which were each set out in his report. This report was confirmed, and the court directed the cost of the action to be paid, and that the claims of Bricken, Mackin and the children be paid and the balance of \$37 be distributed pro rata among the general creditors. This was done, and the case stricken from the docket in the year 1897.

It appears that Mrs. Rosetta Johnson did not personally know that she had any claim against the estate of West; that J. M. Knott, who was the cashier of a bank, was her agent and transacted all her business, and actually made this transaction with Mrs. Mackin, by which she received this note for \$400 and collected the interest for her for one or two years from West. It also appears that neither Parrott, the administrator of West, nor any of the other parties to that action other than Knott and Mrs. Mackin had any knowledge or information of the existence of this \$400 note, or that Mrs. Rosetta Johnson held that claim, or any other claim, against the estate of T. J. West. There is not an intimation in the whole of the proceedings of Parrott to settle that estate that she had any claim against it of any kind or character.

In the year 1901, after the death of Rosetta Johnson, her executor, the appellant herein, filed his affidavit and moved the circuit court that the action of Parrott to settle the estate be reinstated on the docket and for a rule against the guardian, Mayes, the appellee herein, requiring him to refund of the amount that the children had received enough to pay the \$400 note, with its interest. Before this motion was heard by the court appellant dismissed this proceeding without prejudice, and immediately instituted this action.

In his petition he made John Horan, the purchaser of the land, and Mrs. Adeline Mackin, defendants. He made all the necessary allegations to enforce the lien on the tract of land sold by Mackin to West. Horan alone answered. He referred to all the proceedings of Parrott to settle the estate of West, and made the same a part of his answer and pleaded the judgment of the court therein as a bar to the prosecution of this action against him, and made his answer a cross action against the guardian of the West children, and asked that in the event he be compelled to pay this \$400 note to appellant, that appellee, the guardian, be compelled to refund that amount to him. Appellee answered this cross petition and also referred to the Parrott settlement suit, and claimed that the judgments rendered by the court therein were final judgments, and that these children received the fund due them by reason of these judgments of the court, and that they were final and could not be collaterally attacked by this action, and asked that this proceeding be dismissed. The pleadings were completed, issues made, proof heard and the court adjudged that the petition of appellant Hill and the cross petition of Horan, in so far as they affected appellee, be dismissed, and adjudged appellee his costs against appellant. The appellant asked a reversal of this judgment.

The appellant claims that Mrs. Rosetta Johnson is not bound by the judgment in the Parrott suit for the reason that she was not a party thereto. He also contends, even admitting that Parrott and all the parties to that action other than Knott and Mackin had no notice of the existence of the claim of

Rosetta Johnson, yet as it was shown by the proof that T. J. West in his lifetime knew that Mrs. Johnson held his note, and as these children and their guardian claimed through and under him, they were bound by his knowledge of the assignment to Mrs. Johnson, even if no one of them had been informed of it after his death. This last proposition is true, provided they had relieved the sum paid them as heirs, legatees or devisees. But as they received it as preferred creditors of the estate, these principles can not apply to them in this case.

As a general rule appellant's first proposition is a correct one, that is, no person is bound by a judgment in an action unless he be a party or privy thereto. But the settlements of the estates of deceased persons are governed by special Code provisions which, in our opinion, alters the general rule stated. By section 438 it is required that the representative or other person authorized to bring an action for the settlement of an estate make as defendants the real representatives, and all persons having liens upon or interest in the property left by the decedent and the creditors of the decedent, so far as known to the plaintiff. By this action it is presumed that the party bringing the suit may not know all the creditors and persons holding liens upon the property of the decedent. For the purpose of obviating this difficulty, and to give every creditor notice of the action, section 480 was enacted, directing the court to make an order for the creditors of the decedent to appear before a commissioner and prove their claims before a certain day to be named in the order, notice of which should be given by advertisement in a newspaper; or if none be published in the county, then by such other modes as the court may judge best calculated to give such creditors actual notice of the order; and in addition to the advertisement in the newspaper the court may direct publication in other modes.

By section 432 it is provided a creditor appearing before a commissioner and presenting his claim becomes thereby a party to the action and is concluded by the final judgment of the court allowing or rejecting his claim. It is provided in section 433, creditors failing to appear and prove their claims agreeable to such order, shall have no claim against the executor or the administrator who has actually paid out the estate in expenses of administration, and to creditors, legatees, or distributees. By section 434 it is provided, legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative as prescribed in the preceding section; and that liability shall continue during the same period that the liability of the personal representative would have continued but for said discharge.

It is apparent from all these Code provisions, taken together, that if an estate of a decedent be settled and these provisions be substantially complied with, then the judgment of distribution should be final and binding upon all creditors whether they had actual notice of the pendency of the action or not. And if a creditor did not appear in such an action and file his claim or move to set aside, vacate or modify the judgment of the court as prescribed by section 518 of the Code, then his claim is lost unless he can recover it against the legatees or distributees as provided by section 434 of the Code. As to the executor, administrator and creditors who file their claims, the

advertisement in the newspaper or by such other means or modes as the court may order, must be conclusively presumed to have notified all creditors of the pendency of the action. For it is provided by section 483 of the Code, that creditors failing to appear and prove their claims agreeably to such order, shall have no claim against the executor or administrator who has actually paid out the estate in expenses of administration and to creditors, legatees or distributees. The next section expressly limits the right of creditors who file the claims, to a recovery from the legatees and distributees of the estate, thereby impliedly relieving the creditors, who have, by order of the court, received the amount of the claims, from the contribution to those who may have failed to file claims.

We are of the opinion that, taking all these provisions together, this is a reasonable construction of them. Otherwise it never could be known when an estate was settled. Those creditors who had filed their claims would be afraid to receive any sums adjudged to them by order of court, for fear that many creditors had failed to present their claims, and that they might thereafter be harassed by a dozen of more suits for contribution. Hence the reason for limiting the right of such creditors to proceed against only the legatees and distributees of the estate.

For these reasons the judgment of the lower court is affirmed.

COMMONWEALTH v. REINECKE COAL MINING CO.

(Filed March 17, 1904.)

1. Indictment—Constitutional law—Upon an indictment charging a coal mining company with "willfully failing and refusing on or before the 15th and 30th days of August, 1902, to pay within fifteen days of the aforesaid 15th and 30th days, respectively, in full amount of wages," etc., returned pursuant to subsection 1, section 2739, Kentucky Statutes, Held—That the act as amended contains nothing that is not germane to subject expressed in the body thereof and in the title, and is not violative of section 51 of the Constitution, and the indictment properly charging an offense denounced by the statute is sustained.

2. Same—An indictment need not follow the language of the statute upon which it is based. It is sufficient if it use the words of the statute, or words of similar import.

3. Same—It is a well established principle in this State that as long as the legislature does not exceed the limits fixed by the Constitution in the enactment of a statute, the courts have no right to interfere on the ground that an act violates the natural principles of justice and right.

John L. Grayot and Clifton J. Pratt for appellant.

Gordon, Gordon & Cox and C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Settle.

On October 7, 1902, the grand jury of Hopkins county found and returned in the circuit court of that county an indictment against the appellee, Reinecke Coal Mining Co., which was in words and figures as follows:

"The Commonwealth of Kentucky
 "vs. Indictment.
 "Reinecke Coal Mining Co.

} Hopkins Circuit Court.

"The grand jurors of the county of Hopkins, in the name and by the authority of the Commonwealth of Kentucky, accuse the Reinecke Coal Mining Co. of the offense of unlawfully and willfully failing and refusing on or before the 15th and 30th days of August, 1902, to pay, within fifteen days of the aforesaid 15th and 30th days respectively, in full amount of wages in lawful money of the United States of America, due a person engaged and employed by said company in the mining industry. Said company employed the services of more than ten persons in the mining industry, committed in manner and form as follows, to wit: The said Reinecke Coal Mining Co., in the said company of Hopkins, on the 15th day of August, 1902, and before the finding of this indictment, did unlawfully and willfully fail and refuse on or before the 15th and 30th days of August, 1902, to pay, to within fifteen days of the aforesaid 15th and 30th days of August, respectively, in lawful money of the United States of America, the full amount of wages due Ben Anderson, a servant and employe of the said Reinecke Coal Mining Co., and to whom money was due by the said company for services rendered said company in August, 1902, for work done in the mining industry. The said Reinecke Coal Mining Co. was, during the months of July and August, 1902, engaged in the mining industry, to wit, mining coal, and did have in its employment during said months and engaged in mining coal at one and the same time and place, persons in greater number than ten. Said Reinecke Coal Mining Co. was at that time, and is now a corporation doing business in Hopkins county, Kentucky, and said company was not prevented from paying said wages in said months by unavoidable casualty. Against the peace and dignity of the Commonwealth of Kentucky."

The lower court sustained a demurrer to and dismissed the indictment, and from that judgment the Commonwealth has appealed.

The offense for which appellee was indicted was created by subsection 1, section 2739, Kentucky Statutes, which reads as follows: "That all persons, associations, companies and corporations, employing the services of ten or more persons in any mining work or mining industry, in this Commonwealth, shall, on or before the 15th and 30th days of each month, pay to within fifteen days of the aforesaid 15th and 30th days, respectively, each servant or employe in lawful money of the United States, the full amount of wages due each such servant or employe rendering such service, unless prevented by an unavoidable casualty: Provided, however, That if at any time of payment any servant or employe shall be absent from his place, he shall be entitled to such payment at any time thereafter on demand."

Subsection 2 of section 2739, forbids the blacklisting of their employes by any person, company or corporation, engaged in the business of mining, or the coercing of such employes to trade at any particular store. And subsection 3 of the same section, declares that a violation of any of the provisions of the act shall be deemed a misdemeanor, and, upon conviction, the persons, company or corporation so offending shall be fined not less than \$50 nor more than \$100 for each offense.

As originally enacted, subsection 1, section 2739, of the statute supra, dif-

ferred somewhat from that subsection as it now appears, in that it provided for the payment to the employe on or before the 16th day of each month, of his wages for the month previous. And contained this further provision, which is not found in the present statute, viz.: "But if such person, corporation or company, after using due diligence, is unable to make said payment as above required (i. e., on the 16th of each month), he or it shall, within fifteen days thereafter, make out a pay-roll and statement of account due each employe and also a due bill for said sum bearing interest from said 16th day of the month and deliver same to each of said employes."

The original act was amended by an act approved March 21, 1902 (Acts 1902, page 125). The enacting part of which is as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"That section 1 of an act entitled 'An act concerning the employes and servants in mining work or industry in this Commonwealth,' which was received by the governor, March 2, 1898, and became a law at the expiration of ten days without the governor's approval, be, and the same is, hereby repealed, and the following is enacted in lieu thereof."

Then follows the language constituting the present subsection 1 of section 3739, which is accurately quoted in the foregoing part of this opinion. We are not advised as to the grounds upon which the lower court sustained the demurrer to the indictment, as the judgment is silent upon that subject, but take it for granted that it was sustained upon one or more of the several grounds argued in the brief of counsel for appellee. It is contended that the indictment charges two offenses, for which reason the demurrer was properly sustained. We question the soundness of this contention. There seems to be but one offense set out in the indictment. Reduced to the briefest statement, the charge in substance is that appellee, on the — day of August, 1902, unlawfully failed and refused on or before August 15th and 30th, 1902, to pay to within fifteen days of those dates, respectively, in lawful money, the full amount of wages due Ben Anderson, its employe, among more than ten others, for labor performed by him in its business of mining. We, therefore, incline to the opinion that the demurrer should not have been sustained on this ground. But if we are mistaken in this conclusion, and should concede that the demurrer ought to have been sustained because two offenses are charged in the indictment, nevertheless it would have been error for the court to dismiss the indictment on that ground, for when a demurrer is sustained to an indictment because of its charging two offenses, the proper practice is to allow the Commonwealth's attorney to elect for which of the two offenses he will prosecute the defendant in the indictment.

It is insisted for appellee that the indictment is defective because it does not allege that Ben Anderson was at his place of labor at the time his wages were payable under the statute, or if absent, that he did, upon his return, demand of appellee his wages. This objection is urged in view of the proviso contained in the statute which declares, "that if at any time of payment any servant or employe shall be absent from his place of labor, he shall be entitled to such payment at any time thereafter on demand."

It is not necessary for an indictment to negative a state of facts that may be relied upon as a defense. If appellee can shield itself behind the proviso

of the statute it must do so by way of defense. An indictment need not follow the language of the statute upon which it is based. It may use the words of the statute, or words of similar import; consequently, the indictment in the case at bar is not, as argued, defective, because it does not follow the precise language of the statute upon which it is based. (*Commonwealth v. Soroggan*, 22 Ky. Law Rep., 1338; *Connor v. Commonwealth*, 13 Bush, 721.)

As it sets forth the offense with such certainty as to apprise the appellee of the nature of the accusation upon which it is to be tried, and to constitute a bar to a subsequent prosecution for the same offense, it is sufficiently specific. (*Paynter v. Commonwealth*, 81 Ky. Law Rep., 1563.)

It is also contended in argument that the amendment of 1902, under which the indictment in this case was found, was not enacted in compliance with the provisions of section 51 of the Constitution, which declares that: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; and no law shall be revised, amended, or the provisions thereof extended, or conferred, by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length;" and it is claimed that the title of the act of 1902 is defective in that the amendment of the act of 1898, is the subject thereof, and such subject does not appear in its title, and because, as further contended, it amends the act of 1898, by a reference to its title only, and without republishing the act as amended.

The title of the amendment of 1902 is as follows: "An act concerning the employes and servants in mining work or industry in this Commonwealth." The general subject of the amendment, as of the original act of 1898, is the better protection of employes and servants in mining work or industry, and the object in view is their payment in lawful money for services rendered. The act, as amended, contains nothing that is not germane to the subject expressed in the body thereof and in the title, and its meaning is so plain that any person of ordinary intelligence can readily understand it. Nor is it true that the act in question amends that of 1898, by a reference to its title only, and without republishing the act as amended. The act of 1902 sets forth in explicit terms that section 1 of the original act is repealed, and that the single section constituting the amendment shall be and is substituted therefor. No other section or provision of the original act was amended by the act of 1902, and as section 1, enacted in lieu of the one repealed, is set out in full, that is, "published at length," in the act of 1902, such publication was and is a substantial compliance with section 51 of the Constitution.

In *Purnell v. Mann, &c.*, 105 Ky., 95, this court, in construing the section of the Constitution, supra, said: "The question then arises how to construe the provision 'but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length,' so as to substantially comply with that section. We think the manifest intention was that the provision should apply only to so much of the law as, after passage of the new act, remains in force amended." * * * (*Herndon v. Farmer*, 24 Ky. Law Rep., 1049.)

The act of 1902 as passed and published, is full and specific enough as to the subject embraced by it to show for what part of the law of 1898 it is sub-

stituted, and, moreover, the part for which it is substituted being in express terms repealed, the residue of the law of 1898 is unaffected, and left in full force.

It is further contended by counsel for appellee that the statute, as amended, is class legislation, also special legislation, and not a just exercise of the police power, for any and all of which reason it is unconstitutional, and should be so declared by this court. The questions raised by the foregoing objections have been heretofore settled by this court in favor of the validity of the statute, and its constitutionality upheld, in the case of the Commonwealth of Kentucky v. Hillside Coal Co., 22 Ky. Law Rep., 549, and without taking time to quote from the opinion, or to discuss it in detail, we hereby express our approval of its reasoning and conclusions.

In truth, section 244 of the Constitution, which provides that "all wage earners in this State employed in factories, mines, workshops, or by corporations, shall be paid for their labor in lawful money," authorized the enactment by the legislature of the statute in question. It is true that Commonwealth v. Hillside Coal Co., supra, was decided before the passage of the act of 1902, whereby the law of 1898 was amended. But the points of difference between the statute in its original and amended form we have already indicated. They are not material, and the opinion of the court in Commonwealth v. Hillside Coal Co. is just as applicable to the present as it was to the former statute.

We can find no ground for the appellee's contention that an enforcement of the statute, supra, would interfere with vested rights, impair the obligation of contracts, or impose a penalty for the nonpayment of debt. It is a well established principle in this State that so long as the legislature does not pass the limits fixed by the Constitution, the courts have no authority to interfere on the ground that the act in question violates the natural principles of justice and right. (Tiedman Lim. Police Power, section 8.)

The subjects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals, and, fifth, the general welfare and safety of the citizens. All business must be subject to reasonable regulations, and as the legislature in enacting the statute under consideration seems to have kept within the purview of section 244 of the Constitution, we are constrained to hold that the statute in all of its parts is valid. Consequently, the lower court erred in sustaining the demurrer to the indictment.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

GRIFFIN v. GINGELL, &c.

(Filed March 16, 1904—Not to be reported.)

1. Mortgage liens—Prior equities—In an action to enforce a mortgage lien on land, on which there are numerous liens for purchase money and subsequent mortgages, Held—That as between equities, that which is prior in time is regarded as best and takes precedence over any which may be subsequently created.

2. Notice—Estoppel—On the facts of this case, Held—That notice given by Griffin, one of the cross plaintiffs, is not sufficient to create a *lis pendens*, or that H. and G., lien debtors, are estopped thereby to prevent the claim of the plaintiff from being first enforced against their lands.

8. Contested claim—No proof—The complaint of Millie Reed, wife of George Reed, that her claim for \$1,350, assigned to her by the building and loan association, was dismissed, can not be considered because it was contested as being fraudulent, and as the proof heard on the trial is not copied in the record, we must presume that it was sufficient to authorize the lower court in deciding against her claim.

Brown & Vance for appellant Griffin.

Givens & Givens for appellant Millie Reed.

R. H. Cunningham for appellee Gingell.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1898, George L. Reed purchased from the Mutual Life Insurance Co. of Kentucky 150 acres of land for the price of \$2,100, and executed therefor his five notes for the purchase price; four of them for \$400 each, and the last one for \$500. The insurance company reserved a lien on this land for the payment of these notes, and on that day took a mortgage from Reed and wife, as additional security, on two other tracts of land then owned by Reed; one known and will hereafter be called the 65-acre tract, and the other the 104-acre tract. Reed had paid on these notes up to the time that the judgment complained of herein was rendered, all the interest, and reduced the principal of them to about \$2,000. Soon after the sale of this land to Reed, he sold and conveyed to one T. C. Larue 120 acres of this 150-acre tract at the price of \$1,900. He paid \$300 in cash. The balance was to be paid in three equal annual payments. These notes were sold and assigned by Reed to appellant, P. H. Griffin. Afterward Reed sold the 65-acre tract to I. W. Gingell at the price of \$2,000, of which \$1,100 was paid cash and land and the balance on time. At the time of the judgment complained of Gingell had paid all of the purchase price except \$847.65, and one McKain held these notes. It appears that shortly before Reed sold the 65 acres to Gingell he sold the 104-acre tract and the balance of 30 acres, the remainder of the 150-acre tract purchased from the insurance company, to one John R. Hayne at the price of \$2,400, of which \$300 was cash, and the balance in five notes. These notes were sold and transferred by Reed to Mann Bros.

It appears from the record that all these purchasers, Larue, Gingell and Haynes, had no actual notice or knowledge of the mortgage of the insurance company upon these lands at the time they purchased, and when the insurance company enforced its mortgage lien the lower court adjudged that each of these purchasers should pay the insurance company its debt in proportion to the value of each of the tracts so purchased by them, and the parties all agreed that the court might fix the value at the prices each of them agreed to pay for the land, to wit: Larue's, \$1,900; Gingell's, \$2,000, and Haynes' land, \$2,400, and fixed the amount Larue should pay to the insurance company at \$603.44, and adjudged that he was entitled to a credit on the notes he had executed, and which were in the hands of P. H. Griffin for that

amount, and gave P. H. Griffin a personal judgment against Reed for this sum, and adjudged that the Illinois Life Insurance Co., assignee of the Mutual Life Insurance Co., had a superior lien on the Haynes tract of land for the sum of \$762.24, but as John R. Haynes had been discharged in bankruptcy, no judgment was given against him. It appearing that Reed had transferred the purchase money notes of Haynes to Mann Bros., it is adjudged that they have a lien inferior to the lien of the company, and directed that if Mann Bros. paid this sum of \$762.24, that the company should assign its lien to Mann Bros., and they should thereafter control the sale of the Haynes land. The court also adjudged that the insurance company had a lien on the Gingell 65-acre tract for the sum of \$635.20, and that Gingell then owed \$347.65 as the balance of the purchase price, and that McKain held these notes. The court ordered that these notes be applied as a credit on the \$635.20, leaving \$237.55 due to Gingell from Reed and wife. The court gave Gingell a personal judgment against Reed for this sum, and cancelled the notes held by McKain.

It also appears from the record that Geo. L. Reed became indebted to a building and loan association in a sum in excess of \$1,500, and prior to the sale to Gingell and Haynes he and his wife executed a mortgage to the building and loan association on the 65 and 104-acre tracts of land. This association brought an action against Reed and wife to enforce the mortgage lien. It appears from an order of court in that action that the association's claim was settled by Geo. L. Reed paying all of the debt except \$1,350, and his wife, Millie Reed, paid this sum to the association, and took an assignment of its lien to that extent for her benefit. Millie Reed, in this action, filed her pleading, alleging these facts, and asked the court to adjudge her a lien on these two tracts of land for the payment of the sum paid by her. Gingell and other parties to this action controverted her claim, and alleged that in fact the whole of this building and loan association debt was paid by Geo. L. Reed; that she did not pay anything thereon, and that this alleged payment by and assigned to her was a fraud, and done with the intention to defraud and defeat the claims of the creditors of Geo. L. Reed.

The lower court adjudged against her, and she has appealed from that judgment. It further appears from the record that when Gingell and wife purchased the 65-acre tract of land from Geo. L. Reed, \$1,000 of the purchase price was paid by a conveyance by Gingell and wife to Reed and wife of a house and lot in the city of Henderson. After this Reed purchased from the Ohio Valley Banking and Trust Co., 100 acres of land and paid part of the purchase price in cash and gave his notes for the deferred payments, and also executed to this trust company a mortgage on this house and lot in Henderson as additional security. Mann Bros. had sued Geo. L. Reed and recovered judgment against him as assignor of the Haynes land notes. Mann Bros. had execution issued on this judgment, and had it levied on this house and lot subject to the mortgage of the trust company. After this Reed and wife executed a mortgage to Yeaman & Yeaman and Givens & Givens, law firms of Henderson, on this house and lot to secure them in a reasonable fee for their services rendered and to be rendered Reed and wife in several suits pending in the Henderson Circuit Court.

Gingell and wife contend that the consideration failed to the extent of \$237

that they received for this house and lot, by reason of the fact that they were compelled to pay for Reed and wife this sum, to relieve the 65-acre tract of land of the lien of the insurance company, and that they have, as between them and Reed and wife, a lien on the house and lot for that sum, and that their lien extends back to the date of their deed, and that their lien is prior to all liens on this house and lot except the lien of the Ohio Valley Bank and Trust Co.; that their lien and equity is prior to the execution lien of Mann Bros., and that the court erred in refusing them a lien on this house and lot, subject only to the lien of the trust company, and that it should have been required to exhaust its claim and lien, first against the 100 acres of land sold by it to Reed, and for the balance, allowed a lien on the house and lot.

We are of the opinion that the court erred to the prejudice of Gingell and wife. They, as between themselves and Reed and wife, had a lien on the house and lot to the extent of \$287, which was subject, however, to the lien of the Ohio Valley Bank and Trust Co., and it should have been first required to exhaust the property of Reed in the 100 acres of land and then collected the balance, if any, from the proceeds of the house and lot.

In the case of *Swigert v. Bank of Kentucky*, 17 B. M., 226, the court said: "The doctrine is well settled that if one creditor have a lien on two funds, and another have a lien of a younger date upon one only of the two funds, the latter will have an equitable right to have the debt of the prior creditor paid out of the fund to which the lien of the latter does not extend."

This rule applies where the debtor or the person who placed a lien on the funds or the fund upon which the junior lien holder has not a lien is still the owner.

Mann Bros. have only an equity by reason of the levy of their execution on this house and lot, they having not, before notice of the equity of Gingell, perfected their lien by a sale of the property levied on and have one inferior to that of Gingell. As between mere equities, that which is prior in time is regarded as best, and takes precedence over any other which may be subsequently created. (See the case *supra*, page 230.)

The appellant, Millie Reed, complains because the lower court adjudged that her claim for \$1,350, assigned her by the building and loan association, was dismissed. Her claim was contested on the ground that it was a fraudulent claim. By consent the proof taken and heard on the trial below was not copied and made part of the record. We have no means of knowing what the proof was upon this issue, and must presume that the proof was sufficient to authorize the lower court in deciding against her claim. The appellant, Griffin, complains at the action of the lower court in not requiring the insurance company to first exhaust the two tracts of land purchased by Haynes and Gingell before proceeding to collect any part of its claim from the tract of land sold T. C. Larue, on which he held the purchase money notes assigned him by Reed, which he became the owner of prior to the sale of the two tracts of land to Haynes and Gingell. Griffin had no lien on any land except the 130 acres sold by Reed to Larue, and if Reed had still owned the Haynes and Gingell tracts, then the court should have required the insurance company to have first sold these two tracts and looked to the Larue tract for the balance of its claim. But as Reed had sold and

parted with both tracts, it was the duty of the court to require that the owner of each tract should pay the mortgage debt ratably, according to the value of the property held by each.

In the case of *Diokey v. Thompson*, 8 B. M., 814, this court said: "We are satisfied that the burden of the mortgage debt should not have been thrown exclusively upon the last purchasers, but should have been distributed ratably among all according to the value of the property held by each. Each of the vendees purchased absolutely, paid a full price for his purchase, and expected, no doubt, that the mortgage debt had or would be paid by the mortgagor, and that each would acquire an absolute estate in the parcel purchased. Either being disappointed, should not be made to bear the entire loss of his purchase, but only to bear the burden of the unpaid debt, equally, according to the value of the parcel acquired by him."

Griffin, prior to the sale of the two tracts of land by Reed to Haynes and Gingell, filed in the office of the county clerk of Henderson county the following notice:

"Notice is hereby given that in action numbered 599 and styled T. C. Larue v. Geo. L. Reed, in the Henderson (Kentucky) Circuit Court, the undersigned has filed a cross action affecting the right, title, claim and interest of the following persons, namely, Geo. L. Reed, M. A. Reed and T. G. Larue, in the following tracts of land in Henderson county, Kentucky, namely, one tract containing 65 acres, and the other 104½ acres and 4 poles, conveyed to Geo. L. Reed by James Miller and others by deed recorded in Deed Book No. 19, page 471, Henderson county clerk's office.

"P. H. GRIFFIN, by Attorney."

He claims that by reason of this notice a *lis pendens* was created, and that Haynes and Gingell were estopped by reason thereof to prevent the claim of the insurance company from being first enforced against their lands. Waiving the question as to whether or not the description of the land given in the notice was sufficient, the facts, as appear of record, are that Griffin held the Larue notes as assignee of Reed, and they were not a lien on either of the tracts sold to Haynes and Gingell, but were only a lien on the Larue tract. We are of the opinion that this did not create a *lis pendens*, or operate to give appellant a lien on either of the tracts, nor operate to authorize appellant Griffin to require that the Gingell and Haynes tracts of land bear the burden of the payment of the mortgage debt of the insurance company. The contention of appellant Millie Reed and Griffin, that the courts' order at its May term, 1903, in setting aside the judgment of the court rendered at the February term, 1902, was void, is not well taken, for the reason that the order to that effect was unnecessary, as the court, at the February term, 1902, when it had full and complete power over its judgments in equity, entered an order suspending the judgment, which had the effect to vacate it.

Wherefore, the judgment of the lower court is affirmed on the appeal as to Griffin and Millie Reed, and reversed on the appeal of Gingell, and remanded for further proceedings consistent herewith.

LOUISVILLE AND EVANSVILLE MAIL CO. v. CLARA BARNES' ADM'R.

(Filed March 16, 1904.)

1. Joint tort feasons—Part satisfaction by one—Liability of others—In an action against two defendants, charging joint concurring negligence, in causing the death of plaintiffs' intestate, the fact that the plaintiff, before the trial, dismissed the action without prejudice, against one of the defendants, in consideration of \$1,000, paid as part compensation for the damage sought to be recovered, does not bar the plaintiff from prosecuting his suit against the other defendant for a sum sufficient to make his entire recovery full and complete.

Powers & Anderson for appellant.

G. W. Jolly and W. T. Owens for appellees.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Davless Circuit Court rendered at its October term, 1902, against the appellant, Louisville and Evansville Mail Co., and in favor of John T. Barnes, administrator of Clara R. Barnes, deceased. The judgment was for \$2,000.

The facts of the case as they appear of record are in substance as follows: About 11:30 o'clock on the night of the 12th of July, 1901, Clara R. Barnes lost her life by drowning in the Ohio river at Owensboro, Ky. The young lady, together with about 400 other persons, embarked early in the night on an excursion boat of the Marsden Co., called the "Fawn," with two barges attached, for a pleasure trip up the Ohio river to Rockport, Ind., and return. On the return, and for the purpose of disembarking its passengers, this steamer landed at Owensboro, Ky., at the upper end of appellant's wharf boat, the barges lying "head on" at the forward end of the wharf boat; the proof of appellee showing that the barges were properly and securely fastened to the wharf boat with a rope attaching the "Fawn" to the bank or shore to keep her from swinging out into the stream. In this situation there was no space between the barges and the wharf boat. The passengers left the barges by stepping down fifteen or sixteen inches on to the front of the wharf boat. About fifty of the passengers had disembarked when the deceased, Clara Barnes, in attempting to make this step from the barge to the wharf boat, fell between them and was drowned. According to appellee's proof this separation was caused by one of the boats of appellant coming into the wharf boat "head on," striking the wharf boat at the upper end, thereby forcing the separation at the place and the time she made her step; that this was an improper and negligent landing of the appellant's boat; that those in charge of it saw the situation of the boat and barges of the Marsden Co., and the disembarkation of its passengers. On the other hand, appellant claims that it did not make its landing in that manner, that it made a proper, easy and safe landing, and did not cause the separation of the barges and the wharf boat; that the separation was produced from some other cause; that in fact the deceased fell between the two and lost her life before appellant's boat made its landing, or even touched the wharf boat; that the deceased lost her life by reason of the negligence of the Marsden.

Co. in making an improper landing at the wharf boat, by failure of the Marsden Co. to use a stage plank for the use of the passengers to pass from the barge to the boat, or by the contributory negligence of the deceased herself in not using ordinary care for her own safety.

Appellee sued both companies, charging joint and concurring negligence, but just before the trial dismissed, without prejudice, his petition against the Marsden Co., and proceeded with the trial against the appellant. The appellant complains that the court erred in overruling its motion for a peremptory instruction to the jury at the conclusion of the evidence. In this the appellant is mistaken. There was proof introduced by many witnesses that the landing made by the appellant with its boat was a very unusual, unsafe and dangerous one, and that the force with which it struck the upper end of the wharf boat forced the separation of the boat and barge just at the moment the deceased was making her step from the one to the other and caused her death.

The appellant complains that the court failed to give a proper instruction on the question of contributory negligence on the part of the deceased. There is not anything in the record showing the slightest neglect or want of care on the part of the deceased, by which she lost her life, and if the court had failed to give any instruction on this point it would not have been prejudicial to appellant, as there was no evidence upon which to base it. Appellant also complains of the following words in the first instruction: "And if they shall further believe that said drowning was caused by the negligence in whole or in part of the defendant, Louisville and Evansville Mail Co.'s officers or servants, etc."

In the case of Louisville and Cincinnati Packet Co. v. Mulligan, 25 Ky. Law Rep., 1288, the court, in discussing an instruction with similar words embodied in it, said: "Appellee being a passenger on the 'White Dove,' and having no control over the boat, may recover of the Cincinnati, although those in charge of the 'White Dove,' were more negligent than those in charge of the Cincinnati. For the negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both. (Danville, & Co. v. Stewart, 59 Ky., 119; Louisville & Co., R. R. Co. v. Caseys' Adm'r, 72 Ky., 728; 7 Am. & Eng. Enc. of Law, 446, and cases cited. * * * The court, by its instructions, told the jury that both boats were governed by the same rules and regulations. * * * Also that appellant was not liable to appellee unless the plaintiff was injured by reason of the negligence in whole or in part of the officers in charge of the Cincinnati."

The court in that case approved this instruction. The most serious question involved in this case grows out of an issue made by an amended answer which was filed during the trial in the lower court, in which it was in substance alleged that the appellee had, in consideration of \$1,000 paid to him by the Marsden Co., dismissed his action against the Marsden Co., this appellant's joint tortfeasor, and had accepted the \$1,000 in satisfaction of his cause of action; that he had no further right to prosecute his action against this appellant. This was traversed by the appellee, and the proof introduced upon this question showed the following state of facts: The president of the Marsden Co., prior to the convening of the court when the trial was had,

desired to avoid further litigation of the matter, and authorized the attorneys for the Marsden Co. to endeavor to bring about a settlement and compromise of the litigation in so far as it was concerned, and authorized them to pay as much as \$1,000, if it took that much to effect a compromise, and placed this money in a bank subject to the order of its attorneys. These attorneys approached the attorneys for appellee, and made a proposition for a compromise, and eventually offered the \$1,000. The attorney for the appellee refused, stating that while they believed that the Marsden Co. was possibly not liable for any negligence, at least they believed its negligence was not as great as that of appellant company's, yet they were afraid if they accepted this compromise settlement appellee's right to prosecute the action against the appellant, their joint tortfeasor, would be barred. Thus matters stood until six or seven days after verdict and judgment against appellant, when the attorneys for the Marsden Co. paid the attorneys for the appellee this money, and they immediately entered a credit upon the judgment against the appellant for this amount of \$1,000.

We are convinced from all the proof in the case that there was an understanding between the attorneys for the Marsden Co. and the appellee's attorneys, prior to the trial, that this amount was to be offered and accepted and the Marsden Co. was to be released, and the case dismissed against it. And that the dismissal was in conformity with this understanding. The question to be determined is whether this operated as a release of the appellant, it being a joint tortfeasor.

Our opinion is, that if the appellee had accepted this \$1,000 in satisfaction of his cause of action or claim for damages, then it would have operated as a release and a bar to any other proceeding against appellant on account thereof. But it is shown by the proof, without contradiction that it was accepted as only part satisfaction, and a release of the Marsden Co., but not in satisfaction of his cause of action and claim for damages. It is a universal rule of law that joint tortfeasors are jointly and severally liable to the injured party. He may sue any one or all at his election, but when he once receives satisfaction for the injury done him from one or more of the tortfeasors, he is barred from proceeding against the other joint tortfeasors. This is upon the idea that he is only entitled to one satisfaction, and to avoid his getting more than one compensation for his injury. There are authorities in many States which hold that any satisfaction from and a release of one joint tortfeasor, releases all. But on a close investigation of these cases, or at least the most of them, it will be found that they were cases where the proof showed that the injured parties had received full satisfaction for their injuries or cause of action. Such are the cases of *Dulaney v. Buffum*, 73 S. W., 125; *Hubbard v. St. L. & M. R. R. Co.*, 72 S. W., 1078; 8 Allen, 474; 57 Cal., 270, 15 Am. Dec., 534; 102 Ga., 40, and other cases cited in these opinions. The sole reason given in these opinions for the rule as stated is that it is to prevent the injured party from receiving more than one compensation or satisfaction for his injury.

We are unable to understand why a part satisfaction and release of one tortfeasor can be considered as complete satisfaction of his claim for damages, and operate as a bar to his cause of action against the other tortfeasors. There can be no good reason for this. The collection of part satisfac-

tion from one tortfeasor is a benefit to the others. Under the law there is no right of contribution existing between tortfeasors. The law does not look with favor upon wrongdoers, and they are unlike obligors in an ordinary contract, where the right of contribution is given. The law ought not to be that a release of one tortfeasor, by his making a partial satisfaction for the wrong done, that this should operate as a release of the other wrongdoers. The law looks with favor upon compromises and settlements. It is not the intention of the law to force people into litigation and prevent settlements out of court.

To uphold the rule contended for by appellant, such a result would follow. If ten persons commit a joint tort, and injure a person to the extent of \$1,000, and if nine of them recognize that fact, and were willing to pay \$100 each for the purpose of remunerating the injured party, and to avoid the expense and annoyance of litigation, and the tenth man refused to pay his \$100, according to appellant the injured party could not accept the \$900 in part satisfaction, and sue the stubborn tenth man. He would plead the settlement as a satisfaction and a bar. Such a construction of the law would be unreasonable and unjust. All that such a person should be allowed to take advantage of would be to require that in any judgment that should be rendered against him, it should be rendered for one satisfaction of the claim for damages less any sums that might have been paid by his joint tortfeasors as a partial satisfaction.

In the case of *Ellis v. Esson, &c.*, 50 Wis., 153, the court said: "The contract set up in this case shows that the plaintiff did not receive the \$200 from Comstock in satisfaction or as full compensation for the injury he had sustained by the trespass, and that it was not the intention to release the other joint trespassers from liability for the trespass. The plaintiff's agreement not to sue Comstock for the trespass, under the circumstances disclosed by the evidence in this case, does not, therefore, discharge the other joint trespassers except pro tanto. The court below properly rendered judgment in favor of the plaintiff for the damages he had sustained by reason of the trespass, less the sum of \$200 received of Comstock. This rule is, we think, supported by the great weight of authority, as will be seen by an examination of the large number of authorities cited" (10 N. H., 92; 8 Me., 568; 2 Vt., 209; 41 Vt., 110; 49 Vt., 823; 3 Robt., 712; 3 W. Va., 893; 22 Pick., 807; 1 Gray, 630-636; 9 Cow., 37; 38 N. J. L., 359; 15 Abb. Pr., 378; 6 Eng. Com. Law, 11, 54 Id., 551; 37 Barb., 319, and 45 Md., 60)

Again, in the same case, the court said: "Certainly the receipt of a partial satisfaction from one of two joint tortfeasors is no injury to the other who is afterwards sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint wrongdoer to proceed at all against his associate, and his refusal to proceed against him is no ground of defense. As it is wholly optional with the injured party to proceed against one or two wrongdoers for the whole of his damages, there is no equity in holding that, because he has received a part satisfaction for his injury from the one not proceeded against, upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defense to the action. He is benefitted and not injured by such proceeding."

The case of *Snow v. Chandler*, 10 N. H., 93, was one where Chandler and one George Holt committed an assault and battery upon Snow; Holt being a minor applied to one White to procure a settlement with Snow for the injury he had received. Snow accepted \$90 as part satisfaction of his cause of action and injury, and agreed to look to Chandler for the balance of his compensation. Snow sued Chandler, and this settlement with Holt was pleaded in bar of the prosecution of the action, claiming that the release of Holt released him. The court said: "The evidence is that at the time of receiving the money from Holt the plaintiff declared that he would not settle with Chandler for \$500. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this, that the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum, the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a part satisfaction of the damage, and the plaintiff may sue or omit to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such arrangement; he remains liable for the whole damage until satisfaction is made. If the individual receiving the injury sees fit to visit the penalty upon any one guilty individual, rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. At the same time, any partial payment by a cotrespasser avails so far for his benefit. Such was the ruling in this case. To this extent the defendant can avail himself of plaintiffs' arrangement with his cotrespasser, but there was nothing in that contract which constitutes a bar to this suit."

The case of *Lovejoy v. Murray*, 3 Wallace, 17, was one in which Murray had recovered judgment on a claim for damages for several thousand dollars and had received \$800 thereon. He then sued the other joint wrongdoers, Lovejoy, etc., and they pleaded the judgment and Murray's acceptance of \$800 thereon in bar of his right to prosecute the action against them. The case was appealed to the Supreme Court of the United States. In an opinion by Justice Miller, the court said: "But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his cotrespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser, or a release to his cotrespasser, do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done to him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such. We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar

in an action against another joint trespasser, who was not party to the first judgment."

In the case of *Bloss v. Plymale, &c.*, 3 W. Va., 409, the court said: "As the cause of action is against all the joint trespassers, the plaintiff may sue all or either of them at his election; and he is entitled to full satisfaction, but he is entitled to but one satisfaction. So where there are different findings in the same verdict when all the trespassers are sued, the successful party must choose *de melloribus damnis*, he can not claim to collect all. It follows then if the damages are satisfied in part by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain in the record. And in such case it was but right and proper that the jury should deduct in their finding whatever sum the plaintiff had already received on account of the alleged trespasses from any of the joint parties, who were afterwards dismissed. This would be the just application of the rule that there can not be a double remuneration for the same wrong."

We have been unable to find where the precise question before us has been considered or passed upon by this court, but the trend of the cases seem to support the conclusion at which we have arrived. The two cases of 1 A. K. M., 433, and *Id.*, 458, in effect decide that in suits on tort, where several are liable, nothing short of a full satisfaction from one will be a bar to further proceedings against the other joint tortfeasors.

In the case of the *United Society of Shakers v. Underwood, &c.*, 11 Bush, 272, this court quoted with approval the quotation above from *Lovejoy v. Murray*, *supra*, and then said: "It thus appears that while the plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendant, or, in case no one of them is able or can be compelled to pay the whole of the judgment rendered against him, may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet ordinarily, when he has made his election, he will be concluded by it. The collection of one judgment extinguishes the entire claim for damages."

In the case of *Sellards, &c. v. Zomes*, 5 Bush, 91, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong; consequently, since our statute of 1886, authorizing several judgments, a dismissal or release of one or more who are sued can not, *per se*, release the others."

In view of the fact that the \$1,000 received from the Marsden Co. was received only as part satisfaction of appellee's cause of action, and not in full satisfaction thereof, the appellee was not barred from proceeding further against appellant.

Wherefore, the judgment of the lower court is affirmed, with damages.

WILLIAMS V. COMMONWEALTH.

(Filed March 17, 1904—Not to be reported.)

1. Criminal law—Practice—The Commonwealth has the right to introduce evidence after a plea of guilty has been entered.

2. Section 174 of the Criminal Code, providing that "at any time before judgment the court may permit the plea of guilty to be withdrawn, and a plea of not guilty substituted," it was error in a prosecution for the trial court to refuse to permit the withdrawal of such plea upon the conclusion of the testimony for the Commonwealth.

John M. Letterle and M. Barnett for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Paynter.

The indictment charges the appellant with the offense of attempting to commit rape upon an infant under twelve years of age, and upon a plea of guilty the jury fixed his punishment at confinement in the penitentiary for a period of twenty years. After the indictment had been returned the appellant, on the 20th day of September, 1903, was brought into court and plead not guilty to the charge. The case was assigned for the 20th of October for trial, and on that day the appellant withdrew his plea of not guilty, and entered one of guilty. At that point in the proceedings Mr. Goldsmith, representing the Commonwealth, announced his intention to introduce evidence notwithstanding a plea of guilty thereupon. The court stated that it had not been customary on pleas of guilty to introduce evidence in that court. The court then asked appellant if he desired to plead guilty, whereupon he replied in the negative. The appellant then withdrew with his attorneys, and upon returning to the court room his counsel withdrew the plea of not guilty, and he entered a plea of guilty. After the Commonwealth had introduced its testimony the appellant moved to withdraw his plea of guilty, and enter one of not guilty. The court refused to permit it to be done.

Section 174, Criminal Code of Practice, provides: "At any time before judgment the court may permit the plea of guilty to be withdrawn, and a plea of not guilty substituted."

Under this provision of the Code the court was authorized to permit the appellant to withdraw his plea of guilty and allow the plea of not guilty to be substituted. The appellant was evidently induced to change his plea from not guilty to guilty upon the idea that the court would require the Commonwealth to observe the custom prevailing in that court, not to allow the introduction of evidence on a plea of guilty. The Commonwealth had the right to introduce evidence after the plea of guilty had been entered. (*Mounts v. Commonwealth*, 89 Ky., 278.) In view of the circumstances under which the plea of guilty was entered, we are of the opinion that the court erred in not allowing the appellant to withdraw the plea of guilty and substituting a plea of not guilty.

The judgment is reversed for proceedings consistent with this opinion.

RHODES, &c. v. THE FRANKFORT CHAIR CO.

(Filed March 17, 1904—Not to be reported.)

Jurisdiction—Appeals—By section 850, Kentucky Statutes, an appeal will not lie to the Court of Appeals where the value in controversy is less than

\$200 exclusive of interest and costs, and the fact that \$25 was allowed the commissioner in this action does not affect the amount in controversy, such amount being part of the costs of the action.

Thos. E. Ward for appellants.

Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

Deducting credits entered previous to January 1, 1900, and one on that day, the judgment is for \$192.17, with interest from January 1, 1900. An attachment was sued out and levied upon real estate, and the court in passing on the attachment when the judgment was rendered put therein the following provision: "It is adjudged that the attachment herein be, and the same is, sustained, and on plaintiff's motion the lien created thereby is waived."

On the threshold we are confronted with the question, has the court jurisdiction to revise the judgment?

Section 950, Kentucky Statutes, provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than \$200, exclusive of interest and cost."

The recovery in this case is less than \$200, and the statute provides that the court can not revise the judgment where the recovery of money is less than \$200. It is, however, suggested that as there was a judgment for \$25 for costs allowed the commissioner of the court, that amount should be added to the \$192.17, and the sum being greater than \$200, the court has jurisdiction. The answer to that suggestion is, that the amount allowed the commissioner of the court is part of the cost of the action, the same as the sheriff's and clerk's costs, and under the statute costs are to be excluded. The title to land is not involved, because the plaintiff declined to have the lien enforced which was created by the levy of the attachment. The court did not decree a lien existed and enter an order that it should be enforced. The effect of the order was to say that the plaintiff had sustained its grounds for an attachment (the attachment was obtained upon the ground that the defendants were nonresidents, and they did not controvert it), but the plaintiff declined to have its right enforced. The title to the land is not involved, and no order was entered as to the attachment from which an appeal could be prosecuted, as no relief was given by virtue thereof. If personal property was seized under an order of attachment of less value than \$200, the action of the court in sustaining or discharging the attachment could not be brought here for review. It is urged that the plaintiff abated its judgment with a view of depriving this court of its jurisdiction. The only judgment it could have had which would have been effective would have been a judgment giving a lien and ordering its enforcement. As no such judgment was entered there was no abatement.

The motion to dismiss the appeal is sustained.

MULLINS v. COMMONWEALTH.

(Filed March 17, 1904—Not to be reported.)

1. Criminal law—Presumption—Where there was no objection at the time made to a statement of a Commonwealth's attorney as to what he would prove on the trial, and no proof adduced as was referred to in the statement, it will be presumed that the jury disregarded the statements which were not substantiated by evidence.

2. Same—Evidence—Where no shots were heard from the point where deceased was found dead, and accused shortly after the homicide stated that he believed he had killed deceased, and when asked how, stated that he had knocked his brains out, and deceased was found lying in the road with his skull crushed and a broken shotgun lying near his body, a plea of self-defense was overthrown.

Coyle & Clark for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was indicted for the murder of James Singleton. When the case was called for trial at the September term of the court the defendant filed an affidavit stating that after the last May term of the court he had been convicted in the Rockcastle Circuit Court on another indictment, and sentenced to the penitentiary for nine years for manslaughter; that he had been confined in the penitentiary until brought out to attend his trial in Jackson county, and had, therefore, been unable to prepare his case; that he could prove by twelve witnesses who were absent, and who had been subpoenaed for him at the May term, facts material to his defense. On the filing of this affidavit the court set the case over to the tenth day of the term. Four of the witnesses referred to were convicts in the penitentiary; the court ordered them brought out. The court also appointed a special bailiff and sent after the other witnesses named in the affidavit. When the case was called on the tenth day of the term all the witnesses named in the affidavit were present except William Robinson, Ambrose Williams and Greeley Mize, Williams being returned as in Ohio, and Robinson that he could not be found. The defendant then filed an affidavit for a continuance because of the absence of Henry Hellard, Isaac Lainhart and Walter Mullins, the two last not having been summoned. The court overruled the motion for a continuance, but allowed the affidavit to be read as the deposition of Greeley Mize and Henry Hellard, refusing to allow it to be read as the deposition of the other witnesses. Of this action of the court appellant complains.

In stating his case to the jury the attorney for the State said that the Commonwealth would be able to show to the jury that the deceased was an important witness against defendant in the Rockcastle Circuit Court, where defendant was charged with murder, and that defendant had killed Singleton in order to get him out of the way as a witness; that the proof would be such that the jury would have no trouble in bringing in a verdict of death against the defendant. No objection was made to the statement at the time, and no proof of this sort was made on the trial. In his grounds

for new trial the defendant assigned this statement as a reason for the verdict being set aside.

The proof on the trial showed that the deceased, Singleton, was working for Mullins in Jackson county, getting out timber; that they both boarded there in the same house, and were friendly; that a few days before the homicide they both went to their homes in Rockcastle county, Singleton riding one of Mullins' mules, which he lent him. After they reached home Mullins lent him the mule to haul wood. They started back together from Rockcastle county. On the way they bought a quart of moonshine whisky, and stopped at another place and bought three bottles of bitters. After this they stopped again to warn; both were drinking. It was now after night, and some time later a man living on the roadside heard some shots to the west of his house. A while after this Mullins appeared at the house where he boarded and said he believed he had killed Singleton. They asked him how. He answered he had knocked his brains out. He ate his supper, and then, with three other men from the house, went back to where Singleton was. As they came along that evening Mullins had a shotgun and Singleton a pistol. When they got back to where Singleton was they found him lying in the road, dead, with the pistol empty near him, and the shotgun, broken at the breech, also lying nearby. He had a fracture of the skull over the right eye, and another on the upper part of the head. From the signs on the shotgun these wounds were inflicted with it. Mullins' statement was that as they were going along, Singleton having his gun, which was empty, began shooting at him, and he then wrenched the gun from him, and knocked him down with it. The evidence failed to show previous malice, but the jury were warranted in concluding that a quarrel came up between them, and that Mullins had killed Singleton in the quarrel, due to their both being drunk. No shots were heard from the point where Singleton was found dead, and the circumstances did not sustain Mullins' plea of self-defense. The witnesses who heard the shots locate them in a different direction from that where Singleton was found.

The witness, William Robinson, as stated in the affidavit, would, if present, have testified to the bad character of Singleton for violence, and of one Alex. Allen for truthfulness. But the character of Singleton was shown by a number of other witnesses, and there was no effort on the part of the Commonwealth to show the contrary. Alex. Allen was not introduced as a witness on the trial. Ambrose Williams was one of the men who went back that night with Mullins to where Singleton lay. There were four or five other men along who were introduced on the trial, and testified to the same facts as proposed to be shown by him; besides, this witness was in Ohio. The witnesses, Lainhart and Mullins, were not included in the first affidavit, no subpoena had been issued for them, and no reason was shown for the apparent want of diligence as to them. We, therefore, conclude that the court correctly ruled as to these matters.

The statement of the prosecuting attorney as to what he expected to prove was perhaps based on evidence that he was misled about. At any rate, there was no exception, and it must be presumed that the jury disregarded statements made by the attorneys in opening the case which were not substantiated by the evidence. We can not reverse for a matter of this sort

unless it is affirmatively shown that there was misconduct on the part of the attorney prejudicing the substantial rights of the defendant. This does not appear. It is only shown that the attorney said that he would prove more than he did prove on the trial, which is often the case in jury trials.

On the cross-examination of Cleo Mullins, a witness for the Commonwealth, the defendant's attorney asked her if she did not steal a lot of clothing on one occasion from P. C. Hoskins. The court sustained an objection to this question. There is no avowal as to what she would have stated; the exception is, therefore, not available. The defendant also offered to prove by an officer that he had arrested her for the offense referred to. This evidence was properly excluded. A witness can not be impeached in this way.

The court limited the argument of the case to an hour and a half on a side. Considering the nature of the evidence, and the few facts on which the case turns, this was not an unreasonable limit of time for arguing it to the jury. The instructions of the court are not complained of, and on the whole case we see no reason for disturbing the verdict.

Judgment affirmed.

KENTUCKY DISTILLERIES AND WAREHOUSE CO. v. LEONARD.

(Filed March 17, 1904—Not to be reported.)

1. Damages—Instructions—In an action for damages for personal injuries against the appellant by the appellee, who was employed as foreman by the Ansonia Copper and Sheet Iron Works Co., which company had a contract with appellant to make certain repairs upon its distillery, the facts showing that appellee having a receipt for board which he desired to deliver to the acting superintendent of the distillery, and also to order some bolts which he needed in his work, not finding the superintendent at the office, went upon the second floor of the warehouse and in coming down on the elevator with four barrels of whisky, a rope giving way the elevator fell, injuring him, which injuries are the basis of this action. Held—In this action the court should have instructed the jury "that if the jury shall believe from the evidence that plaintiff, while in the employ of the Ansonia Copper and Sheet Iron Works, and while engaged for it in the repairing of defendant's distillery plant, it became necessary, as an incident to said employment, to use the defendant's elevator, and while using the same, with ordinary care for his own safety, said elevator fell and injured plaintiff by reason of the defective condition of its appliances, of which he had no knowledge and of which he could not have known by the use of ordinary care, and which was known to the defendant," * * * they should find for him in such damages as sustained not to exceed the sum sued for.

2. Same—In action to recover damages resulting from injury on going into a warehouse, instructions were erroneous which permitted a recovery without regard to plaintiff's right to be in the warehouse.

D. W. Lindsey, Joyes & Jarvis and Morton V. Joyes for appellant.

B. G. Williams for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellant owns the Saffell Distillery, situated about one mile south of Frankfort. The property consists of a distillery, a warehouse and an office

building, all on the same premises and within a short distance of each other. After appellant bought the property it began to repair it, and made a contract with the Ansonia Copper and Sheet Iron works Co. to make certain repairs on the pipes, stills, worms, etc. Appellee Leonard was the foreman of the copper works in the employment of the Ansonia Co. Appellant paid the board of appellee and his crew, delivering to him the checks to the boarding-house keeper weekly, and requiring him every Monday morning to deliver to it the receipt which he had taken for the board. James Saffell was the superintendent of the distillery for appellant; but he being away for a large part of the time, Linton Tanner acted as superintendent in his absence. When anything was needed in the way of material Leonard would apply to Saffell, or, in Saffell's absence, to Tanner. In passing from the distillery to the office he would pass by the warehouse. On the Monday morning in question Saffell was not at the distillery, and Tanner, as usual, was there. Leonard had the receipt from the boarding-house keeper, which it was his duty to deliver to appellant. He and his men were at work in the distillery; some small bolts were needed in the work; Leonard went up to the office to deliver the boarding house keeper's receipt and to order the bolts, and not finding either Saffell or Tanner there, he came back by the warehouse and inquired where Tanner was. He was informed that Tanner was up stairs on the second floor of the warehouse. The only means of going up to the second floor of the warehouse was by means of an elevator, or by climbing up a post to which some strips were nailed, and going through the elevator hole on the second floor. The elevator was used to carry whisky up and down, and also by the hands, or any one having occasion to go up in the warehouse. They climbed the post when the elevator was not running. Leonard went up on the elevator, which was in charge of Tanner, and operated by him. When he reached the second floor he gave the receipt to Tanner, made the requisition for the bolts, got a drink of whisky, and got on the elevator to go down. There were four barrels of whisky on the elevator, and as it was lowered the ropes gave way, precipitating Leonard and the whisky to the basement. By the fall his ankle was seriously injured. The plaintiff's proof showing these facts, the court overruled appellant's motion for a peremptory instruction to the jury to find for it, and the case being submitted to the jury, they found for the plaintiff a verdict for \$1,500.

The proof for the defendant was to the effect that Leonard was drinking heavily on Saturday night, and though sober Monday morning, wanted very much a drink of whisky, and went up in the warehouse to get a drink of whisky. It was conceded that he gave Tanner the receipt while there, but the defendant's proof was that this should have been given to Saffell, and not to Tanner, and that he made no requisition on Tanner for the bolts; also that Tanner was only a foreman of the hands in Saffell's absence, and had nothing to do with Leonard; that the bolts were really on hand; that there was a sign at the bottom of the elevator "Keep Off," and that one of the men at the top told Leonard not to get on.

While there was some conflict in the evidence, the proof warranted the jury in concluding that the rope which held up the elevator was old and rotten and the pulleys out of order; that the rope was frazzled and insecure,

and that the insecure condition of the elevator was known, or might have been known, by ordinary care on the part of the defendant. The proof also as to the severity and permanent character of the plaintiff's injuries warranted a recovery for \$1,500, if he was entitled to recover at all. While the evidence was conflicting as to the extent of Tanner's authority in Saffell's absence, the proof for the plaintiff warranted a submission of the case to the jury, for if the facts shown by the plaintiff were true, Tanner was acting as superintendent in Saffell's absence, and as Saffell was absent so large a part of the time, and the business was done in this way, appellant must be deemed under the facts shown by the proof to have held Tanner out as having this authority. Tanner was operating the elevator himself. He saw Leonard come up on the elevator, and if he allowed Leonard to get on the elevator to go down, it can not be said that Leonard was using the elevator without the defendant's consent. The elevator was evidently used to carry both the whisky and persons having business in the warehouse from one floor to another, the hands often going down on it with the whisky; but at the time in question there were other hands below to receive the whisky, and there was no one on the elevator but Leonard when it fell. Leonard denied that he was warned not to get on the elevator, and also denied that he got on it after it started, as shown by the defendant. Leonard had not been in the warehouse before, and knew nothing of the condition of things there. At the conclusion of the evidence the plaintiff asked the following instruction, which was objected to by the defendant, and refused by the court:

"1st. The court instructs the jury that if they shall believe from the evidence that the plaintiff while in the employ of the Ansonia Copper and Sheet Iron Works, and while engaged for it in the repairing of defendant's distillery plant, it became necessary for him, as an incident to said employment, to use the defendant's elevator, and while using same with ordinary care for his own safety, said elevator fell and injured the plaintiff by reason of the defective condition of its appliances, of which he had no knowledge and of which he could not have known by the use of ordinary care, and which was known by the defendant, or could have been known to it by the exercise of ordinary care, in time to have prevented said injury, they shall find for the plaintiff such sum in damages as will reasonably compensate him for the injury sustained by said fall, not to exceed the sum of \$3,000."

The defendant asked the following instruction, which was objected to by the plaintiff, and refused by the court:

"A. Unless the jury believe from the evidence that plaintiff, at the time he received his injuries, was in defendant's warehouse on the second floor thereof, in the necessary performance of service for which he was employed by defendant or its contractor, the Ansonia Copper and Sheet Iron Works, and that the elevator, when loaded with four barrels of whisky, was the proper means of descent from the second floor to the first floor, and said elevator, or its mechanical appliances, was in a dangerous or defective condition, and that such condition was known to defendant, its agents or employees superior in authority to plaintiff, or could have been known to them by the exercise of ordinary diligence, and was not known to plaintiff, or could not have been known to him by the exercise of ordinary diligence, and

by reason of such defective or dangerous condition said elevator fell, thereby causing plaintiff's injuries, and that there was no caution or warning printed or written on said elevator directing persons to keep off, which was seen by plaintiff, or might have been seen by him by the use of ordinary care, and that the plaintiff did not by his own negligence so far contribute to his own injuries that but for such negligence on his part he would not have been injured; they shall find for defendant."

The court of its own motion gave the jury the following instructions:

"1st. If the jury believe from the evidence that the plaintiff was by the carelessness and negligence of the defendant, or by its authorized agents or employes, injured by the fall of the elevator in the defendant's whisky warehouse, they ought to find for the plaintiff, unless they further believe from the evidence that the plaintiff by his own negligence contributed to his own injury, and in which case they ought to find for the defendant.

"2d. If the jury believe from the evidence that the plaintiff went to the defendant's warehouse and was permitted by the superintendent of said warehouse to use said elevator, when said superintendent knew, or by the exercise of ordinary care could have known, that said elevator was unsafe for use, they ought to find for the plaintiff, unless they further believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, that the same was unsafe, and in which case they ought to find for the defendant.

"3d. If the jury believe from the evidence that the plaintiff got aboard of said elevator while the same was being lowered with its usual load of freight without the knowledge of the party operating said elevator, or if they believe from the evidence that at or about the time he boarded said elevator he was warned by any of the defendant's employes not to get on said elevator, and not heeding said warning, if any, they ought to find for defendant."

Appellant complains of the charge of the court because it fails to submit to the jury the question whether Leonard was using the elevator in the necessary performance of the service for which he was employed, and makes the defendant liable if he was permitted by the superintendent to use it when the superintendent knew, or by the exercise of ordinary care could have known, that the elevator was unsafe. It also complains that the court did not give the instruction asked by it.

(The instruction asked by defendant, among other things, required the jury to find for the defendant if there was a warning printed or written on the elevator directing persons to keep off, which was seen by plaintiff, or might have been seen by him by the use of ordinary care. There would be more force in the position that the defendant would not in this event be responsible if Leonard had been hurt on the upward trip, before the superintendent knew he was thus using the elevator. But when he reached the top and the superintendent knew of his use of the elevator, and knew of his getting on it to go down, it can not escape liability because of the warning printed on the elevator, for the reason that the defendant might waive the restriction, and it can not be allowed to consent to the use of the elevator by Leonard, and then to escape liability because it had a printed warning on it for persons to keep off.) Besides, we think the printed warning properly meant for all persons to keep off except those allowed by the defendant

to use the elevator, for the proof clearly shows that the elevator was used by the hands or other persons having occasion to go up in the second story. The instruction, therefore, would have misled the jury, and was properly refused.

If the plaintiff went up in the warehouse for his own purposes, and not as an incident to his employment, the defendant owed him no duty to keep its elevator safe for his use. The elevator was not intended to carry passengers, but only freight and those having business in the warehouse in the discharge of their duties. If the plaintiff was not in the warehouse pursuant to the course of his employment, or on business incidental thereto, he had no right there at all, and the defendant owed him no duty except to avoid injuring him after his danger was perceived. The foreman's allowing him to get on the elevator to go down did not create an obligation on the part of defendant to have the elevator safe. There was no express or implied invitation for him to use the elevator unless he was in the warehouse in the course of his employment. We, therefore, conclude that in lieu of the first and second instructions given by the court, the first instruction asked by the plaintiff should have been given, and instruction A. asked by the defendant should have been given with the omission of the following words: "When loaded with four barrels of whisky;" also these words: "And that there was no caution or warning printed or written on said elevator directing persons to keep off, which was seen by plaintiff, or might have been seen by him by the use of ordinary care."

Instruction A. thus modified should have been given in lieu of No. 3, given by the court. For if the plaintiff was in the line of his duty in the use of the elevator, the defendant owed him the duty to exercise ordinary care to keep it safe, and the fact that one of the hands said to him not to get on would be only a fact to be considered with the other facts in the case in determining whether the plaintiff exercised ordinary care, for this hand was not in charge of the elevator, and the conduct of the foreman who was present must be considered in connection with the way the elevator was loaded and the other facts in determining whether the plaintiff was negligent in getting on the elevator as he did.

The instructions given by the court were erroneous in permitting a recovery by the plaintiff without regard to his right to be in the warehouse, if he was permitted to come down on the elevator. And although the defendant objected to the instruction which the plaintiff asked, the same idea was embodied in instruction A., which it asked. The case was tried by the jury on an issue which did not control the result.

The judgment is, therefore, reversed, and cause remanded for a new trial.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed March 17, 1904—Not to be reported.)

C. J. Waddill and B. D. Warfield for appellant.

John L. Grayot and N. B. Hays for appellee.

Appeal from Hopkins Circuit Court.

Judge Barker delivered the following response to petition for rehearing

Although the statute provides no penalty for its violation, it forbids the obstruction of the street for more than five minutes, by trains or cars. The city council could not, by ordinance, legalize what the statute forbids; and the ordinance was, therefore, incompetent, as evidence on behalf of the defendant. The only question to be determined is, did the defendant obstruct the highway with its train of cars for an unreasonable time? It is a common law proceeding, and is to be tried on common law principles, without regard to the provisions of the statute, or the ordinance referred to (Illinois Central R. R. Co. v. Commonwealth, 20 Ky. Law Rep., 115), except that no obstruction for less than five minutes is unlawful.

Petition overruled.

FIRST NATIONAL BANK, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 17, 1904—Not to be reported.)

Railroads—Bonds—Where a railroad company was proceeded against for not keeping a roadbed in order, pursuant to the terms of a certain lease, and judgment recovered against it, it is entitled to recover its pro rata on bonds which it holds; and the fact as to whether the suit was brought in the name of the trustee for all the bondholders, or under section 25 of the Code of Practice, is not material; and the fact that it denied the breach and resisted the action did not preclude it from sharing in the bonds of the leased road.

Simrall & Doolan and W. S. Pryor for appellants.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The Louisville & Nashville R. R. Co. allege in their petition in this case that A. L. Schmidt, as trustee of the bondholders of the northern division of the Cumberland & Ohio R. R. Co., recovered a judgment against it in the Shelby Circuit Court for failure to keep its roadbed in order, as required by the terms of a certain lease; and that in satisfaction of this judgment, they paid to Schmidt, as trustee, \$29,796.24 that Schmidt deducted from this sum the cost and expense incident to the prosecution of the suit, and deposited the balance in the First National Bank of Louisville to the credit of Clint McClarty, as trustee, for a pro rata distribution to the owners of the bonds, two hundred and fifty in number. It further alleges that it is the owner of twenty of the bonds, which it presented to McClarty at the bank and demanded their pro rata which the defendant refused to pay, for which they pray judgment.

The defendants answered in three paragraphs. In the first they deny that the suit was instituted by Schmidt as trustee for all the bondholders of the northern division of the Cumberland & Ohio R. R. Co.; but in his own right and for other bondholders of the Cumberland & Ohio, having a common interest with him, under section 25 of the Civil Code; second, they deny plaintiff's right to recover for the reason that their breach of contract, occasioned the litigation in which the judgment was rendered. In the third, they plead that it was the duty of the railroad company to have set up their

claim in the former suit. A general demurrer was sustained to each paragraph of the answer, and defendant's declining to plead further, judgment was rendered for plaintiff in accordance with the prayer of their petition, and the defendants have appealed. It is immaterial whether the suit was instituted in the name of Schmidt as trustee for all the holders, or was brought under section 25 of the Code. In either case it was prosecuted for the benefit of all the bondholders, and the mere fact that plaintiff denied the alleged breach of contract and resisted recovery in the former suit, did not preclude them from asserting claim for their pro rata of the recovery on the bonds held by them. And it seems to us that defendants have no right to complain because they paid the entire judgment and only asked for their pro rata after the payment of the cost and expense of the litigation instead of pleading such ownership in the former suit. In that case they denied all liability, and certainly could not, in advance, have determined what the amount of the recovery of the cost and expense incident to the litigation would be. We, therefore, conclude that the trial court properly sustained a demurrer to the answer.

Judgment affirmed.

HUNT v. KENTUCKY WESTERN RY. CO.

(Filed March 17, 1904—Not to be reported.)

M. C. & G. D. Givens for appellant.

J. M. Dickinson, Pirtle & Trabue and W. E. Bourland for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Paynter.

The issues involved on this appeal are substantially as were those in *Curry v. Kentucky Western Ry. Co., &c.* (opinion delivered February 3, 1904), and *Page v. Southern Construction Co., &c.*, ante, 1634, and by the authority of the opinions delivered in those cases at the present term, the judgment is affirmed.

MUTUAL LIFE INS. CO. OF N. Y. v. LUCAS.

(Filed March 18, 1904—Not to be reported.)

Insurance—Where an application for a life insurance policy contained the provision that the insurance should not take effect until the first premium shall be paid during the continuance of the good health of the applicant, and the applicant was killed before the delivery of the policy, to wit, on June 18, 1903, in an action upon the policy by the personal representative of the deceased, where it appeared that the agent without authority of the company agreed with the applicant that if he would take the insurance he would hold the policy until the 1st of July, when one-half of the premium should be paid and that his note would be taken for the remaining half, such agreement was not sufficient to waive prepayment, but was only an agreement to hold policy until the 1st of July, and then deliver upon condition that half of the premium be paid and a note executed for the remainder and this contingency, never happening, the policy never became effective.

Grubbs & Grubbs and Field McLeod for appellant.

W. O. Davis and B. G. Williams for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 22d day of May, 1903, William P. Lucas, of Midway, applied on one of appellant's printed blanks through their local agent, C. W. Parrish, for a policy of insurance on his life for \$1,000, payable at his death to the appellee, Mary E. Lucas. The application contained this provision: "I hereby agree that all the following statements and answers, and all those I make to the company's medical examiners, in continuation of this application, are by me warranted to be true, and are offered to the company as consideration of the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued."

This application was forwarded to the home office of the company, and about the first day of June a policy issued in conformity to the application reached the hands of the local soliciting agent, Parrish, to be delivered to the applicant upon the payment by him of the first annual premium of \$38.56. Before the delivery of this policy, or the payment of the first premium due thereon, the insured, Lucas, was killed on the 15th of June, 1903. Thereupon the policy was, at the request of the company, returned to them by Parrish, the local agent, and cancelled. Subsequently the appellee, Mary E. Lucas, offered to pay the premium, made the usual proofs of the death of the insured, and upon appellant's failure to pay, instituted this suit for the recovery of the amount of the policy, and alleges by way of avoidance of the provision of the policy "that it should not take effect until the first premium had been paid during the continuance in good health," that at the time the contract was entered into between the insured and G. W. Parrish, acting for the company, that it was agreed that the first premium of \$38.56, should be paid on the 1st of July, 1903, but that the insurance should take effect and be in force from the 22d day of May, 1903, and that the policy was issued by the defendant in accordance with this agreement, and dated on the 22d of May, 1903, the day on which the application was made, and the agreement made with the local agent, and that the policy was issued pursuant to this agreement, and transmitted to Parrish for delivery to the insured. Demurrer was filed to this petition, which was overruled. Thereupon an answer was filed to this petition, which denied the alleged agreement with Parrish, and relied upon the conditions of the policy hereinbefore recited, and further alleged that C. W. Parrish was a mere soliciting agent, and had no authority to waive the conditions as to the payment of the first premium, and the delivery of the policy during the continuance in good health of the insured. The issues were made up by reply, traversing the affirmative allegations of the answer, and alleging that the delivery of the policy to Parrish was in effect a delivery to Lucas. The trial court held the company liable, and they have appealed.

To support their contention that C. W. Parrish, the local soliciting agent of the company, had waived the provisions of the policy relied on to defeat

recovery, he was introduced by plaintiff, and testified in substance that previous to the 22d of May, 1903, he had solicited Lucas to take out the policy; that Lucas objected to doing so because he had no money to pay the first annual premium of \$38.56, and would not have until he collected his salary from the government on the 1st of July thereafter; and that it would not suit him to pay more than one-half of the premium in cash at that time; that he, "Parrish," then proposed that if he would make his application for the policy and it was issued by the company and sent to him for delivery, that he would hold it for him, until the 1st day of July; and that at that time, he could pay one half the first premium in cash and give a note for the balance; that Lucas accepted this proposition, and made his application, which was duly forwarded by him to the general agency of the company in Louisville, and thence to the office of the company in New York, and the policy issued thereon, which was returned to him for the collection of the premium and delivery of the policy about the 1st of June thereafter. The witness testified that the company had no knowledge of this agreement on his part with Lucas; that he had frequently made similar agreements in order to procure insurance, and had himself paid the first premium to the company before he had received it from the insured; that whilst Lucas was insolvent, he was getting a salary from the government, and his impression was then that if Lucas had requested it, he would have taken his note at the date of the application for the entire amount of the premium and receipted therefor, and delivered the policy, but that he had not done so because the agreement between them only called for the delivery of the policy upon the payment in cash of one-half the premium on the 1st of July. It also appears from his testimony that local agents were permitted to hold policies as much as sixty days. The testimony of Parrish does not, in our opinion, establish an agreement to waive the prepayment of the first premium but only shows an agreement to hold the policy for the insured until the 1st day of July, and then to deliver it upon the condition that he paid one-half the first premium in cash and executed his note for the balance. If he had relied solely upon the promise of Lucas to pay on the 1st day of July, there was no reason why the policy was not delivered when Lucas came and examined it after its arrival and before his death.

This court has in a number of cases decided that where a local agent accepted a note in payment of the first premium due upon the policy, and the policy itself was delivered to the insured, that this was a waiver of the conditions of the policy as to payment in cash, and was binding upon the company. (*National Life Ins. Co. v. Tweddell*, 29 Ky. Law Rep., 881.) They have also held that where the agent of a life insurance company collected the premium in cash at the date of the application and issued a receipt therefor, stipulating for insurance from the date of the receipt, that the contract of insurance was completed by the approval of the application, and a recovery could be had although the policy was not actually delivered to the beneficiary prior to his death. (*Lee v. Union Mutual Central Life Insurance Co.*, 19 Ky. Law Rep., 608.) The facts of this case do not bring it within the rule of either class of cases. Here there was neither a payment of the premium or a delivery of the policy; but a mere naked agreement to hold and deliver the policy upon condition that one-half of the premium was

paid in cash and a note executed for the remainder. It seems to us that this case falls within the rule announced in the *St. Louis Life Insurance Co. v. Kennedy's Adm'r*, 69 Ky., 450, and *Dickerson's Adm'r v. Pruential Savings Life Assurance Co., &c.*, 21 Ky. Law Rep., 611, and the *Mutual Life Ins. Co. of New York v. Sinclair*, 24 Ky. Law Rep., 1543.

Being of the opinion that the testimony wholly fails to support the conclusions reached by the lower court, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

Judge Nunn dissents.

ALBIN CO. v CITY OF LOUISVILLE.

(Filed March 18, 1904.)

Taxes—Board of Equalization—Constitutional law—In an action by appellee to collect taxes of appellant the contention that section 135 of the Constitution was violated because the Board of Equalization acted as a legislative court, was not sustained. A board of equalization which passes on the question of the value of property listed for taxation with power to approve, or increase the same or decrease it is not a legislative court.

H. M. Lane and A. T. Burgevin for appellant.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This was a suit by the appellee to recover taxes upon personal property of appellant for the years 1895, 1896 and 1897. The following defenses were presented: First, a traverse denying the authenticity of the tax bills. The city proved the authenticity of the bills by its assessor, and, under the charter, a prima facie case was thus made out, which was not overcome by the defendant. (Section 2996 of the Kentucky Statutes, and 95 Ky., 254.)

The appellant, by the second paragraph of its answer, averred that it handed in, to the city assessor, schedules of its property subject to assessment for city taxes for the years 1894, 1895 and 1896, which schedules were brought by the assessor before the Board of Equalization of the city, and the board rejected the schedules so furnished by the appellant, and arbitrarily fixed the amount of taxes which the appellant should pay. It is nowhere alleged in the answer, nor in any pleading, what was the value of this property as contained in these schedules for each of the years, nor is it alleged that these schedules were sworn to before the assessor or one of his assistants, as required by section 2983 of the Kentucky Statutes.

The reply denies that any schedule of any kind was handed to the city assessor or to one of his assistants by the appellant, or any one for it, for any of these years. We are of the opinion that the defense on this point was insufficient; but admitting its sufficiency, it appears that appellant never complained to the assessor, but appeared before the Board of Equalization, upon notice from the board, concerning the tax for 1896 only. The board raised the valuation after hearing the appellant. It is true that appellant claims that it was before the board for the other years, but it did not estab-

lish that fact to the satisfaction of the court, nor is it material, since it does not appear that the assessment was increased for either of the other years over the amount fixed by the assessor.

Appellant alleged that the action of the Board of Equalization in fixing the amount of taxes which it should pay on its property, "was arbitrary, contrary to the evidence before it, and was entirely unsupported by the evidence." It was not stated in the pleadings in what manner or particular this board was arbitrary, except that it rejected the evidence of appellant and reached its conclusions without any evidence. It may be that the conclusion reached appeared arbitrary to appellant, when, in fact, it was not arbitrary, but it admits that its officers appeared before the board and testified. This board had the right to give such weight to this evidence of appellant's officials as it deemed proper, and if, upon the whole facts and circumstances presented, it fairly concluded the assessment made was proper, then it was the duty of appellant to pay same. The statute confides these questions of value to the Board of Equalization, and the court has no power to review its conclusions in that respect, unless the Board has proceeded corruptly or fraudulently, which is not alleged or claimed in this case.

It is further claimed by appellant that in fixing the valuations, the Board of Equalization acts as a legislative court, contrary to section 135 of the Constitution, which section reads as follows: "No courts save those provided for in this Constitution shall be established." It also refers to the case of *Pratt v. Breckinridge*, 23 Ky. Law Rep., 1856, for authority to support its contention. The direct point decided in this case was simply that the State Board of Contest, composed of three commissioners, was a legislative court, within the meaning of this section of the Constitution.

In our opinion, this decision does not furnish authority for holding that a mere Board of Equalization, which passes on the question of value of property listed for taxation, with power to approve, increase or decrease the same, is a legislative court. It certainly was not contemplated by the framers of the Constitution to do away with such tribunals, which had never before, by any decision of this court, been held to be a judicial tribunal, or vested with the powers and duties of a court. If the legislature is powerless under the present Constitution to provide for such a tribunal as a Board of Equalization, then the whole revenue system of the State, counties and municipalities, must give way, and hereafter when a question is made as to the value of property fixed by the assessor for taxing purposes, the only remedy will be to provide for an appeal to the regular courts, and thereby make the judges thereof the final assessors. In our opinion, such is not the proper construction of section 135 of the Constitution.

Wherefore, the judgment of the lower court is affirmed, with damages.

EAST JELLICO COAL CO. v. GOLDEN.

(Filed March 19, 1904—Not to be reported.)

1. Damages—Master and servant—A judgment for \$1,500 as damages for injuries sustained by appellee as a result of rock and dirt falling upon him from the roof of appellant's coal mine will not be disturbed where it appears from the evidence that the injury occurred in a part of the mine where it

was not the duty of appellee to keep the roof propped so as to prevent its falling, and in a place twenty or twenty-five feet from the point where he was engaged at work at the time, it being, therefore, the duty of the appellant to have kept the roof propped so as to prevent the roof from falling which resulted in the injury to appellee.

2. Same—Negligence—In an action against appellant for damages it was the province of the jury to determine whether the injuries sustained were caused by the negligence of it or appellee, and the verdict being for appellee, and the court being unable to say there was no evidence to support the verdict, it will not be disturbed.

3. Pleading—Variance—In an action for damages where the petition fixes the place of the accident at one point, but the proof establishes the fact that it was at another, no objection being made by the adverse party to this proof at the time, the variance was not material because before the taking of any proof the plaintiff offered to file an amendment showing the true place of the injury, and upon the amendment being refused proof was offered without objection.

James D. Black and P. D. Black for appellant.

B. B. Golden for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a verdict and judgment of \$1,500, recovered in an action by appellee against appellant in the Knox Circuit Court, for injuries to his person by the falling upon him of a rock and dirt from the roof of appellant's coal mine, where appellee was at the time at work "drawing stumps;" it being averred in the petition that his injuries resulted from the negligence of the appellant in failing to keep the roof of its mine in a safe condition.

There can be no doubt from the evidence but that appellee's injuries were both painful and permanent, for his hip and spine were crushed and his person otherwise so hurt, as to produce partial paralysis of the bowels, and impairment of his general health. It appears from the record that in mining operations, large blocks or stumps are left in certain places in the mines, as supports for the roof over the room in which the miners work, with spaces to allow passing around them. When the coal in any division or section of the mine has been exhausted, all the miners are withdrawn from that particular place, and the stumps or pillars are taken out for the coal they contain. In removing them props of timber are used to support the roof. The removing of these pillars or stumps is called "drawing the stumps," and it is a work of more or less danger.

The work of drawing the stumps in the mine of appellant was solicited by appellee of the mine superintendent, Hansford, who informed appellee of the danger attending it, and expressed to him the fear that he was not sufficiently skilled in mining to undertake it, but appellee told him that he understood the danger and could do the work, and his employment by the superintendent followed. Appellee then began and proceeded with the work, until he was injured by the falling upon him of rock and dirt or slate from the roof of the mine, the weight of which was about one thousand pounds. Much of the work of removing the stumps was done by blasting with powder. In removing the stumps it was the duty of appellee to prop

the roof at that place with timbers to prevent same from falling when left without the support of the stumps, but it was the duty of appellant to furnish timber for that purpose. The point of difficulty in this case arises in determining from the evidence whether the place of the accident was in that part of the mine where appellee was charged with the duty of keeping the roof securely propped, or at a point where it was the duty of appellant to do so.

If the debris fell upon appellee in a part of the mine which did not include the stumps he was removing, and the propping of which he was not charged with the duty of attending to, it was the duty of appellant to keep its roof at that point in a reasonably safe condition, and if it failed to do so, and by reason thereof the debris fell upon and injured the appellee, such failure was negligence, and appellant is responsible to appellee for such damages as he may have sustained thereby. But, upon the other hand, if the place where appellee was injured was a part of the mine from which he was removing stumps, it being his duty to keep the roof there securely propped, if he negligently failed to do so, and by reason of such negligence received his injuries, appellant is not liable therefor. Furthermore, though the place of the accident was not that part of the mine from which appellee was removing stumps, but was a part thereof that appellant was required to keep propped, if it was in such close proximity to that part of the mine from which appellee was removing stumps, as to be affected by the blasting done by appellee upon the stumps, and the blasting caused the debris by which appellee was injured to fall, when it would not otherwise have done so, the appellant is not liable therefor, unless its mine superintendent knew, or by the use of ordinary care, could have known that such blasting would cause the top of the mine at that place to fall, and with such knowledge, or means of knowledge, negligently failed to guard against its doing so, by more securely propping the same, and appellee did not know, or by the use of ordinary care could not have known, that such would be the effect of the blasting.

In other words, it was the primary duty of appellant to keep that part of its mine through which appellee had to pass to reach the place of the stumps, securely propped so as to make it reasonably safe for his use, but after informing him of the danger of the work of removing the stumps, it was under no duty to protect him in that part of the mine where the stumps were situated, from danger resulting from his manner of doing his work. (Crabtree Coal Mining Co. v. Sample's Adm'r, 24 Ky. Law Rep., 1703; Ashland Coal Co. v. Wallace, 19 Ky. Law Rep., 849; Gibson v. Ry. Co., 46 Mo., 163.)

While the evidence is conflicting as to the place of the accident, we think the weight of it conduces to establish the fact that it occurred at a point twenty or twenty-five feet from the stump that appellee at the time was removing, and in a part of the mine where it was not his duty to prop the roof to keep it from falling.

The evidence also conduces to prove that the falling of the roof was caused by the blasting done by appellee upon the nearby stump. If so, the appellant is not liable unless it was shown by the evidence that it knew, or by the use of ordinary care could have known, that the blasting would cause

the roof to fall, in time to have secured it against falling; and further that appellee did not know, and by the use of ordinary care could not have known, that the blasting would have such effect. It was the province of the jury to determine whether appellee's injuries were caused by the negligence of appellant, or by his own negligence. They found that appellant was the negligent party, and as we are unable to say that there was not some evidence to support the verdict, it will not be disturbed. The instructions, though not in full accord with the view of the law herein expressed, were more favorable to appellant than was proper, for they in effect informed the jury that appellee was not entitled to recover, even if the accident occurred in that part of the mine where appellee was not at work, and where appellant was alone charged with the duty of keeping the roof of its mine in a safe condition, unless it knew or by the use of ordinary care could have known of the danger to appellee from overhanging rock or slate at the place of the accident, and that appellee did not know or by the use of ordinary care could not have known of such danger, in time to have prevented his injuries. As we have already stated, it was the duty of appellant to keep entrances and passways in the mine in a reasonably safe condition for the use of its employees, and appellee in using such passways had the right to rely upon the assumption that appellant's mine superintendent had properly performed his duty in that respect.

It is insisted for appellant that there can be no recovery in this case because it is alleged in the petition that appellee was injured in the main entrance of appellant's mine, whereas the evidence shows it was received in the first side right entrance, and that the variance is fatal.

We can not accept this view of the case. It is true that the petition fixes the place of the accident as in the main entrance, and that the proof shows it to have occurred in the first side right entrance, but no objection was made to the evidence by appellant. In fact, its own evidence was directed to showing that it was in the first side right entrance.

Section 129, Civil Code, provides that "no variance between pleadings and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and thereupon the court may order the pleadings to be amended upon such terms as may be just." (*Gaines v. Deposit Bank*, 19 Ky. Law Rep., 171.)

Section 130, Civil Code, provides that "If such variance be not material, the court may direct the fact to be found, according to the evidence, and may order an immediate amendment." (*Woodcock v. Farrell*, 1 Met., 437.)

After the beginning of the trial, and before the taking of the evidence had progressed to any considerable extent, the appellee offered to file an amended petition in which, among other things, it was averred that the injury to his person occurred in the first right side of the main entry, but the lower court refused to allow the amendment to be filed. Such refusal, under the circumstances, was error, but only prejudicial to appellee. In view of the offer to file the amendment, and of the fact that without objection from appellant, the proof was allowed to be made to show the true place of the accident, just as if there was no issue made by the pleadings on that point, and of the further fact that the rights of the appellant were not prejudiced

thereby, we are of opinion that it is estopped to raise the question of variance now relied on.

For the reasons indicated the judgment is affirmed.

LOGSDEN v. WESTERN BRICK CO.

(Filed March 18, 1904—Not to be reported.)

Damages—Instructions—In an action by appellant against appellee for the recovery of damages sustained by receiving injuries resulting by the falling of a wall of dirt upon him while he was engaged in filling a gondola, the evidence showing that the place was not a safe one, which fact was, or could have been known by the master, and was unknown to plaintiff, and could not have been, known by him with ordinary care, an instruction should have been given embodying this view of the law.

J. D. Reed and W. W. Thum for appellant.

O'Neal & O'Neal and Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Hobson.

Appellant sued appellee to recover for personal injuries received in its service. The testimony tended to show that he was employed in appellee's brick yard and was directed by the foreman to go to another part of the yard than that in which he was at work and assist in shoveling some dirt in cars. While he was thus engaged near a high bank it caved in on him, inflicting serious injuries. The proof was conflicting as to the cause of the caving in of the bank. The jury found for the defendant. The chief complaint on the appeal relates to the instructions given by the court, which, so far as material, were as follows: "The court instructs the jury that if they shall believe from the evidence that while the plaintiff was at work in the pit in the evidence mentioned, the defendant's agents or servants superior to the plaintiff in its service by or through their gross negligence caused a portion of the clay bank in the evidence referred to to fall upon him, and that the plaintiff thereby sustained the injuries by him alleged, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the plaintiff by negligence on his part so far contributed to his injury that but for such negligence he would not have been injured, in which latter event the law is for the defendant, and the jury should so find."

It is complained that the instruction should have been that it was the duty of the master to furnish a safe place for the servant to work and if the place was dangerous and this was known to the master or ought to have been known to it and was unknown to the servant, and by reason of this he was hurt, he could recover. (Ashland Coal and Iron Co. v. Wallace, 20 Ky. Law Rep., 853; VanDyke v. Memphis, &c., Co., 24 Ky. Law Rep., 1283.) When the case was before us originally we reached the conclusion that the instruction given by the court was correct in view of the allegations of the petition; but upon reconsideration of the record and in view of the amended

petition and the answer we conclude that the case was before the jury on the merits. The proof for the plaintiff shows that he was an inexperienced man, had been in the pit only a short time, and was working under the bank about eight or ten feet high, shoveling the dirt into a gondola. The bank had been dug into to the depth of about three feet and to the height of about two and a half feet, and one witness testified that when the accident happened, he saw wooden gluts which had been driven into the bank above and saw a negro man prying the bank with a crow bar just a few minutes before it fell. The evidence for the defendant contradicted this, and was to the effect that the bank was moist from recent rains and only a little of it fell off, and plaintiff was not hurt much. The proof for the plaintiff warranted the jury in concluding that the place assigned to the plaintiff to work was not safe, and that this was known to the master, or could have been known to it by the exercise of ordinary care, and was unknown to plaintiff, and could not have been known to him by ordinary care. An instruction submitting the case to the jury on this idea should have been given. The instruction quoted should not have been given.

Judgment reversed and cause remanded for a new trial.

Whole court sitting.

Judge O'Rear dissents.

COMMONWEALTH, BY, &c. v. AYER & LORD TIE CO.

(Filed March 18, 1904—Not to be reported.)

Frank A. Lucas for appellants.

Campbell & Campbell for appellee.

Appeal from McCracken Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

Section 4141, Revised Statutes of the United States, provides that the home port of vessels should be that at, or nearest to, which the owner, if there be but one, usually resides. Sections 4178 and 4334 require that the name of this home port should be painted upon the stern of the vessels, with appropriate penalty for disobedience. The act of 1884 prescribes that the word "port," as used in sections 4178 and 4334, in reference to painting the name and port of registered or licensed vessels on their sterns, should be construed to mean, either the port where the vessel is registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owners reside.

The argument of counsel for appellee, that the act of 1884, while changing the meaning of the word "port" in sections 4178 and 4334, left it unchanged, as used in section 4141, amounts to this; that the Congress of the United States, after a policy continued throughout a century, requiring the name of the home port to be painted on the stern of vessels, suddenly changed that policy, without any apparent reason, and permitted the name of a port, which was not the home port, to be painted thereon.

We think that Congress required the name of the home port to be painted on the stern of the vessel for a wise and useful purpose, enabling all persons, who had dealings with them, to know where they belonged; and we

are not willing to lightly adopt a construction, that it was intended by the act of 1884 to leave the place where the owner resides as the home port of the vessel, and yet permit the name of another port to be painted upon the stern. This construction would not only fail to enable persons dealing with vessels to know, of certainty, their home port, but it would absolutely mislead by permitting false information to be hung out under governmental sanction.

Petition for rehearing overruled.

LOUISVILLE RY. CO. v. MEGLEMERY.

(Filed March 18, 1904—Not to be reported.)

Fairleigh, Straus & Fairleigh and Kohn, Baird & Spindle for appellant.
M. A., D. A. & J. G. Sachs for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Judge Hobson delivered the following response to petition for rehearing:

On a reconsideration of instruction four asked by appellant, we conclude that it is subject to the criticism made by appellee, and that on another trial the court should modify it so as to read, "the court instructs the jury that if the plaintiff alighted," etc. It should also be modified in the next clause so as to read, "That the plaintiff was thereafter injured by a backward movement," etc. With this change we see no objection to the instruction, and on the whole case we think a new trial should be ordered. Complaint is made of the petition, and complaint is also made of the answer, but we think the issue is substantially presented. (L. & N. R. R. v. Harrod, ante, 250.)

Petition overruled.

JONES v. COMMONWEALTH.

(Filed April 13, 1904—Not to be reported.)

Criminal law—Evidence—The defendant being on trial for feloniously breaking into the dwelling house of J. G. Fusen and taking two sides of bacon and a ham therefrom, while testifying as a witness on his own behalf, was asked by the attorney for the Commonwealth this question: "Did you on the former trial of this case, when you were convicted of this offense, swear that you met James Bray on the Sunday night that you say you started back home, the night the meat was said to have been found in your crib," which the court required defendant to answer over the objection of his counsel, but after the examination was completed the court admonished the jury that the form of the question was improper, and that they should not consider the fact that defendant had been theretofore convicted. Held—While the question was improper we can not believe in the face of the admonition of the court, that it could have been prejudicial to defendant.

S. B. Dishman for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant was indicted for feloniously breaking into the dwelling house of J. G. Fusen, and taking therefrom two sides of bacon and a ham, by the grand jury of Knox county, and upon his trial before a petit jury was found guilty, and his punishment fixed at two years confinement in the penitentiary. Appellant testified as a witness in his own behalf, and upon cross examination, the Commonwealth's attorney propounded the following question to him: "Did you on the former trial of this case, when you were convicted of this offense, swear that you met James Bray on the Sunday night that you say you started back home, the night the meat was said to have been found in your crib?"

The defendant, by counsel, objected to the form of the question, which the court overruled, and required him to answer. He thereupon answered as follows: "I did not swear on the former trial about having met James Bray on that night because nothing was asked me about having met him. Bray was present as a witness on the former trial, but did not testify."

After the examination was completed, the trial court admonished the jury that the form of the Commonwealth's attorney's question was improper, and that the jury should not consider the fact that the defendant had been theretofore convicted, nor permit it to have any weight with them in the decision of the case. It is insisted for the appellant that the admonition to the jury by the trial court did not cure its error in failing to sustain the defendant's objection to the form of the question, and cite the case of *Tully v. Commonwealth*, 18 Bush, 142. In that case the trial court permitted the entire record of a previous trial to be read to the jury; and that case certainly presented a very different question from the one at bar. While it was clearly improper for the Commonwealth's attorney in framing his question to have referred to the fact of appellant's conviction upon a former trial, we can not believe in the face of the admonition of the court that this slip could have been prejudicial to the defendant. In *Pierce v. Commonwealth*, 10 Ky. Law Rep., 180, the defendant was on trial for killing one Monroe, and upon the trial of the case a copy of an indictment against the defendant for killing one Thomas was permitted to go to the jury over the defendant's objection; but before the conclusion of the trial, was withdrawn, and the jury told that they had no right to consider it for any purpose in making their verdict. Upon appeal this error was relied on for a reversal, but this court held it insufficient, saying: "We have no right to presume that appellant was prejudiced by reading that indictment. For to do so requires the assumption that the jury disregarded their oath and duty to try the case according to the evidence."

We are of the opinion that this error does not afford ground for reversal. A reversal is asked for the additional reason that the testimony of the Commonwealth was not sufficient to warrant a verdict of guilty. It was very clearly shown by the testimony that the dwelling of J. G. Fusen was broken into on the night of January 12, 1903, and two sides of bacon and a ham taken therefrom while the family were absent; and that Fusen went to the house of appellant and informed him that he intended on the next morning to have every man's premises on the creek searched for the missing prop-

erty; and that on that night he and John Jones, a brother-in-law of the defendant, went to his premises, saw him enter his stable, heard him throwing corn up against the walls of the crib, saw him emerge from the stable, carrying a box on his shoulder, which he set down in the field and began to open; that Fusen called out to the defendant, and fired his pistol; that defendant thereupon took to his heels, and an examination of the box disclosed the missing meat. They also went to the stable and discovered a hole in the pile of corn from which the box had been taken. Whilst the defendant introduced very strong evidence conducing to prove an alibi, we think there was sufficient evidence on which to found the verdict of the jury. Upon the whole case we perceive no error prejudicial to the substantial rights of the defendant.

Judgment affirmed.

PRITCHETT v. CONTINENTAL CASUALTY CO.

(Filed April 13, 1904.)

1. Accident insurance—Ratable indemnity—Installment payments of premiums—Assignment of wages—Forfeiture—Notice to company—Loss of foot—On November 7, 1902, appellant, a locomotive engineer, in the service of the N. & W. Ry. Co. contracted with appellee for an accident policy for \$750 indemnity against the loss of a foot, agreeing to pay \$51.84 premium in five equal monthly installments, beginning January 1, 1903, and, as a part of the contract assigned to the company the sum of \$51.84 of his claim for salary against said N. & W. Ry. for services rendered and to be rendered, payable in installments of \$10.37 each, the first installment to be deducted out of his wages for December, 1893. These installments provided for his insurance for ratable periods, the first for two months, the second for three months, the third for three months and the fourth for five months, and if the first four were paid the fifth should be paid by the railway company provided appellant remained in its service when it became due. In default of any payment, when due, all rights under the policy to be void and can only be reinstated by tendering payment at the general office, and no claim can be made between date of forfeiture and reinstatement. In case appellant ceased to be in the employ of said railway company before the first installment became due then his rights to cease, unless he notified the secretary of the company within three days thereafter and remitted said installment. The policy was issued and accepted. Appellant was discharged by the railway company December 18, 1903, and was paid his wages except \$10.37, which he left in the hands of the paymaster for appellee, but did not within three days thereafter notify appellee, in writing, or remit to it the first installment of his premium. He then entered the service of the C. S. Ry. Co., and on January 29, 1903, had his foot cut off by accident. On January 31, 1903, the N. & W. Ry. Co. paid appellee the \$10.37, which it had retained out of appellee's wages. Held—On these facts that appellant was entitled to recover the indemnity of \$750 from the insurance company.

2. Same—The contract sued on, not being a Kentucky contract, is not affected by the provisions of our statute.

W. Don Forman and Forman & Forman for appellant.

Breckinridge & Shelby for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

On November 7, 1902, appellant, Pritchett, who was a locomotive engineer in the service of the Norfolk & Western R. R. Co., at Columbus, O., applied to appellee for an accident policy. The application among other things contained the following:

"I agree to pay therefor (that is, for the insurance applied for) \$51.84 in equal installment payments of \$10.37 without notice; the first installment payment of \$10.37, to be paid on the 1st day of January, 1903, and one payment of like amount due the same day of each of the next succeeding four months. In default of any payment being made by 12 o'clock, noon, standard time, of the day when due, as above specified, all my rights under said policy, and the rights of the beneficiary thereunder, shall then and thereby become void, and can only be reinstated by tendering payment at the general office, and, if accepted, the reinstatement takes effect from and after the date of such payment, and no claim can be made between the dates of such forfeiture and such reinstatement. Any and all payments, as above agreed, may be deducted from any claim I may have on account of my insurance.

"I agree that any order or assignment given by me to the company in lieu of the installment payments above stipulated for, shall be and form a part of my contract with the company, and that the company does not accept or incur any responsibility for the collection thereof."

On the same day he signed and delivered to it a paymaster's order, which reads as follows:

"In lieu of payments provided in my application for accident insurance in the Continental Casualty Co., of Chicago, Ill., I hereby assign to said company the sum of \$51.84 of my claim against the N. & W. Ry. for services rendered and to be rendered by me, due and payable in five monthly installments as follows: First installment of \$10.37, to be paid and deducted from my wages for the month of December, 1902; second installment of \$10.37, to be paid and deducted from my wages for the month of January, 1903; third installment of \$10.37, to be paid and deducted from my wages for the month of February, 1903; fourth installment of \$10.37, to be paid and deducted from my wages for the month of March, 1903; fifth installment of \$10.37. It is understood and agreed that the installments above provided for, respectively, shall provide for my insurance under a policy to be issued to me by said company and bearing even date and number herewith, for ratable periods, to wit: The first installment, two months; the second installment, two months; the third installments, three months, and the fourth installment, five months, in their successive order as herein given; with the further understanding and agreement that if the first, second, third and fourth installments be paid when due, respectively, the fifth installment shall be paid by the railway company, provided I remain in the service of said railway company when same becomes due.

"I agree that failure to deduct any of the above installments by said paymaster, from any cause, is at my risk, and if any installment be not deducted as above provided, all my rights and rights of my beneficiary under said policy issued to me shall be void. I hereby waive for myself and my beneficiary under said policy any notice of the payment or nonpayment of any installment provided for, and I further agree that in case of default

upon any of the above installments, the same may be deducted from my wages in any succeeding month, at the option of said Continental Casualty Co., but such deduction shall only reinstate me from the date of such deduction and for the insurance covered by it.

"I agree that should I be discharged from or cease to be in the service of said railway system before the first of said installments becomes due, then all my rights and rights of my beneficiary in said policy shall immediately cease, unless I notify the secretary of said Continental Casualty Co., in writing, within three days after leaving said service, and remit said installment with said notice, and said reinstatement shall take effect only from the date of said company's receipt therefor. No agent shall alter or waive any of the conditions of this order."

The papers were forwarded to the company, and at its office in Chicago it issued a policy of date November 7, 1902, insuring Pritchett for twelve months, among other things in the sum of \$750 against the loss of a foot. The policy contained this clause:

"The consideration for this policy is the warranties and agreements contained in the application herefor, which is made a part hereof, and the paying when and as authorized by the company in writing of the premium specified on the reverse hereof, or in the insured's assignment of wages or order on the paymaster therefor. * * *

"It is further agreed that no indemnity shall accrue for any injury sustained subsequent to any default in the payment of premiums as herein provided and previous to any reinstatement of this policy which may subsequently be effected."

Pritchett continued in the service of the Norfolk & Western Ry. Co. until December 18, 1902, when he was discharged by it. He then received his wages due him from the company, except the sum of \$0.87, which he left in the hands of the paymaster for appellee, pursuant to the order he had given, quoted above; but he did not within three days after leaving the service notify the appellee in writing and remit to it the first installment of his premium. He then entered the service of the Cincinnati Southern Ry. and at Lexington, Ky., on January 29, 1903, had his foot cut off in an accident. On January 31 the Norfolk & Western Ry. Co. paid appellee the \$10.37, which it had retained out of Pritchett's December wages. On these facts Pritchett sued appellee to recover the indemnity of \$750, and it pleaded in defense of the action that he had ceased to be in the service of the Norfolk & Western Ry. Co. before the first installment of his premium became due, and that he had failed to notify it in writing within three days after leaving the service, or to remit the first installment with the notice, setting out the clause of the paymasters order providing that in this event the policy should immediately cease, and alleging that the policy was not in force at the time of the accident in which the plaintiff lost his foot. The court held the plea good, and dismissed the petition. The plaintiff appeals.

The application, the paymaster's order and the policy are all dated November 7. Each of the papers was manifestly made with a view to the other two, and all three must be read together, as one instrument, in determining their meaning. While it is stipulated in the application that the first installment of the premium is to be paid on the first day of January, 1903, it

is stipulated in the paymaster's order that in lieu of the payments provided for in the application the insured assigns to the company his claim against the Norfolk & Western Ry. for services rendered and to be rendered by him in five monthly installments, four to be deducted from his wages for the months of December, January, February and March; the fifth installment to be paid later. The insured was not, therefore, in default in the payment of the first installment of the premium, and no defense is made by the company on the ground that this money was not paid to it by the railway company until January 31. For the assignment of the claim on the railroad company under the paymaster's order being in lieu of the payments specified in the application, the company took the assignment and agreed to look to the railroad company for the money, provided the assured left the amount out of his December wages in the hands of the railroad company for it. It is stipulated in the order that the failure of the paymaster to deduct any of the installments from his wages is at his risk, and if any installment is not deducted all rights under the policy shall cease, but there is no provision as to the time when the railroad company is to pay appellee, and the necessary effect of the contract is that the insured is not affected by the delay of the railroad company in paying over the money after it has been deducted. When, therefore, appellee was hurt, he was not in default in the payment of any part of the premium. The second installment was not due until February 1. He had done all he was required to do as to the first installment if he had remained in the service of the Norfolk & Western Ry. Co. But he had not remained in the service of that company, and the question to be determined is what effect shall be given to the clause of the contract providing that if he left the service of the railroad company before the first installment became due, then all rights under the policy should cease, unless he notified appellee in writing within three days after leaving the service and remitted that installment with the notice. It will be observed that this clause only refers to his leaving the service of the railway company before the first installment became due. If he left the service of the company after the first installment became due, it has no application. In that event, he was required to give no notice of his leaving the service of the railroad company in order to preserve his rights. It was certainly not contemplated by the contract that when the railroad company retained in its hands the first installment, the insured was also to remit the amount to appellee with a notice stating that he had left the service of the railroad company. While the proper construction of the contract is a matter of difficulty, taking it as a whole we think it evident that this clause was only inserted as a security for the payment of the first installment. The contract is an unusual one. It took effect from November 7, and yet nothing was to be paid upon it until the insured's December wages were earned, and then he was to leave in the hands of the railroad company the amount of the first installment. If he had left the service of the railroad company before the month of December appellee would have had no security for the payment of its money, and yet would have been compelled to carry the risk until default was made in the payment of the first installment but for this clause of the contract. It, therefore, required him, if he left the service of the company, at once to give notice to it of that fact, and immediately pay the first installment.

It is stipulated in the order not only that the failure of the paymaster to deduct the installments from his wages was at his risk, but also that if any installment was not deducted as therein provided, all rights under the policy should be void. When, therefore, Pritchett settled with the railroad company on December 18 he was bound to leave the amount of the first installment in its hands, or lose all rights under the policy. When the deduction was made the railroad company held the money for appellee. The contract is silent as to when the deduction from his wages should be made, and necessarily means that this should be done when his wages for the month should be settled. It is immaterial whether the settlement was made before or after the 1st of January. The first installment became due out of his wages when his wages for December were settled by the railroad company, and if it was not then deducted the policy ceased. It is not stipulated that if he should be discharged before the first installment was paid, then notice in writing in three days must be given, accompanied with a remittance of the first installment. The words, "before the first of said installment becomes due," are evidently used with reference to the preceding part of the order by which his wages so far as necessary are assigned to appellee in lieu of the payments provided for in the application. The meaning of the clause is, if he should leave the service of the railroad company without leaving the first installment in its hands, he must then give the notice, and remit with it the amount; for in that event appellee would have no security for its money. To hold that he lost his insurance unless he left the amount in the hands of the railroad company, and also lost it if he did not in addition remit the amount to appellee himself in three days, would be to force him to pay this installment twice to preserve his rights. Contracts must be construed reasonably, and in case of doubt conditions like this are construed against the insurer, for he prepares the contract and his liability should not be defeated by doubtful phrases. The purpose of the contract is indemnity, and the insured will not be adjudged to have lost his indemnity unless this is the fair meaning of the contract. The giving of the notice that he had left the service of the railroad company and the remitting of the amount of the first installment with the notice stand together. He was not required to give the notice unless he was also required to remit the amount of the first installment with it. There was no necessity for him to remit to appellee money which, by the terms of the contract, he had left in the hands of the railroad company for it, and as the remittance was to accompany the notice, when no remittance was required, no notice need be given. The notice only went with the remittance. The policy is silent upon the subject. The condition is inserted only in the order assigning the wages, and apparently relates merely thereto. It does not appear to have been regarded as material what railroad company the insured worked for, for no notice was required if he left the service of the railroad company after the first installment became due, thus showing that the insurer intended to guard only against the loss of its security for the payment of the first installment. In *Lyon v. Travelers Insurance Co.*, 54 Am. R., 357, the court said of a similar contract, where the railroad company had not paid over the money: "It is true nonpayment of the premium for any one of the periods suspends the enforcement of the policy; but the insured in a case like this, when he has provided

For the payment when due and the premium made is in the possession of the defendant, or under its control, payment will be deemed to have been made until the insured is notified by the defendant to the contrary."

In *Fidelity and Casualty Co. v. Johnson*, 80 L. R. A., 206, the court, in response to a similar defense, said: "The assured's duty as to the payment was fully performed when he left the installment in the hands of the paymaster." (1 Coy., 242; *Eury v. Standard Ins. Co.*, 10 L. R. A., 584.) The case of *Travelers Insurance Co. v. Bane*, 85 Ky., 677, was where the insured was in default in the payment of his premiums. So also are the cases of *McMahon v. Travelers Ins. Co.*, 77 Iowa, 229; *Landis v. Standard Ins. Co.*, 6 Ind. App., 502.

We, therefore, conclude that the clause relied on by the defendant does not defeat a recovery where the amount of the first installment was deducted from the December wages and left in the hands of the railroad company for appellee. The contract sued on not being a Kentucky contract, is not affected by the provisions of our statute.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

WOODLAND CEMETERY CO. v. ELLISON.

(Filed April 13, 1904—Not to be reported.)

Appeals—Judgment—Where upon the return of a case to the lower court where the value and use of certain property is in controversy such value and use was determined as directed in the reversal of the case, and a judgment entered by the chancellor in accordance therewith, the finding of the chancellor will not be disturbed.

R. S. Crawford for appellant.

Tye & Denham for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hobson.

The facts of this case are set out in the opinion on the former appeals. (*Finley v. Hill*, 19 Ky. Law Rep., 989; *Woodland Cemetery Co. v. Ellison*, 23 Ky. Law Rep., 2222.) When the case was last here the court said, after holding that the sale to Ellison was void: "But inasmuch as the corporation has received the benefit of his purchase money, they should be required to repay it to him. The court will ascertain the value of the use of the property by Ellison and the damages done to it, if any, by him, and set it off against the interest and purchase price."

On the return of the case to the circuit court proof was taken by the parties on the questions indicated, and on final hearing it was adjudged that Ellison had done no damage to the land, and judgment was entered in his favor for his purchase money with interest, subject to a credit of \$5 a year for the use of the land. The plaintiffs again appeal. The rule is that ordinarily the chancellor will not order a cemetery sold; but there were only two graves on the land bought by Ellison, and the cemetery company had not paid Freeman the purchase money. Freeman had a lien on the land for his purchase money, and when Ellison paid Freeman he became entitled by sub-

stitution to the benefit of Freeman's lien, for the cemetery company and those who bought from them took subject to Freeman's lien, and this was not divested by the payment made by Ellison to Freeman in his purchase from the company. The proof sustains the chancellor's finding that the land is in as good condition as when received by Ellison. While he cut some trees from it, he also put the land in grass. The trees were not well suited for shade, and if shade trees are desired they can be set out. The cleaning up of the land and getting it in grass were of as much value to it as the trees which were cut.

The court properly allowed Ellison interest. The proof as to whether the money was tendered to him was conflicting. But, admittedly, the tender was not kept good. A tender to be effective must be kept good. Besides, it was held on the last appeal that Ellison was entitled to his money, with interest, and that opinion is the law of the case. The proper method of computing rents in the case of vendor and vendee where the sale is rescinded is a matter of some difficulty. It depends somewhat on the facts of each case, the effort being as nearly as possible to place the parties in statu quo, and do justice between them. The proof is conclusive that Ellison spent a good deal on the land. He improved it on the idea that it was his, and got very little out of it. He was allowed nothing for his improvements or expenses. On all the facts, and giving some weight to the chancellor's judgment, we conclude that we ought not to disturb his finding on the question of rents.

Judgment affirmed.

McKOWN v. GETTYS & GILBERT.

(Filed April 12, 1904—Not to be reported.)

Contracts—Sale by broker—Appellant, a Louisville broker, wired appellees, St. Louis brokers, offering to sell them 5,000 cases tomatoes, futures, at so much, which offer was accepted, and the details of the transaction completed by letters between them. Appellant failing to carry out his contract, appellees had to fill their contracts made as a result of this one, at advanced prices. In an action by appellees against appellant for the amount they lost by reason of his failure to perform his contract, Held—that the contract to deliver the tomatoes at the price named was absolute and appellees are entitled to recover upon it.

R. C. Kinkead for appellant.

W. W. & J. R. Watts for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Barker.

The appellant, W. M. McKown, is a merchandise broker in the city of Louisville, Ky. The appellees, Gettys & Gilbert, are engaged in the same business in St. Louis, Mo.

On the 9th day of July, 1901, the appellant telegraphed to appellees as follows: "We offer for immediate reply by wire 5,000 cases of 3 lb. standard tomatoes futures, 77½ cts. delivered East St. Louis, regular terms. St. Louis proper 2 cts. hundred higher." Upon receipt of which appellees wired

appellant: "Will take 5,000 cases 3 lb. standard tomatoes futures, 77½ cts. delivered East St. Louis. Quote more."

"Seventy-seven and one half cents" meant per dozen cans, there being two dozen cans in each case. By "futures" was meant tomatoes which had not, at the time of the contract, been packed, the packing season not opening until some time after the dates of the telegrams, and ending late in the fall.

Immediately after wiring their reply, appellees wrote appellant as follows:

"W. H. McKown,

"St. Louis, Mo., July 10, 1901.

"Louisville, Ky.:

"Gentlemen—Your telegram received, quoting 5,000 cases 3 lb. future Indiana tomatoes at 77½ cts. delivered E. St. Louis. We wired you promptly that we would take the 5,000 cases with division of brokerage, and now await your confirmation with contracts. Kindly write us full particulars in regard to the factory, giving us all the information you can as to their responsibility, character, etc.; also endeavor to get the privilege of label, allowing \$1 per thousand, if it should be desirable. Give us an 80 per cent. contract guaranteed. If you have anything more to offer in future tomatoes, please wire us promptly.

"Yours truly,

"GETTYS & GILBERT."

On the 12th of July, appellant wrote appellees as follows:

"Louisville, Ky., July 12, 1901.

"Messrs. Gettys & Gilbert,

"St. Louis, Mo.:

"Gentlemen—So far we have succeeded in placing 5,000 cases tomatoes for your account with the Lexington Canning Co., Lexington, Ind., and will furnish the regular association contract for these goods. These good people are thoroughly responsible, and pack a nice line of goods, and you need anticipate no fears in reference to them. Please send us the names of the several buyers, and we will have contracts made out accordingly. * * *

"Yours truly,

"W. M. McKOWN."

Within two or three days after the receipt of this letter, appellees claim to have resold the tomatoes to various parties, thereby obligating themselves to deliver the goods to their customers at the proper time. Afterwards, the Lexington Canning Co. repudiated the contract for the tomatoes, which appellant assumed to make for it, and consequently, at the end of the packing season, appellees were compelled to go upon the open market and purchase other tomatoes at a largely advanced price, in order to fill the contracts they had made based upon the supposition that they would in due time receive the 5,000 cases from the Lexington Canning Co.; after which, they instituted this action against appellant, setting up in their petition substantially the foregoing facts, and alleging that, at the time they were forced to purchase the tomatoes to supply their customers, the market price had advanced from 77½ cents per dozen cans to \$1.15 per dozen cans, and that they had by reason of appellant's breach of contract, been damaged in the sum of \$3,750, that being the difference between the contract price at which they

had purchased them of appellant and the market price which they had been forced to pay because of his failure to comply with the terms of the contract.

Appellant, in his answer, admitted the sending of the telegram, and the receipt of the answer thereto, above quoted, but denied that it constituted a contract of sale between him and appellees, and also denied the material allegations of the petition. By a second paragraph in his answer, he alleged that the transaction between him and appellees was merely the business of broker with broker, and not intended by him, or understood by them, to be an absolute sale, but that it was only an offer on his part of goods, which, upon acceptance by them, had to be reported to his principal, the Lexington Canning Co., and approved and ratified by it before it constituted a contract of sale; all of which appellees well knew and understood at the time; that they well knew that it was then, and is now, "a custom and usage of trade, particularly applicable to the business carried on by the plaintiffs (appellees) and this defendant (appellant) that brokers' quotations of prices are, and were, subject to change or revocation, and that no quotation offered by one engaged in the business that this defendant and plaintiffs were at the time mentioned engaged, are binding either upon the broker or principal until reported by the broker to the principal, and the acceptance of such quotation formally had by the principal. That this defendant (appellant) states that he did report to his principal, the Lexington Canning Co., the conditional acceptance of the quotation on the tomatoes as mentioned in the petition, and that said principal declined to accept said offer, or to enter into any contract whatever with plaintiffs, or to ship or to deliver to said plaintiffs any of the tomatoes as set out in the petition. Defendant further states that there never was any contract by this defendant to deliver to the plaintiffs any of the tomatoes or goods mentioned in the petition, except on the ratification and confirmation of such price by his principal, the Lexington Canning Co., which, as hereinbefore stated, they refused to accept or ratify or confirm."

By reply appellees controverted all of the affirmative allegations of the answer, thus completing the issues. A trial resulted in a verdict in favor of the appellees in the sum of \$1,250, of which appellant is now complaining.

The testimony of appellees fully sustain their theory of the case, that they regarded the telegram from appellant to them, and their reply thereto, as an absolute contract, just as it appears on the face of the transaction, although they did not know whether appellant was acting for himself, or was dealing for another. The correspondence between the parties, which is in evidence, beginning with the letter of the 12th of July from appellant, shows that he considered that the Lexington Canning Co. was bound by the contract, evidenced by the telegrams; on July 17, he wrote: "In reference to the Lexington matter, we feel that we are fully right, and we propose to stand just as pat on this deal, as if we had their signature to a contract.

"We have their word, to sell the goods; we have their letter of acceptance at the price quoted you; the only thing, their acceptance was for another party than your good selves; but we had a perfect right to change the buyer even after the contract was passed, and we propose to hold them for their trade."

On the subject of its liability on the contract made by him, appellant wrote to the Lexington Canning Co. on the 17th of July, 1901:

"Referring again to the question of your position in relation to 5,000 cases of 3 lb. tomatoes. We beg to advise you that we have two other transactions that were going through at the same time; they were similar to yours. Both of these packers have forwarded their contracts, one of them getting his contract here only this morning. Now, we trust you will look at the fairness of this deal, and will forward your contract immediately for signature of the buyer, and thus save expense and annoyance of trouble to yourselves and to the buyer."

In his testimony appellant said, frankly, he had no authority to bind the Lexington Canning Co., and it was not bound to appellees by his acts in the transaction involved in this litigation. By his telegram to appellees, and their acceptance of its terms, appellant made with them what purported, on its face, to be an absolute contract to deliver the tomatoes at the price named; by his letter of the 12th of July, 1901, he represented to them that he had placed their order with the Lexington Canning Co. All that appellees desired was a responsible principal, and it was immaterial whether appellant or the Lexington Canning Co. occupied that position. As it turned out that appellant had no authority to act for the canning company, he was liable as principal, provided appellees were ignorant of this want of authority. (*Sanford v. McArthur*, 18 B. Mon., 421; *Murray v. Caruthers*, 1 Met., 71.)

The trial court instructed the jury as follows:

"No. 1. If the jury believe from the evidence that when plaintiffs Gettys & Gilbert on July 10, 1901, wired their acceptance of defendant's offer contained in his telegram of July 9, 1901, they knew that defendant's said offer was made by him as a broker, and that such offer, by reason of defendant's limited authority, would not be binding until ratified and confirmed by defendant's principal, and that defendant's principal refused to ratify and confirm such offer, they shall find for the defendant.

"No. 2. If the jury believe from the evidence that said plaintiffs did not purchase the goods embraced in defendant's offer of July 9, on their own account, or if the jury believe from the evidence that when plaintiffs wired their acceptance of defendant's offer they knew said offer was made by defendant as a broker, and if they further believe from the evidence that at that time there existed among merchandise brokers a well defined, uniform and universal custom known to plaintiffs, or which they ought to have known, that when an offer is made by a broker like that contained in said telegram of July 9, 1901, it is of no binding effect until ratified and confirmed by such broker's principal, and if they further believe from the evidence that defendant's principal refused to ratify and confirm said offer, they shall find for the defendant.

"No. 3. If the jury believe from the evidence that when plaintiffs wired their acceptance of defendants' offer they did not know that said offer would not be binding until ratified and confirmed by defendant's principal by reason of defendant's limited authority, and if they further believe from the evidence that no custom among merchandise brokers as defined in instruction No. 2, existed at the time of said offer, and if they further believe from the evidence that plaintiffs accepted said offer on their own account, they shall find for the plaintiff.

"No. 4. If the jury find for the plaintiffs, they shall award them such sum as represents the difference if any, between the market price of the tomatoes mentioned in defendant's offer under the conditions of said offer at the time plaintiffs first learned of defendant's refusal to deliver said tomatoes, if he did so refuse, and the price fixed in said offer, not to exceed the sum of \$3,750, the amount claimed in the petition."

This presentation of the law was as favorable to appellant as he was entitled, if not more so. There was no variance between the contract sued on, and the cause of action established in the evidence. It is sometimes a question of some nicety to determine whether in questions of the liability of agents to third parties the form of the action should be for a breach of contract or for deceit; but in cases such as this, the right of the injured party to sue in contract is beyond question. The contract is contained in the telegrams; it is absolute in terms, and purports on its face to be the contract of appellant personally; to relegate the appellees to an action against some one else, it was incumbent on him to show a legally bound principal, which he failed to do. The rule is that where an agent acts without authority, and uses apt words to bind himself, he is liable on the contract. (Mechem on Agency, section 550.)

The trial court did not err in admitting the evidence of the custom among the brokers of St. Louis to use a different form of words when contracting in their own name, and when contracting subject to the confirmation of others. Under the issues in this case, it was material to show what appellees understood by the words of appellant's telegram, it having been pleaded that they knew the contract tendered was not absolute, but subject to confirmation; it was also competent, as tending to defeat the universal custom among brokers, pleaded and relied on by appellant as a bar to appellees' action. The evidence adduced fully sustains the verdict.

For the reasons indicated the judgment is affirmed.

JOHNS v. CUMBERLAND TELEPHONE AND TELEGRAPH CO.

(Filed April 13, 1904—Not to be reported.)

Damages—Evidence—Instructions—In an action against a telephone company for damages for trespass to land, the petition setting out ownership and possession and that the telephone company had wrongfully, forcibly, maliciously and against his will trespassed upon his land, the defendant company failing to deny ownership and possession in its answer, the evidence supporting the allegations of the petition the plaintiff was entitled to a peremptory instruction for damages done to his property.

J. H. Shelton for appellant.

Fairleigh, Strauss & Fairleigh for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellant to recover damages of appellee for an alleged wrongful trespass upon his land situated in Hickman county, Kentucky.

In his petition appellant alleges that at the time of the trespass he was the owner and in possession, and that he is now the owner and in possession of thirty-three and one-third acres of land, set out by metes and bounds, and that appellee, by its agents and servants, on the — day of May, 1902, and on various other days thereafter, prior to the commencement of the action, wrongfully, forcibly, maliciously, and against his will and consent, trespassed upon his land, digging holes therein, and erecting telephone poles thereon, destroying the soil and grass, etc.; that these wrongs were done over his protest, and were committed forcibly, unlawfully, and maliciously; that by reason of same his property was injured, and he was insulted and humiliated, and damaged in the sum of \$250.

Appellee's answer fails to deny the ownership and possession of appellant of the land in question: nor does it deny that the holes were dug and the poles erected on appellant's land; it being merely denied that the alleged trespass was maliciously, wrongfully and unlawfully done. An analysis of the pleading shows that its denials are limited to the words of aggravation used in the petition, leaving the actual trespass admitted.

By the second paragraph it is affirmatively alleged that appellee had had possession of the strip of land in question for six years last past. This plea is bad, and appellant's general demurrer to it should have been sustained. Upon the trial of the case the evidence showed that the agents and servants of appellee came upon the land admitted in the pleadings to be the property and in the possession of appellant, and, over his protest, and against his will and consent, dug holes in it, and erected poles thereon; that they, without pretending to know to whom the land belonged, in the presence of appellant, and despite his protest, wilfully committed the trespass complained of in the petition.

The learned trial judge, overlooking the admissions in the answer as to the ownership and possession of appellant of the property, and the defects in the denials as to the trespass, evidently concluded that appellant had failed to establish his ownership and possession, and gave the following instruction: "The jury are instructed that inasmuch as the proof in this case shows that the poles of the defendant were on the outside of plaintiff's fence, said defendant had the right to put up their poles where they did along plaintiff's fence and had the right also to plant their guy pole and 'dead man' where same, from the evidence, were planted. Therefore, you will find for defendant in this case unless you believe, from the evidence, that the 'dead man' planted near plaintiff's fence was put in in such a negligent and careless manner as to cause a wash under plaintiffs' fence and in his field, in which event you will find for the plaintiff such actual damages as you may believe from the evidence he has sustained, if any, from planting said 'dead man' by defendant's employes where it was planted, not exceeding \$250."

Under the pleadings and evidence in this case, appellant was entitled to a peremptory instruction for the actual damage done his property by the action of appellee's agents and servants, and also to an instruction that, if the trespass was done in a high-handed, malicious and oppressive manner, he was entitled to recover punitive damages. (*Ohio Valley Telephone Co. v. Myer*, 22 Ky. Law Rep., 36.)

Upon the return of this case, appellee, if it desires, should be permitted to amend its answer.

The judgment is reversed for proceedings consistent with this opinion.

BROWN v. COMMONWEALTH.

(Filed April 15, 1904—Not to be reported.)

Criminal law—Instructions—Appellant having been indicted under section 1166, Kentucky Statutes, for willful and malicious cutting and wounding, an instruction to the jury that they should find him guilty of malicious cutting if the same was done "feloniously and with malice aforethought" was erroneous, and an instruction that they should find the defendant guilty of cutting in sudden heat and passion if the same was done in sudden heat and passion and without previous malice has been condemned by the Court of Appeals because it does not follow the language of the statute, the words "sudden affray" not being synonymous with the words "in sudden heat and passion."

H. A. Schoberth for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Nunn.

Appellant was tried at the October term, 1903, of the Woodford Circuit Court on a charge of willful and malicious cutting and wounding of Mack Layton with the intent to kill him. He was found guilty and his punishment fixed at three years confinement in the penitentiary. The appellant asks a reversal, claiming that the court erred in instructing the jury and for the further reason, as he claims, that the evidence did not authorize the verdict.

The offense with which appellant was charged, as shown by the witnesses, was committed about as follows: On one night in the month of September, 1903, the prosecuting witness, Mack Layton, and three or four friends of his were in a saloon known as the Botkin saloon in Versailles. At the moment when the appellant entered the saloon, Layton and his friends were examining some kind of puzzle when appellant, walked up and rested his weight upon Layton and looked over at the puzzle. Whereupon Layton pushed him and told him that there was plenty of room without pushing him. Appellant answered, "O go to h—l." Layton picked up a salt stand, threw it at appellant striking him on the head. It bounced, struck the wall and fell to the floor breaking in pieces. Appellant then started toward Layton. Botkin, the saloon keeper, then ordered him out of the house. He went out of the back door into the alley and returned to the door and said to Layton, "you wont come out here and do that." Botkin again made him go away. He soon returned to the door and said to Layton, "you come out here and I'll show you what I'll do to you." Layton immediately went out and they engaged in a fight, appellant cutting Layton on the cheek near the ear. Layton was not confined to his bed by reason of his wound, but it was serious enough to require being sewed up by the doctor. This in substance was

proven by four or five witnesses. The appellant agreeing to it, except he claimed that he did not know what took place between the time he was struck with the salt stand and the time when Layton reached him in the alleyway when they commenced the fight, and said he only cut him with the knife to defend himself.

If the appellant was conscious of his acts in calling and daring Layton out into the alleyway to fight, he can not claim a case of self defense. This the jury evidently believed. If he had used the knife at the moment when the salt stand was thrown, the case would be different. The appellant contends that the court failed in its instruction to use the word "willfully." In this, he is mistaken. The court said to the jury, "if they believe from the evidence beyond a reasonable doubt that the defendant in this county and before the finding of the indictment herein did willfully and maliciously cut and wound one Mack Layton with a knife, they ought to find him guilty; guilty of malicious cutting and wounding, if the same was done feloniously, with malice aforethought and with intent to kill the said Layton." This instruction was more favorable to the appellant than he was entitled to. The words "feloniously" and "with malice aforethought" were improperly used in the instructions and unfavorable to the Commonwealth. This prosecution was under the statutory offense and defined in section 1166 of the Statutes.

The court gave an instruction on sudden heat and passion and one directing the jury to find him guilty of the lesser offense if they had any doubt of the offense he was guilty of and also one on self-defense in the usual form and the usual instruction on reasonable doubt. The court told the jury that they should find the defendant guilty of cutting in sudden heat and passion if the same was done in sudden heat and passion and without previous malice. This instruction was condemned by this court in the case of *Violett v. Commonwealth*, 24 Ky. Law Rep., 1720. In that case the court said: "It will be observed that the instruction of the court defining the offense does not follow the language of the statute. By the instruction of the court, the offense consists in shooting in sudden heat and passion without previous malice. By the statute, it consists in shooting in a sudden affray or in sudden heat and passion without previous malice and not in self-defense."

The words "in sudden affray" are not synonymous with the words "in sudden heat and passion," the statutory offense is, therefore, different from that defined in the instruction.

Section 1166 defines the statutory offense of the willful and malicious shooting or cutting of another with the intent to kill. Section 1243 of the statutes defines the offense of shooting or cutting another in a sudden affray or in sudden heat and passion and the court in its instructions should have defined these offenses as herein stated. (*Hardin v. Commonwealth*, 24 Ky. Law Rep., 1540.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

CITY OF COVINGTON v. ASMAN.

(Filed April 14, 1904—Not to be reported.)

Damages—Appeal—In an action for damages against a city for injuries sustained in consequence of a defective sidewalk, upon a return of the case to the lower court upon a former appeal, the instructions meeting the requirements of the law, and the evidence authorizing the verdict against the city, such verdict upon a second appeal will not be disturbed.

F. J. Hanlon for appellant.

B. F. Graziana for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

On the night of the 4th of September, 1900, the appellee, Emma Asman, while walking along the sidewalk of one of the streets of the city of Covington, stepped into a hole therein, by which she was thrown down, severely wrenching and spraining her ankle, inflicting serious bodily injury upon her, and from which she suffered great pain. To recover damages for this injury, she instituted this action. This is the second appeal of the case; the opinion on the first appeal is contained in the 24th volume Ky. Law Rep., 415.

Upon the first appeal, the judgment was reversed, because the instructions did not submit to the jury, for their determination, whether the sidewalk, at the time and the place the injury occurred, was in a reasonably safe condition for the use of persons of ordinary care and prudence. Upon the return of the case to the lower court, a second trial resulted in a verdict for the appellee for the sum of \$1,500. The instructions of the learned trial judge were amended to meet the requirements of the opinion on the first appeal, and contain a correct exposition of the law applicable to the case. The evidence upon the second trial was substantially that produced upon the first, except that it tendered to show that appellee's injury was greater, and of a more permanent nature, than at first supposed. The facts of this case and the rules of law flowing therefrom are fully set out in the former opinion, and it is not necessary, therefore, that they be repeated here. A careful reading of the record convinces us that the appellee was entitled to the verdict awarded her by the jury.

The judgment is affirmed.

DAVIS v. BOONE COUNTY DEPOSIT BANK, &c.

(Filed April 14, 1904—Not to be reported.)

Pleading—Bills of exchange—In an action upon a note by a bank which it had discounted, the allegation in the petition that "The said obligation was during the business hours of this plaintiff, at its regular place of business, and while the said obligation was alive, and before the maturity thereof" discounted at, by and to this plaintiff" was sufficiently explicit, the term

"discounted" having a well-defined legal meaning, which involved the meaning that the note had been bought by the bank and paid for.

J. G. Vallandigham and John A. Lee for appellant.

H. G. Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge O'Rear.

The record establishes the fact that appellant executed to appellees, Swope & Hartsough, a negotiable note which before its maturity, was discounted by the appellee bank.

The discounting was for value in the usual course of the bank's business.

Appellant defended the suit by denying that the note was discounted, and by pleading that it had been procured by the payees' fraudulent misrepresentations, and was without consideration. All the evidence showing that the note had been discounted as stated, there being no conflict on this point, the court properly instructed the jury peremptorily to find for the bank. The only attempt in the record to charge the bank with notice of the infirmity of the paper was the claim that its attorney, who was the same president of the corporation for whose benefit the note is alleged to have been taken, was in a position to know, and presumably knew of the lack of consideration. Even if it be conceded that the attorney actually knew of the facts alleged in the answer as constituting the fraud perpetrated on appellant by the payees of the note, the facts show, as far as they show anything on that point, that the attorney's interest was hostile to that bank, and, therefore, is no presumption that he gave the bank the information on that subject that he might have had. This evidence alone was not enough to charge the bank with notice. The petition alleged: "The said obligation was during the business hours of this plaintiff, at its regular place of business, and while the said obligation was alive, and before the maturity thereof, discounted at, by and to this plaintiff, and it has ever since been and now is the sole, only, and exclusive owner thereof."

It is complained that this averment is defective, and fails to show a discounting of the note so as to place it upon the footing of a foreign bill of exchange under the Statute, section 483, because it does not state when or how the note was discounted, nor the consideration paid for it. We are of opinion that the averment was sufficiently explicit, the term "discounted" having a well known legal definition, which involved the statement that the note had been bought by the bank and paid for, it deducting and reserving interest. The word discount has as true illegal significance, and is as well understood as the word "paid." The motion to make the petition more definite and specific on this point was properly overruled.

In an amended answer appellant sought to make his answer a cross petition against the payees of the note, who had discounted it to the bank, namely Swope & Hartsough, claiming that if it should develop that the note in fact had been discounted by the bank so as to cut off appellant's de-

fense, then appellant should be allowed to recover against the payees whatever judgment might be recovered against him by the bank. The circuit court dismissed this cross petition without prejudice, and we think properly so. Until the maker of the note, appellant had been adjudged to pay it to the bank, or had paid it, he had no cause of action against the original payees for their alleged fraud; his cause of action had not accrued at the time he tendered the cross petition.

The judgment of the circuit court is affirmed.

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KENTUCKY COURT OF APPEALS.

BOARD OF PARK COMMISSIONERS OF THE CITY OF LOUISVILLE
v. MARRETT.

(Filed April 13, 1904—Not to be reported.)

Recitals in deed—Consideration—Estoppel—The appellee, by a clause in his deed to appellants, located the Demange fourteen acres, which appellants had previously purchased out of the same survey, as having seven acres lying south of it, which necessarily makes the tract he sold appellants adjoin the Demange tract; the consideration for the deed was \$2,250, and, presumably this consideration was paid for all that the deed conveyed, and by his deed appellee is estopped to say that Demange fourteen acres does not lie north of and adjoining the seven acres as he now contends. On the evidence the court should have peremptorily instructed the jury to find for the defendant (now appellant).

Kohn, Baird & Spindle, H. L. Stone, C. M. Lindsay and R. L. Greene for appellant.

A. E. Willson and M. B. Gifford for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

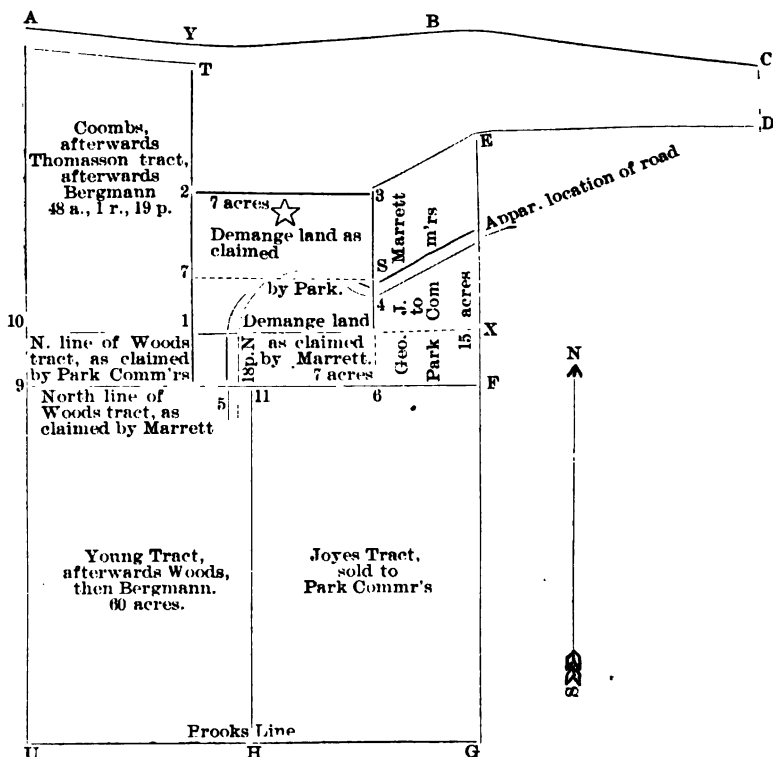
Opinion of the court by Judge Hobson.

Roman Marrett owned a tract of land in Jefferson county conveyed to him in 1845 by Stephen Sanders, who bought it at a commissioner's sale in a chancery action to foreclose a mortgage given by William Sanders in 1836, the tract conveyed to Marrett being known as lot 12 in that sale, the whole tract consisting of 363 acres and being cut up into smaller tracts for the purposes of sale. Sanders had sold 100 acres to Walter Young, and the remainder of the land not paying the mortgage debt, 60 acres on the north end of the Young land was sold and purchased by Churchill, who conveyed it to James Woods. On August 25, 1856, Marrett conveyed fourteen acres off his tract to his sister, Rose Demange, and on September 29, 1866, he conveyed to his son, the appellee, George Marrett, the tract conveyed to him, less the land conveyed to his sister. Rose Demange on July 8, 1891, conveyed her

tract to the board of park commissioners of the city of Louisville, who had previously bought from Patrick Joyes a tract lying south of it, and about the same time or a little afterward bought from George Marrett fifteen acres lying east of the Demange tract. This controversy turns on the proper location of the Demange tract of fourteen acres, which in the deed to her is 'bounded as follows:

"Beginning at said Marrett's corner in James Woods' line, also corner to Wm. P. Thomasson, a stake, and running thence with said Thomasson's line north 32 poles to a stake; thence east 70 poles to a stake; thence south 32 poles to a stake on the side of a hill in said Woods' line; thence with said line west 70 poles to the beginning."

Thomasson's land lay west of Marrett's and north of the Woods tract. The situation is shown on the following map on which the Marrett tract is represented, as claimed by appellee, by the lines A, Y, B, C, D, E, F, 6, 5, 7, T, A, the Thomasson tract lying west of it, the Woods tract south of Thomasson's, the Joyes tract east of Woods and the Demange tract, as claimed by appellee, being represented by the lines 5, 6, 8, 7:



On the other hand, appellants maintain that the Demange tract was actually located on the lines 1, 4, 8, 2. The controversy is over the seven acres embraced within the lines 2, 3, 8, 7. If the line 2, 3, is the north line of

the Demange tract, the land in controversy is the property of appellant. But if the north line of the Demange tract is from 7 to 8, the seven acres is the property of appellee. The proof shows that when the park commissioners bought the land of Mrs. Demange, both she and George Marrett showed them the lines of her tract as claimed by the park commissioners and indicated on the map by 1, 4, 8, 2. The corners were pointed out at 2 and at 8 as well as at 1 and 4, and there was no question then as to this being her land. It was surveyed by a surveyor employed by the park commissioners and Marrett also pointed out to him the corners. Mrs. Marrett testifies that her brother sold her to the line 2, 8, and that she had always held up to this line, which included some apple trees which were recognized as hers. About the time of the trade with Mrs. Demange the park commissioners were on a trade with Marrett for fifteen acres of his land lying east of her tract, and when this land was surveyed out it was discovered that the calls of Marrett's deed took him from E to F and from T to 5. He then set up claim to the park commissioners that his line ran from 5 to F and not from 1 to X, as had been supposed. The line J, H, G is established and undisputed. The Joyes deed called to run 178 poles from this line and so did the Woods deed. One hundred and seventy-eight poles will take you to the line 10, 1, X. It will thus be seen that there was a lap between the deeds. The park commissioners were claiming up to the line 1, X, so when Marrett and wife made them a deed for the fifteen acres embraced within the lines 8, E, F, 6, these words were embraced in the deed: "Also convey without warranty all their interest in a tract of land of about seven acres lying immediately south and adjoining the south line of the fourteen acres heretofore conveyed by Rose Demange to the said second party by deed dated July 8, 1891, and recorded in deed book 817, page —, Jefferson county clerk's office."

The consideration for the deed was \$2,250. On the trial of the case Marrett introduced proof showing that his father and he had held up to the line F, 6; that a marked tree stood at 6, also at 11, and that from 11 westward to 9 there was an old fence, and the marks of the old fence row could still be seen upon the ground. After the survey was made of this line Marrett claimed it as the south line of his tract, and claimed that the Demange tract should be run out from the point 5 as the beginning corner. He showed that the point 6 is on the side of the hill, while 4 is near the foot of a ridge, and that a man who entered under Mrs. Demange had cut the timber down to the line 5, 6, and that this line was then recognized by those living on the Woods tract. On the other hand, appellants showed that after they bought the Demange tract and were cleaning it up, Marrett showed them the line 2, 8 as the north line of the Demange tract, but when in February, 1892, they began to put a fence along the line Marrett claimed the land as his, and forbade the building of the fence. The deed from Mrs. Demange to the park commissioners was made on July 8, 1891, and the deed from Marrett to them was made on July 16, 1891. The surveys had been made some time before the deeds were executed. It is conceded that the corner of Thomasson's tract is at 1. The point is marked by a stone which has been set there for years, and is undisputed. Thomasson claimed no land below the line 1, 10, and there was an old fence also along this line. The call of the Demange deed, beginning at Marrett's corner in James Woods' line, also corner at

Thomasson's, must be at the point 1, unless we reject part of the description of this beginning corner. It is earnestly argued that this should be done, and that the parties at the time thought this corner was at 5 and intended the deed to begin at 5, being mistaken in supposing that Thomasson's corner was at 5. But whatever might be thought in this regard of the description contained in the deed made in 1856 to Mrs. Demange, it is perfectly clear that the description contained in her deed to the park commissioners, made just eight days before Marrett's deed to them, undoubtedly refers to the point 1 on the plat as its beginning corner. The proof shows not only that both she and George Marrett pointed out the corners of the land before it was bought, but that after this the park commissioners had the tract surveyed, and the deed was made by the survey and pursuant to it. To suppose that in this deed the parties referred to any other land than the tract indicated on the plat by the figures 1, 4, 3, 2, is to shut one's eyes to the facts. The description in the deed begins with these words: "Beginning at what was formerly Marrett's corner in James Woods", now G. T. Bergman's, line, at a stake." This corner of Bergman undoubtedly is at 1, and the proof leaves no question that this is the beginning point as contemplated by the parties in the deed which Mrs. Demange made to the park commissioners; and in the deed which Marrett made to the park commissioners, as shown above, only eight days afterwards he conveyed to them without warranty all his interest "in a tract of land of about seven acres lying immediately south and adjoining the south line of the fourteen acres," conveyed by Rose Demange. This seven acres can not be any other land than the seven acres shown on the map by the figures 1, 4, 6, 5, for there is no other seven acres south of and adjoining the south line of the Demange fourteen acres as described in her deed. Besides, George Marrett claimed no land south of the line 5, 6. He had made a survey by which he claimed the line 5, 6, F as his south line, and the proof leaves no doubt that the purpose of the clause quoted from his deed to the park commissioners was to settle all disputes between him and them as to the location of his south line. By this clause in his deed he located the Demange fourteen acres as having seven acres lying south of it. This necessarily makes the line 1, 4 the south line of the Demange tract. The tract had been surveyed and had been conveyed on the idea that the line 1, 4 was its south line, and his quit claim of the land south of this line, describing it as adjoining the Demange land on the south, could not have been understood by the park commissioners as meaning anything less than that the line 1, 4 was the south line of the Demange tract. He testified on the trial that he did not understand this clause of the deed to amount to anything, and received no consideration for it. But both the parties with whom the transaction was had are dead, and he can not testify for himself as to any transaction with a person who is dead. The consideration for the deed was \$2,250 in hand paid, and presumably this consideration was paid for all that the deed conveyed. We, therefore, conclude that by his deed he is estopped to claim the land indicated on the plat by the figures 1, 4, 6, 5, or to say that the Rose Demange fourteen acres does not lie north of and adjoining this seven acres; for if the Demange fourteen acres included this seven acres as he now contends, it could not have been described in the deed as lying south of and adjoining the Demange fourteen acres.

The court should, therefore, at the conclusion of the evidence have peremptorily instructed the jury to find for the defendant.

Judgment reversed and cause remanded for further proceedings consistent herewith.

MULDOON v. MERIWETHER.

(Filed April 14, 1904—Not to be reported.)

Plaintiff declared in special assumpsit that defendant promised to pay him \$500 for procuring a settlement of certain life policies. The proof showed that the agreement of settlement was procured, but before the money was paid defendant changed his mind and declined to carry it into effect.

1. Variance—Failure of proof—Under the provisions of Civil Code, sections 129, 130 and 131, this is not a failure of proof, but even if a variance, material or immaterial, as there was no objection or showing made to the court on that score, it is waived by such failure.

2. Burden of proof—The allegations of the petition were denied and an affirmative defense interposed upon which an issue was joined. If there had been no proof introduced plaintiff would have lost and, therefore, had the burden of proof and closing argument.

3. Errors not excepted to—The motion for a new trial did not complain of the instructions given by the court nor of the court's refusal to give instructions asked by appellant except as to the peremptory instruction. We can not, therefore, pass upon alleged errors in the giving and refusing instructions other than the peremptory.

Chatterson & Blitz for appellant.

B. F. Washer and Chas. H. Shield for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge O'Rear.

The motion for a new trial in the circuit court did not complain of the instructions given by the court, nor of the court's refusal to give instructions asked by appellant, except as to the peremptory instruction. We can not, therefore, pass upon alleged errors of the trial court in the giving and refusing of instructions, other than the peremptory.

Appellant contends that there was a material variance between the petition and the proof, and that the peremptory instruction asked for at the close of the evidence should have been allowed. Plaintiff declared in special assumpsit that defendant promised to pay him \$500 for procuring a settlement of certain life policies held in the Mutual Life Insurance Co. of Kentucky by defendant. The proof for plaintiff showed that the agreement of settlement between defendant and the insurance company was procured, but before the money was paid defendant changed his mind, and declined to carry it into effect. The money was not actually paid defendant under the settlement.

Section 129 of the Civil Code provides that no variance between pleadings and proof is material, which does not mislead a party to his prejudice in maintaining his action or defense upon the merits. Before a party can claim the benefit of that provision as to a material variance by the terms

of the section, he must satisfy the court of the prejudicial effect of the surprise, and then the court must allow amendments to pleadings so as to conform to the facts, on such terms as may be just. By section 130 Id., if the variance is immaterial the court may direct the fact to be found according to the evidence. By section 131, Id., "If, however, the allegation of the claim or defense, to which the proof is directed, be unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof."

Under the definitions given, we are of opinion that this is not a case of failure of proof, but, even if a variance, material or immaterial, as there was no objection or showing made to the court on that score, it is waived by such failure. (*Anderson v. Rogers*, 1 Bush, 200; *Gaines v. Deposit Bank*, 10 Ky. Law Rep., 171; *Woodcock v. Farrel*, 1 Met., 437.)

The allegations of the petition in several material particulars were denied by the answer. In addition an affirmative defense was interposed, upon which an issue was joined. As the pleadings were framed, if there had been no evidence introduced, plaintiff would have lost, and, therefore, had the burden of proof and the closing argument. (Civil Code, section 526.)

Judgment affirmed, with damages.

COMMONWEALTH v. AYERS.

(Filed April 14, 1904—Not to be reported.)

Indictment—An indictment charging that the defendant in Daviess county before the finding of the indictment unlawfully, willfully, feloniously and maliciously shot at Tom Jackson with a pistol, a deadly weapon, intending to kill him, but without wounding him, said pistol being loaded with powder and bullets or some other hard substance, is good and sufficient.

Clifton J. Pratt, N. B. Hays and Loraine Mix for appellant.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Andy Ayers, was indicted under section 1166 of the Kentucky Statutes for the offense of willfully and maliciously shooting at another without wounding.

The indictment is as follows: "The grand jury of Daviess county, in the name and by the authority of the Commonwealth of Kentucky, accuse Andy Ayers of the crime of unlawfully, willfully, feloniously and maliciously shooting at another with a pistol, a deadly weapon, intending to kill such person, but without wounding him. Committed in manner and form as follows, to wit, the said defendant did in the county of Daviess and before the finding of this indictment unlawfully, willfully, feloniously and maliciously shoot at Tom Jackson with a pistol, a deadly weapon, intending to kill him, but without wounding him. Said pistol was loaded with powder or bullets, or some other hard substance, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

A general demurrer to this indictment was sustained by the trial court, and the Commonwealth has appealed.

Section 1166 of the Kentucky Statutes reads as follows: "If any person shall willfully and maliciously shoot at another without wounding * * * with a gun or other instrument loaded with leaden bullet or other substance * * * with the intention to kill, he shall be confined in the penitentiary not less than one nor more than five years."

The indictment charges every act essential to constitute the crime created by the statute and substantially follows its language, and is direct and certain as regards the party, the offense, the county and the circumstances of the offense as required by sections 122 and 124 of the Criminal Code, and was good and sufficient.

For reasons indicated the judgment of the trial court is reversed and cause remanded, with instructions to overrule the demurrer and for other proceedings consistent with this opinion.

ILLINOIS CENTRAL R. R. CO. v. JACKSON, &c.¶

(Filed April 14, 1904.)

1. Railroads—Mistake of agent in selling ticket—Passenger ejected before reaching destination—Action of conductor—Excessive verdict—Appellee, nineteen years of age, bought a ticket from Central City to Gilbertsville, on appellant's train, for \$2.25. The agent, by mistake, gave him a ticket to Greenville. The conductor put him off at first station beyond Greenville, refusing to carry him further. Held—That the appellee is entitled to recover compensatory damages in which is included mortification and humiliation consequent upon the wrongful ejection, and a verdict for \$350 will not be disturbed.

2. Special damage—Filing amended plea during trial—The court did not err in allowing appellee to file an amended plea for special damage during the trial, alleging loss of contract for labor.

3. Failure of appellant to offer instructions—The appellant was entitled to an instruction upon its theory of the case, but it did not offer one, and, therefore, can not complain of this error.

Jonson & Wickliffe, J. M. Dickinson and Pirtle, Trabue & Cox for appellant.

R. Y. Thomas for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, by his next friend, brought this action against appellant for damages, alleging that he was wrongfully ejected from a passenger train on which he was being carried as a passenger by appellant. He recovered a judgment for \$350, of which appellant complains.

The facts as they appear of record were, in substance, as follows: Appellee, who was about nineteen years of age, called for and paid for a ticket from Central City to Gilbertsville, Ky. He boarded one of appellant's trains, the conductor took up his ticket, and after passing Greenville, Ky., the first station after leaving Central City, the conductor called upon him

again for a ticket, or his fare, which he did not furnish, and he was ejected from the train at Dupoy, the second station from his starting point. There is no dispute in the evidence that appellee for the price of \$2.35 purchased a ticket which should have entitled him to ride to Gilbertsville. A ticket was delivered to him, which he testified he did not understand; that it had the name of all the stations on it, and was not straight on one edge. The proof shows that it was known as a "simplex ticket."

Appellee's version of what occurred between him and the conductor after leaving Greenville is in substance as follows: The conductor asked him for a ticket and he told the conductor that he had given him his ticket and that he was going to Gilbertsville. The conductor moved on a short distance in the aisle and then returned and said to appellee that he would have to pay his fare or get off of the train. Appellee again told him that he had given him his ticket which he had bought at Central City for Gilbertsville, and that he had paid \$2.35 for it, and then the conductor used the following language: "And he said, I never; and I told him to look and see, and he said, 'no, by G—d,' he was running that train, and he took me by the arm and told me to get off, and the train stopped and he led me off."

He also told the conductor he did not have any money to pay another fare to Gilbertsville. Appellee stated further that he was on his way to Gilbertsville to meet a man with whom he had contracted to labor on his farm at the price of \$20 per month during the crop season; that this man lived nine miles in the country from Gilbertsville and had promised to meet that train and take him to his home; that by his failure to go on this train he had lost this contract; that he had endeavored to get other work, but had failed for three months to get a place to labor. He further stated that on his return to Central City the agent had returned to him his \$2.35.

Appellant admits that appellee had paid for a ticket to Gilbertsville, but that the agent at Central City, by mistake, gave him a ticket to Greenville. The conductor's version of what took place between himself and appellee was in substance as follows: He stated that when he took up appellee's ticket, he announced the name "Greenville," but that he did not know whether or not appellee heard it; that after leaving Greenville he asked appellee for a ticket or fare. Appellee replied that he had given him a ticket which entitled him to be carried to Gilbertsville. The conductor said to him that he was mistaken; that it was possible that the agent at Central City had made a mistake in giving him the ticket to Greenville, and then offered to let appellee ride to Nortonville without charge, and he (conductor) would then ascertain whether the agent at Central City had sold appellee a ticket to Gilbertsville, and, if so, he would carry him on to that point. Appellee refused this offer, stating that he would get off at Dupoy, as he had acquaintances there, but that all were strangers to him at Nortonville. When the train arrived at Dupoy, appellee got off; that he did not touch or insult appellee; did not use the language attributed to him by appellee, or any similar language. Appellee, in rebuttal, testified that the conductor did not say anything about a possible mistake of the agent at Central City in selling and delivering him a ticket, nor offer to take him on to Nortonville; that there was not anything said of that kind or character, nor did he say he would get off at Dupoy for the reason that he had acquaintances

there, or anything like that. He stated that he had never been to Dupoy in his life before that occasion, and all who lived there were strangers to him.

Appellant first complains of the action of the lower court in allowing an amended petition to be filed during the trial, in which it was alleged that, by reason of his being put off of this train, he lost his contract for labor, and asked special damages by reason thereof. The only limitation upon the discretion of the court in allowing amended pleadings is that they must be in furtherance of justice and must not change substantially the claim or defense. This court has in several cases decided that the lower court did not abuse its discretion in allowing amended pleadings to be filed during the trial, and in one case, at least, approved the action of the lower court in permitting an amended petition to be filed after all evidence had been introduced, and the court had instructed the jury. (Section 184, Civil Code; *Kearney v. City of Covington*, 1 Met., 339; 15 B. M., 564 and 91 Ky., 368-444.) The amendment in this case set forth an item of special damage, and if the appellant had made it known to the court by affidavit or otherwise that it could not proceed with the trial, that it desired time to investigate the matter set forth in the amended pleading, we have no doubt that the court would have granted its request. But the appellant, on the filing of this amended petition, did not ask for a continuance, or for further time for preparation; therefore, it has no cause for complaint. At the conclusion of the evidence for the appellee, and again when all the evidence had been introduced, the appellant offered and asked the court to give a peremptory instruction to the jury to find for it, which the court refused. Under the proof, appellant was bound to pay appellee at least actual compensation for the reason that it admitted it made a contract with appellee and received the fare to transport him to Gilbertsville on that day and failed and refused to do so. But it says that its conductor had the right to put him off of the train at Dupoy for the reason that the ticket he delivered was for Greenville. Granting this to be true, yet appellant is not relieved from its contract, for the reason that it was the fault or wrong of the appellant, by its agent, in giving him the ticket to Greenville, instead of to Gilbertsville. There is no pretense that appellee committed any wrong or mistake. As between the conductor and appellee, the conductor may properly rely upon the ticket as it reads, and if it read to Greenville, and he the (conductor) did not know that it was a mistake, then he had the right to eject the appellee from the train, and his action therein could not be regarded as tortious, unless accompanied with unreasonable and unnecessary force or insult. (104 Ky., 28.) This was a case very similar to the one at bar, and the court said: "Nevertheless it is generally, and, we think, properly, held that the ticket accepted by the passenger must usually be treated as conclusive evidence of the passenger's rights as between him and the conductor, leaving the passenger to his action against the carrier if he had not been given such a ticket as his contract called for."

Again the court, after discussing and deciding that in such a case an instruction on exemplary damages should not have been given in that case, said: "The action is essentially and in form *ex contractu*, and the recovery, if any, must necessarily be limited to compensatory damages, and we do not think the jury were in fact instructed, or could have fairly understood, that

they were authorized to find exemplary damages; for the mortification and humiliation consequent upon the wrongful ejection of a passenger from a railroad train is a proper element of damages recoverable for a breach of contract like the present." To the same effect is the case of *L. & E. Ry. Co. v. Lyons, & Co.*, 21 Ky. Law Rep., 778.

These cases decide in substance that the conductor is absolved from the payment of any damage in ejecting a passenger in accordance with the terms of his ticket, provided that the ejection is not accompanied with unreasonable and unnecessary force or insult, but in such case the passenger's right of action is against the carrier and the agent who gave him the erroneous ticket, or either, as he may elect. The criterion of recovery is limited to compensatory damages in which is included mortification and humiliation consequent upon the wrongful ejection. The instructions given by the court conform to these views, at least there is no material and prejudicial error in them. The appellant, however, was entitled to an instruction upon its theory of the case, but it did not offer one, and, therefore, it can not complain of this error. In the case of *L. & N. R. R. Co. v. Harrod*, 25 Ky. Law Rep., 251, the court said: "The rule upon this question is that where a party to a civil case fails to offer an instruction upon a point of law involved in a case, it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved, which is refused by the court because of defect of form or substance, then it is the duty of the court to prepare, or have prepared, and give a proper instruction on that point."

The appellant also complains of the amount of the judgment. The jury saw and heard the witnesses and from its verdict it must have accepted appellee's version of the matter as true, and we do not feel authorized to disturb their verdict. It certainly was very insulting on the part of the conductor to dispute in emphatic language what appellee had said about buying the ticket and to refuse to look among the tickets he had taken up to ascertain if he could find the one appellee had given him, but instead of that to answer him with the words related by the appellee, and then lead him off the train from a coach comparatively full of people.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed, with damages.

GALBRAITH v. STARKS.

(Filed April 14, 1904.)

1. Plea of payment—On an action for an indebtedness represented by the promissory notes of the appellant in the sum of about \$5,000, appellant filed a plea of payment by way of counterclaim which the trial court dismissed, and adjudged the recovery by appellee of the amount sued for. Held—That while shopkeepers or tradesmen's books are held admissible as substantive evidence to show original entries made therein in the regular course of business, an account which has been transcribed and does not purport to be anything more than chronological entries of various payments alleged to have been made by appellant to appellee upon the land notes, are not competent evidence. Meagerness of evidence that leaves the mind unsatisfied is a failure of evidence. The trial court properly dismissed the counterclaim.

J. R. Mallory and Perkins & Trimble for appellant.

Browder & Browder for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge O'Rear.

Beginning about 1886, and down to 1899, appellant became indebted to appellee in numerous transactions, all represented by the former's promissory notes, in the sum of approximately \$5,000. Three of the transactions were the purchase of real estate; another the purchase of a half interest in a drug store, owned by the parties as copartners; others rent of house. In the purchase of the interest in the store, appellant admitted by writing then signed that the notes and accounts owing the firm, amounting to the sum of \$885 belonged to appellee, but that appellant was to collect them in the firm's name, and pay over to appellee the sums collected.

Numerous payments were made, at irregular intervals, upon this gross indebtedness. All of the notes were surrendered to appellee as having been paid, except one of \$400, subject to certain endorsed credits, which was retained by appellee, and to collect which and enforce the lien reserved upon a lot, this suit was brought. Appellant defended, pleading payment, and in addition seeking by counterclaim to recover of appellee \$169.60, with interest, which he alleged he had overpaid. Although the various transactions had no connection one with another, it was asserted that payments were made indiscriminately by appellant to be applied on his indebtedness to appellee, and that it was so applied by the latter, extinguishing all the other debts, as well as the debt of which the note sued on was a part, and overpaying that debt as stated. An issue was tendered upon the plea, and the proof heard. The only witnesses were the two parties. The trial court dismissed the counterclaim, and adjudged the recovery by appellee of the amount sued for, thus finding against the plea of payment. If there was evidence enough to sustain or refute the plea the question would be one of fact. But we have come to the conclusion that there is not enough evidence for either purpose.

Able counsel have each presented theories of probability that are not without plausibility. Yet in accepting either we would be forced to resort solely to conjecture—conjecture, it is true, that seems more or less probable. This state leads to a closer analysis of the rules of evidence upon which the respective theories must in part rest. The burden of proof upon the whole case was upon appellant. Had he testified clearly of his own knowledge as to the facts upon which his counsel rely, his case might have been made out. So with appellee. But the payments referred to were mostly made ten or twelve years before the parties came to testify. Their recollections as to those transactions are shown to have been very misty, and far from satisfactory. They were merchants, living in different communities. Nearly all the payments were by bank checks. That is, appellant had drawn certain checks on his banker in favor of appellee, but not stating in them the consideration. Some few payments are claimed to have been made in money. Appellant contends that as he has shown an aggregate of payments of money (by checks and otherwise) to appellee within the period since the debts were created, equal to or in excess of his indebtedness to appellee, he

has done enough to shift the burden to appellee to show that they, or some of them, were not made on these notes.

"Payment" is a term of art as used in law. It involves more than the passing of money or its accepted equivalent, from one to another. The acceptance of money or other thing of value in satisfaction of a debt, or in exchange for labor, goods or other commodity, will be a payment, where it was so intended by the payor. Generally there must be something shown in addition to the mere passing of money from one to the other. True, that fact may be a strong circumstance in determining whether it was intended and accepted as a payment on a debt. And other slight circumstances might satisfy the judicial inquiry as to the intent and purpose of such transaction. But it is not unusual for persons indebted to have other transactions with their creditors, and to pay money for something else, than upon the pre-existing debt. Whether there was or not a payment made upon a particular debt, may frequently be of vast importance to the parties as affecting other rights, as well as the rights of others. So that the intent of the parties becomes a material element in determining whether a transaction is a payment. The one who asserts that it is, must prove it. There is no reason for a rule that would change the law of evidence where a payee of money happens to be a creditor of the payor, so as to impose upon the former a burden, and relieve the latter of it, contrary to the general rule in all other cases. But going further in this case, it was shown, as has been indicated, that appellant undertook in 1888 to collect some \$885 in notes and accounts for appellee, and to transmit him the money so collected. Appellee says appellant did collect some of this money and paid it, and that some of the payments now sought to be applied to the land notes sued on were in reality made upon account of those collections. Appellee naturally has no means of knowing actually whether such collections had been made, for he does not claim to have been present. Appellant at first denied that appellee owned the firm notes and accounts referred to, but evidently that was a case of forgetfulness. The writings, which he admitted upon confrontation, show the contrary. Then he testified that he did not recollect whether he had collected any of those debts. Indeed, he said he remembered nothing whatever about it. But he agreed that if his books would show anything on the subject, that when he returned to his home from giving the deposition he would transmit to the notary a statement from them showing the facts. Some weeks later he did write the notary a letter which was attached to his deposition, in which he admitted having found that he had collected certain of the notes, etc., amounting to less than \$100, but added that another book was lost, making the not unreasonable impression that the lost book covered also a part of the period during which such collections, if made, would have been entered. Appellant kept a sort of system of books; appellee does not appear to have kept any memorandum at all of these transactions, more than the notes and the written contracts. So far, all will depend upon the requirement of the law as to proving payment. If when appellant, the debtor, shows that money had passed from him to appellee, the creditor, that it must be credited on the former's existing indebtedness, unless the creditor can show satisfactorily that it was for something else, then appellee has made out his case. On the other hand, if appellant should

be required to show in addition to the passing of the money, that it was to be applied on this indebtedness (or at least that this was all his indebtedness to appellee), then he has failed. While such fact of payment might be proved by circumstances, from which the law would presume the intent and purpose of acceptance, here, however, instead of the circumstances pointing to such payment, they rather negative it, in several particulars. For example, when it was shown that appellant undertook to collect the old firm notes for appellee, and did in fact collect some of them, and thereafter made remittances unexplained, the law will apply, and will allow appellee to apply, as he has evidently done, such remittances in discharge of the collections, rather than in payment of the remitter's own debts. In answer to the thought that only about \$.00 of the payments can be so accounted for from the evidence, we must remember that it was within appellant's power, and it was his duty as the agent of appellee, to render a complete statement of those collections; or, if because of the loss of certain of his books, he could not render such statement, still, he fails to thereafter give any explanation, or offer himself as a witness on that point, that he might be examined under oath touching the loss of the book, the period it covered, and whether, if it was only a ledger, a journal or cash book, showing the same things was not in his possession, from which, though with additional labor, the truth might have been gathered. Nor does he disclose how the account was kept in his books. He elects instead to leave those matters in doubt, relying upon the absence of such evidence, the admitted inability of his adversary to meet the point, and the supposed state of the law that under these circumstances his unexplained remittances would be credited on his individual debts to appellee. He who fails to produce the best evidence which is within his control, or who fails in his duty to keep an account, whereby confusion to his own advantage and to the detriment of his adversary ensues, can claim no favorable presumption from his lapses. On the contrary, the law presumes that the best evidence if produced would be adverse to him. Applying that familiar and just rule in connection with what has been said above, the failure of appellant's proof becomes even more apparent.

Though appellant testified that he had paid the whole of his indebtedness, and stated that he so testified after having refreshed his recollection by an inspection of his books, we are satisfied that his statements are more in the nature of deductions drawn after examining his books, than a refreshed recollection of the original events. This is made apparent to us by the manner of testifying and many statements of the witness. This brings us to consider the value of certain book entries proved in the record, and seemingly relied on as substantive evidence to sustain appellant's plea. Though it is not made perfectly clear, we gather that appellant had entered upon a ledger book an account showing certain payments made upon the various debts of which the note sued on is one. The account, as transcribed, is by no means complete as an account. It does not purport to be anything more than chronoligical entries of various payments alleged to have been made by appellant to appellee upon the land notes. As to their value as private memoranda we are not here concerned. It is as to their relevancy as probative evidence. Appellant testified that they were made by him at the time, and were original entries. Still we are of the opinion that they are

not competent evidence. Shopkeeper's or tradesmen's books, the original entries made therein contemporaneously, and in the regular course of business, are admissible, under a rule of necessity, as substantive evidence of the facts of the shopkeeper's transactions with his customers in relation to that particular business. (*Poor, &c. v. Robinson*, 13 Bush, 290; 1 Greenleaf on Evidence, sections 117-118.) It is unnecessary to restate the reasoning underlying the adoption of this rule. Excepting the case of persons whose business it is to pay out money, such as bankers and the like, we do not know that it has been extended in this State further. Indeed it has been intimated by this court (*Brannin v. Force*, 12 B. Monroe, 508) that it was limited to such. It was no part of appellant's merchandising business to buy real estate, and to pay for it in installments. Such entries on his books, though made contemporaneously, were utterly foreign to his mercantile affairs, and can not, therefore, be said to have been entries made by a merchant or tradesman in the usual course of his business; and consequently they are not entitled to the presumptions of regularity and of freedom from purposeful fabrication that the routine entries of merchandise sales are conceded in law. Section 606, subsection 7, Civil Code, is but declaratory of, the common law on this point, with the addition that a party in interest may testify concerning such entries even as against one who is dead, or under certain disabilities. The account does not prove anything. As the plea of payment was not sufficiently supported, the circuit court was right in not hazarding a guess as to what the truth concerning it was. Meagreness of evidence that leaves the mind unsatisfied is a failure of evidence.

The judgment should be affirmed.

GERMAN v. BOARD OF TRUSTEES OF HIGHLAND PARK GRADED
COMMON SCHOOL DISTRICT, NO. 46.

(Filed April 14, 1904.)

Duties and compensation of treasurer of school board—It appearing that appellant only qualified to perform the duties as treasurer of the board, required by section 4443, Kentucky Statutes, it was no part of his duty to post election notices; to make statements of receipts and disbursements (except with regard to taxes); to get up supplies for the school; purchase the land for the school building; to attend to all contracts for the erection of school buildings and foundation work, or to attend to the correspondence of the district, and a demurrer to his claim for such services was properly sustained.

O'Neal & O'Neal and Isaac T. Woodson for appellant.

Weaver & Bensinger for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

This action was instituted by appellant to recover of appellee damages for a breach of contract in failing to allow him to perform duties devolving upon him as treasurer. The petition contained four paragraphs. Appellee

filed a demurrer to paragraphs Nos. 1, 2 and 4, which was sustained by the court.

The appellant, in effect, concedes that the court did not err in sustaining this demurrer, but contends that the court committed an error in sustaining a demurrer to his amended petition, in which it was, in substance, alleged that, in the month of May, 1897, he was appointed by the appellee as its treasurer, and that thereafter he executed bond with approved security as such treasurer, which bond was approved and accepted by the appellee, and he entered upon his duties as treasurer for the years 1897, 1898, 1899 and 1900; that he executed bond as such treasurer for each of the years named, and in each instance the bond was accepted and approved by the appellee; that he continued from the date of his first appointment to act as such treasurer until the 10th day of June, 1901, at which time appellee refused to allow him to act further in the full discharge of his duties. Appellant then uses the following language: "The plaintiff further states that it was his duty to, and he did, perform the duties as treasurer of said board in making out and posting all the election notices in said district annually, and making out itemized monthly statements of receipts and disbursements, and in attending annually to getting all the supplies required for the school in said district, and attending regularly all the meetings of the trustees and giving them information in regard to all steps taken annually, and attending to the purchase of the land for the new school building in the said district, and attending to all the contracts on said school building, including the foundation work, and keeping all the accounts, and attending to all the payments of claims against said district and attending to all the correspondence in reference to the business of said district and school, all of which was done and performed by the plaintiff in the discharge of his duties as treasurer aforesaid for each of the four years succeeding said appointment and qualification, and the said services were continued in the year 1901, in the making out and posting of the election notices in said district, all of which was done and performed at the special instance and request of the defendant, and accepted and ratified by defendant, and was of the reasonable value of the sum of \$2,153, whereby defendant became justly indebted to the plaintiff in the sum of \$2,153, etc."

In the second paragraph of the amended petition the following averments occur: "The plaintiff further states that it was his duty and he did annually make out in writing six itemized reports, for said board, of his services in reference to the business of said board, and the proceedings in reference to the levy and collection of taxes for said district for the years 1897, 1898, 1899, 1900 and 1901; and one itemized tax list annually of the taxes assessed against the taxpayers of the said district for said years, which was reasonably worth \$100 per annum for said reports and \$20 per annum for said tax list; and in addition that he expended for postage stamps used in his said business as treasurer of said district and for said board for the years 1900 and 1901, the sum of \$27.42, and in addition thereto that he performed services in August and September of the year 1902 as treasurer of said board, at the special instance and request of said defendant, amounting to the value of \$55, namely, in examining records and making out tax bills for delinquent taxes several years prior thereto, which was done and performed

at the instance and request of said defendant, and was of the reasonable value of \$55. An itemized statement of said services is filed herewith as part hereof, and marked 'statement No. 2,' and on said services claimed for in this paragraph (the total of which amounts to \$682.42, which was the just and reasonable value of said services, and to which amount the defendant became justly indebted to the plaintiff, all of which is due and unpaid except that), the defendant paid to plaintiff the sum of \$280 in cash, and allowed the plaintiff to retain \$217.22 in penalties collected from delinquent taxpayers, leaving due and unpaid plaintiff of said \$682.42, a balance of \$185.22, all of which is due and wholly unpaid, and said defendant has failed and refused to pay to plaintiff said balance."

It is evident that appellant bases his right of recovery on the fact that he performed the services for which he charges as treasurer of appellee, and he claims that by virtue of section 4479 of Kentucky Statutes he is entitled to the sums charged, to wit: For making out the election notices and posting same in said district annually for four years \$7 per annum, \$28; for making out itemized monthly statements of receipts and disbursements annually for four years at \$140 per annum, \$560; for tending to all the supplies required for school of said district annually for four years at \$25 per annum, \$100; for attending all the regular meetings of trustees, and posting them so that they would act legally in all steps taken annually for four years, at \$60 per annum, \$240; for attending to the purchase of the land for the new school building, \$45; for attending to all the contracts on said school building, including the foundation, annually for three years at \$120 per annum, \$360; for keeping all the accounts and attending to all the payments of said district annually for four years at \$175 per annum, \$700; for attending to all the correspondence of said district annually for four years at \$30 per annum, \$120. Total, \$2,160. For making out six itemized reports annually for 1897, 1898, 1899, 1900 and 1901, at \$100 per annum, \$500; for making out one itemized tax list annually for 1897, 1898, 1899, 1900 and 1901, at \$20 per annum, \$100; for postage stamps used for said school district for 1900 and 1901, \$27.42; for services rendered in August and September, 1902, \$55. Total, \$682.42. By cash, \$280. Balance due, \$402.42. Penalties collected, \$217.20. Balance, \$185.22.

Appellee contends that this section was repealed by the revision of the school laws of 1894, in which it claims that section 4443 of the Kentucky Statutes covers all the duties and compensation required of and allowed the treasurer of graded common school districts. We can not agree, upon this proposition, with the contention of either appellant or appellee. Sections 4443 and 4479 were both enacted and became parts of the general school law in the year 1893, one as section 79 and the other as section 115, in that act. They have both been re-enacted at each revision of the school law since that date. Section 4443 has been amended once in 1894 by allowing the treasurer the same fees as sheriffs in collecting taxes, to wit: Ten per cent. and also giving him the power to collect the taxes from delinquents. Before this amendment the treasurer was allowed only 6 per cent, and the sheriff was required to collect the delinquent taxes. In 1898 section 4443 was again amended by giving the trustees discretion to dispense with the services of a treasurer as provided by this section, and to make it the duty of the sheriff

to collect the taxes and perform the duties of treasurer. Section 4448 does not conflict with section 4479. It only has reference to the collection of taxes and their disbursements, and the making of reports with reference thereto. It appears from the pleadings of appellant that he was appointed and executed bond under this section. It is not shown that he executed bond as required by section 4479. The bond he executed was executed to the board of trustees, and accepted and approved by them. Section 4479 requires that the treasurer authorized by this section, before he enters upon the duties of his office, shall, in the county court, execute bond with security approved by the court, payable to the Commonwealth of Kentucky for the use and benefit of the trustees, etc.

In our opinion these two sections relate to different matters. One person might be appointed to fill both positions, but in such event, before he could legally act and perform the duties, as required by both sections, he would be compelled to execute each of the bonds as required by the two sections. A person having executed only the bond, as required in section 4448, could not legally receive and disburse money received from the sale of bonds under the school law, or funds collected for the purpose of defraying the annual expenses of the school, or funds for the payment of the interest on such bonds, or for any money received by gift or devise for the benefit of the school. Such funds should be received and disbursed only by a person who had been appointed and executed the bond required by section 4479. It was for such services as these that section 4479 required that the trustees should pay the treasurer such sum as should be reasonable and just.

It appearing that appellant only qualified to perform the duties as required by section 4448, we are of the opinion that it was not any part of his duty as such treasurer to post election notices; to make statements of receipts and disbursements except with regard to taxes (and for this the statute fixes the compensation); to get up supplies for the school; purchase the land for the school building; to attend to all contracts for the erection of school buildings and foundation work, and to attend to the correspondence of the district. It appears that most all of the matters charged for by appellant, except the items referring to reports of receipts and disbursements, are things which the statute contemplated should have been performed by the trustees without expense to the district, and if the trustees employed appellant to perform these services, then it is a question between the trustees and appellant as individuals, and not as officials of the district. This question, however, is not before us, and we refrain from expressing any opinion upon it.

Wherefore, the judgment of the lower court is affirmed.

GERMAN WASHINGTON LIFE INSURANCE ASSOCIATION v. CITY OF LOUISVILLE.

(Filed April 15, 1904—Not to be reported.)

G. L. Everbach, I. T. Woodson and Lane & Harrison for appellant.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division..

Judge Hobson delivered the following response to petition for rehearing:

We have read with interest the petition for rehearing and have reconsidered the questions raised, but are unable to see that any reason exists for modifying the opinion which we rendered herein. The clerical error in appellant's corporate name did not vitiate the tax bills. The sense is perfectly apparent. The city taxes in the same way as appellant all like corporations. The fact that as to other corporations unlike appellant a different system is devised does not affect it, as no injustice is thereby done it. The legislature may properly classify taxpayers in devising an equal system of taxation. No right of appellant under the Federal or State Constitution appears to have been violated. This question was considered on the original hearing, but omitted from the opinion.
The petition is overruled.

BOARD OF PUBLIC WORKS OF LOUISVILLE v. SELVAGE CONSTRUCTION CO.

(Filed April 15, 1904—Not to be reported.)

Contracts—Contracts which have been awarded by boards of public works of cities of the first class for the original construction of public ways are not required to be approved by the general council as a prerequisite to their validity.

H. L. Stone for appellant.

DuRelle & McHenry and Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The sole question presented for adjudication by this record is whether or not contracts which have been awarded by boards of public works of cities of the first class, for the original construction of public ways, are required to be approved by the general council as a prerequisite to their validity. This question was answered in the negative by this court in the cases of *Barfield v. Gleason*, 23 Ky. Law Rep., 140, and *Joyce v. Falls City Artificial Stone Co.*, 23 Ky. Law Rep., 1201. To the principle announced in these opinions we adhere.

Judgment affirmed.

COMMONWEALTH v. LOUISVILLE & EVANSVILLE PACKET CO.

(Filed April 15, 1904.)

1. Local option—Jurisdiction of Kentucky on Ohio river—Selling whisky on steamboat—A sale of spirituous liquors on a steamboat anchored on the Ohio river at the Cloverport, Ky., wharf, is in violation of the local option law in force in the Cloverport Magisterial District of Breckinridge county, Ky., the State of Kentucky having jurisdiction to the north shore of the Ohio river.

J. R. Layman and N. B. Hays for appellant.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hobson.

The local option law is in force in the Cloverport Magisterial District of Breckinridge county. Appellee was indicted on the charge that it rented on its steamboat, known as the Henry Harley, in its possession and under its control, a room, bar and place to another, in which he sold spirituous, vinous and malt liquors, with its knowledge and consent, to Edward Gregory at the wharf in Cloverport while the boat was anchored to the wharf on the Ohio river. The defendant demurred to the indictment, and on the hearing of the demurrer it was agreed that the Cloverport Magisterial District is bounded as follows: "Beginning at a point on the Ohio river (here follow several calls); thence a straight line to the Hancock county line to William B. Beaty's residence; thence with the Hancock county line to the Ohio river; thence up said river to the beginning."

It was agreed that the boundary of the district should be considered on the demurrer as if set out in the indictment. The agreement also contained the following: "The town of Cloverport is located in the district on the Kentucky side of the river and is bounded on the north by said river, which is a navigable stream." The court sustained the demurrer and dismissed the indictment on the ground that the acts complained of being done on the Ohio river were not done within the Cloverport Magisterial District, as the lines of the district begin at a point on the Ohio river and in closing run to the river; thence up the river to the beginning. It is insisted for appellee that the judgment is right, and that the territorial limits of the district extend only to the river and do not include any part of it.

The boundary of Kentucky extends to the northern shore of the Ohio river a low-water mark. In the act of February 11, 1820, after the boundaries of the State were defined, it was enacted: "The sovereign power and jurisdiction of the Commonwealth of Kentucky extends to and over the entire soil and waters within the limits described in the preceding section, except so far as she may have ceded jurisdiction to the United States for national purposes. Each county in this Commonwealth, whose boundary is described in part by the Mississippi and Ohio rivers, shall be considered as bounded in that particular by the State line; and the islands thereof shall be within the respective counties holding the main land opposite thereto within this State; and the several counties and tribunals thereof shall hold and exercise jurisdiction accordingly." (Kentucky Statutes, section 198.)

By sections 1078-90, Kentucky Statutes, the several counties are required to be laid off into magisterial districts, and it was not contemplated that any portion of the county should be left out of the districts thus provided for, the statute requiring the commissioners in each case "to divide the county into not less than three nor more than eight justices' districts." In calling for the Ohio river as the northern boundary of the Cloverport district, which bordered on it, the commissioners followed the language used by the legislature in creating the counties bordering on the Ohio river, so far as we have seen. The district begins at a point on the Ohio river and runs thence to a given point in Breckinridge county. The beginning point is not fixed on the south bank of the river. The only designation is "on the Ohio river." The natural meaning of this is that the district line begins in the line of the county on its northern shore, for it can not be presumed that the com-

missioners intended to leave out any part of the county in the division which they made. The same construction must be given to the closing line "thence up said river to the beginning," for the line of the district runs to the river with the Hancock county line, and all that part of Breckinridge county next. Hancock was plainly intended to be embraced in this magisterial district. There is nothing in the calls to indicate that it was contemplated that the line of the district should stop short of the northern limit of the Hancock county line, and the contrary is shown to have been the intention by the last call which runs "thence up said river to the beginning," which is the point "on the Ohio river." In the case of patents calling to begin on a navigable stream and to run with it, the rule in this State is that the title to the bed of the river passes to the middle of the stream. (*Lumber Co. v. Green*, 57 Ky., 257; *Miller v. Hepburn*, 71 Ky., 826; *Asher Lumber Co. v. Lunsford*, 17 Ky. Law Rep., 245; *Cockrell v. McQuinn*, 90 Ky., 61.) But as the State of Kentucky includes the whole of the Ohio river to the northern shore at low-water mark, its subdivisions calling to begin on the river and run with it are not to be limited to the thread of the stream, but must go to the State line. In the construction of every document the aim of the court is to arrive at the intention of the makers, and give fair effect to it, and as the counties of the State bordering on the Ohio river extend to the northern limit of the State, the magisterial districts bordering on the river must be given the same limit, for it was manifestly not the purpose of the legislature that any part of a county should be left out and be not included in any of the districts. To illustrate: If an island was formed in the Ohio river between the upper and lower corners of the Cloverport district, would it be maintained that this island was not a part of the district? Or if in times of low water sand bars are left along the Kentucky shore, would it be said that these, though land in Kentucky and in Breckinridge county, belonging to the adjoining proprietors, are not in the district? The purpose of establishing magisterial districts is to secure police protection from local officers, and this is just as necessary on the river as on the land.

In *Welsh v. State*, 9 L. R. A., 664, the Supreme Court of Indiana affirmed a conviction where the defendant had been fined for selling whisky on the Ohio river in violation of the license laws of Indiana. The jurisdiction of Indiana and Kentucky on the river is concurrent, and no one can, with impunity, violate the laws of either State on the river.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the indictment.

COMMONWEALTH v. CITIZENS NATIONAL BANK.

(Filed April 15, 1904.)

1. Taxation—Shares of national banks—Jurisdiction of county courts—Sheriffs—Omitted property—By Kentucky Statutes, section 4241, it is the duty of the sheriff or auditor's agent to have all omitted property listed for taxation, and when the assessor, under the act of March 10, 1900, fails to make the assessment of shares of stock in a national bank it was "omitted property," within the meaning of section 4241, and the county court has jurisdiction of the proceeding by the sheriff in the name of the Commonwealth.

2. Conflict of State law with Federal law—Section 5210, U. S. Rev. St., provides that the president and cashier of every national bank shall cause to be kept at all times a full and correct list of the shareholders in the bank, subject to the inspection of the officers authorized to assess taxes under State authority, and by Id., section 5219, the shares of stock in the bank may be included in the valuation of the personal property of the holder of the shares in assessing taxes imposed by authority of the State, provided, first, the taxation shall not be at a greater rate than is assessed upon moneyed capital of individuals, and, second, that shares owned by nonresidents of the State shall be taxed in the city or town where the bank is located and not elsewhere. Held—That the act of March 21, 1900, is not in conflict with the aforesaid acts of congress.

3. Subdivisions of the State—Counties, cities and towns are subdivisions of the State created for governmental purposes, and taxes levied by these subdivisions are levied by authority of the State.

4. Franchise—The franchise of the bank which is granted to it by the United States government, is not subject to taxation.

5. Penalty—A penalty may be properly imposed in the proceeding because the property was not listed with the assessor.

6. Agency—Notice to bank—Parties to proceeding—The bank by the act is made the agent of the shareholders and notice to the bank is notice to the shareholders within the meaning of section 4241. The president and cashier of the bank were properly made defendants to the proceeding, as it is made their duty to list the stock.

7. Limitation—Retrospective assessments are barred after five years from the time the property should have been assessed.

Robt. Harding and W. J. Price for appellant.

Robt. T. Quisenberry for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hobson.

This proceeding was instituted in the Boyle County Court in the name of the Commonwealth by the sheriff of Boyle county to have the shares of stock of the Citizens' National Bank of Danville assessed for taxation for county purposes for the years 1892 1899, inclusive, under section 4241, Kentucky Statutes. The bank, its president and its cashier were made defendants. Their demurrer to the jurisdiction of the court and to the capacity of the plaintiffs to maintain the action was overruled, also a general demurrer to the proceedings. An answer was then filed, and the issues being made up, the court, after hearing the evidence, entered a judgment assessing the shares of stock as prayed. An appeal was taken to the circuit court, and there a judgment was rendered dismissing the proceeding, and the Commonwealth appeals.

The objection to the jurisdiction of the county court rests on the idea that section 4241 does not authorize the sheriff to have shares of bank stock which have been omitted listed for taxation. The section includes all omitted property. The objection to the jurisdiction of the county court was, therefore, not well taken; for while it was the duty of the assessor to make the assessment under the act of March 21, 1900, when he failed to do so the shares of stock were property omitted by the assessor within the meaning of section 4241. The demurrer to the capacity of the plaintiff to maintain the

proceeding was also properly overruled; for the proceeding was in the name of the Commonwealth and instituted by the sheriff who is authorized by section 4941 to institute it. The statement filed contains the necessary averments, distinctly showing that the property had been omitted by the assessor of Boyle county and the board of supervisors and had not been taxed for the years named. It is insisted, however, that the act of March 21, 1900, is in conflict with the national bank act of the United States, and is to this extent void. The provisions of the national banking act relied on are as follows: "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of said association and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency." (Section 5310, U. S. Revised Statutes.)

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holders of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property or associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." (Section 5219.)

The act of March 21, 1900, is as follows: "Whereas, the Supreme Court of the United States has lately decided that article 3, chapter 103 of the acts of 1891, 1892 and 1893 is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in 1892, any adequate mode of taxing national banks, while State banks are now and have been ever since 1892, taxable for all purposes State and local; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1st. That the shares of stock in each national bank of this State, shall be subject to taxation for all State purposes and for the purposes of each county, city, town and taxing district in which the bank is located.

"2d. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"3d. When any of said shares of stock have not been listed for taxes for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of 1892, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: Provided, That where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article 3 of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

"4th. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"5th. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

"6th. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article 3 of the revenue law and said decision of the Supreme Court.

"7th. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

It will be observed that by section 5210, U. S. Revised Statutes, the president and cashier of every national bank shall cause to be kept at all times a full and correct list of the shareholders in the bank, subject to the inspection of the officers authorized to assess taxes under State authority. It will also be observed that by section 5219, the shares of stock in the bank may be included in the valuation of the personal property of the holder of the shares in assessing taxes imposed by authority of the State; and the legislature of each State may determine the manner and place of taking the shares of the stock, subject to these two restrictions: First, the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State; second, the shares of stock owned by nonresidents of the State shall be taxed in the city or town where the bank is located, and not elsewhere. Real property of the bank is subject to State, county or municipal taxes to the same extent according to its value as other real property is taxed. At the time the act of March 21, 1900, was passed the Supreme Court of the United States had in the case of *Owensboro National Bank v. Owensboro*, 173 U. S., 664, held the previous statute of Kentucky in conflict with the act of congress, because by it the tax was levied on the franchise of the bank or its intangible property and not upon the shares of stock as the property of the stockholders. The act in question was passed to avoid the effect of this decision. It had been previously held by the Supreme Court in a number of well-considered opinions that a State

may levy a tax on the shares of stock and require the bank to pay the tax. This was first held in *National Bank v. Commonwealth*, 9 Wallace, 353, which was followed in *Bell's Gap Railroad v. Penn.*, 134 U. S., 232; *Van Slyke v. Wisconsin*, 154 U. S., 591, and *Aberdeen Bank v. Chehalis County*, 166 U. S., 440. The act of March 21, 1900, follows the rule approved in these cases in so far as it makes the bank the agent of the stockholder for the purpose of assessing the shares of stock and paying the taxes thereon for him. In assessing the shares of stock in the bank the assessing officer must be governed by the rule that it shall not be at a greater rate than is assessed upon other moneyed capital invested in State banks. (*New York v. Tax Commissioners*, 4 Wallace, 244; *Aberdeen Bank v. Chehalis County*, 166 U. S., 443.) The franchise of the bank, which is granted to it by the United States government, is not subjected to taxation. Section 6 of the act of March 21, 1900, provides that the purpose of the act is to place national banks, with respect to taxation, upon the same footing as State banks, and one reason given for the emergency clause is that it is important that State banks and national banks should be taxed equally for all purposes. Under these provisions any exemption from taxation which would be allowed a State bank, or any deduction that would be made in favor of a State bank, must, under the act of 1902, be made in the assessment of the shares of stock of a national bank. In no respect may the moneyed capital invested in a national bank be taxed under the act at a higher rate than the moneyed capital invested in State banks, nor may any discrimination be made against the national bank.

Taxes levied by counties, cities, towns and taxing districts are imposed by authority of the State. Counties are but subdivisions of the State created for governmental purposes. They derive their authority from the State and can levy no taxes except such as the State authorizes them to levy. They levy taxes by authority of the State and the levies they make are as fully the act of the State as those made by the legislature itself. The only difference is that the legislature, under the power vested in it, instead of levying these taxes itself, authorizes local legislative bodies better adapted to understand the local necessities to make the levies as the local exigencies require. This power of the legislature which is universally exercised is recognized in sections 157, 158, 159 and 180 of the Constitution, and is in words conferred on the legislature by section 181: "The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Unquestionably the State in the distribution of the powers of the government may not commit to one body the power to levy certain taxes and to another the power to levy others; but when it does this all the taxes so levied are levied by the authority of the State. It was held under the previous statute that the shares of stock in national banks might be assessed to the shareholder by the assessor and should be given in by the shareholder in the list of his personal property. (*Scobee v. Bean*, 109 Ky., 526.) The act of March 21, 1900, did not, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor

to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made, the property was simply omitted from the tax list and the sheriff is authorized by section 4241, Kentucky Statutes, to institute the proceeding to have any omitted property assessed. A penalty may be properly imposed in the proceeding because the property was not listed with the assessor as required by law and stood as any other property for the assessment of which a proceeding under section 4241 may be instituted. While neither the bank nor its president nor its cashier is the owner of the shares of stock, the bank is made by the act the agent of the shareholders and the notice to it is notice to his agent within the meaning of section 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and, therefore, knows who they are, notice to the agent in an assessment of property is sufficient notice to his principal whom he represents. Certainly the agent can not arise the question of the want of notice to his principal or maintain that the proceeding is in violation of the fourteenth amendment to the Constitution of the United States. Nor can it raise the question that peradventure some of the shares may have changed hands. These defenses can only be made by the shareholders and do not properly arise in this case.

Limitation was not pleaded as to the retrospective assessments, but we have held in several cases that retrospective assessments were barred after five years from the time the property should have been assessed. The shares in the bank, as here in *Soobee v. Bean*, might have been assessed every year in the name of the shareholders. The act of 1902 created no new right; it simply gave a new remedy. The statute began running when the property might have been assessed, and the right to make the assessment after five years is barred. On the return of the case the defendants will be allowed to amend their answer and set up limitation if they desire to do so.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judge Paynter and Judge Nunn dissents.

Judge O'Rear dissents from so much of the opinion as holds the act of 1900 valid.

GERMAN GYMNAS TIC ASSOCIATION, &c. v. CITY OF LOUISVILLE.

(Filed April 15, 1904.)

Taxation—Institutions of education—Physical culture—Under Constitution, section 170, providing that "institutions of education not used or employed for gain by any person or corporation and the income of which is devoted solely to the cause of education," the property of an incorporated gymnastic association in which a teacher in physical culture is constantly employed to instruct the members, and maintained by the payment of monthly dues by the members and from which no one derives any pecuniary benefit, is an institution of education in the meaning of the law and exempt from taxation.

Earnest Macpherson, Lewis N. Dembitz and Geo. A. Brent for appellants.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

The German Gymnastic Association of Louisville is a corporation by virtue of the act of the general assembly of this Commonwealth approved March 4, 1854. It owns real property in the city of Louisville of the value of \$15,000 where regular gymnastic exercises are taught. A teacher in physical culture is constantly employed, who instructs the members; and also one day of the week is devoted to the teaching of branches ordinarily taught in schools. Lectures and addresses are delivered and occasionally discussions of timely topics take place. The association is maintained by the payment of monthly dues by the members. There are no shares of stock and no one derives any pecuniary benefit from the association.

Section 170 of the Constitution provides that: "Institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," shall be exempt from taxation. It is claimed that appellant is exempt from taxation by virtue of this provision of the Constitution. If it was conceded to be an institution of education, it would not be exempt from taxation if it was used or employed for gain. The record shows that it was not so employed, so the only question to be answered is, is it an institution of education.

Education is not confined to the improvement and cultivation of the mind.

It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught not only the dead and modern languages, mathematics, and the sciences, etc., but the bible and christian evidences, and a gymnasium is maintained, and foot ball and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to a perfect education. The framers of the Constitution did not use the term in such a restricted sense, as to exclude exercises which tend to develop strength. This is of as much importance to the State, as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. In *Mt. Hermon Boys' School v. Gill*, 145 Mass., 146, the court said: "Education may be particularly directed to either the mental, moral or physical faculties, but in its broadest and best sense it relates to them all." In *Ruohs v. Backer*, 6 Helsk., 385, the court said: "In its broadest sense, the word education comprehends, not merely the instruction received at school or college, but the whole course of training, moral, intellectual or physical." In *People v. Barber*, 42 Hun., 27, the court said: "Suitable recreation and physical exercise are deemed requisite to health and successful culture." If one institution afford an opportunity to acquire this perfect education, it is one of education. If three institutions are organized, one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to pro-

duce a better physical development, each is an institution of education, as much as the one at which the student can acquire the threefold knowledge. It is simply a matter of judgment or convenience on the organization of institutions of education whether one shall furnish all the opportunities for the acquisition of an education, or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Chief Justice Burnam and Judge Hobson dissent.

CANADY, GILLUM & KEY v. WEBB.

(Filed April 14, 1904.)

Contracts—Liens—In an action by material men to recover for building material which was used in the erection of a house, the cost of the improvements exceeding the contract price, which was paid in full, deducting from appellant's claim their pro rata of the excess of cost of building, it appears their claim had been satisfied and their action was properly dismissed.

Robbins & Thomas and Mason Bros. for appellants.

W. J. Webb for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

Appellants are dealers in lumber and building material in the city of Mayfield. Murray & Hatcher were, in the years 1900 and 1901, contractors and builders, and entered into a contract with appellee, Webb, to erect for him a house of certain character and dimensions at the price of \$2,650, which was afterward, by reason of the change in the building, increased to \$2,974. Murray & Hatcher purchased of appellants the most of the lumber and building material used in the erection of this house. The appellants to preserve their lien filed in the county clerk's office, within six months after they had ceased to furnish material, the statement as required by section 2468 of the Kentucky Statutes. In the month of October, 1901, appellants instituted this action against appellee to enforce their lien for the amount of balance due them, the whole claim amounting to \$1,431, the balance to \$478. Appellee resisted the enforcement of this lien, claiming that appellants had been paid all that was due them for materials furnished for the erection of his house, and that they did not furnish lumber and material of the value and amount as charged in appellants' petition. Appellants filed amended petitions giving additional credits on their claim, and when the last amendment was filed, they then claimed that there was still due them \$156. The court on the trial of the case found in favor of appellee, and appellants have appealed.

There was a contest over a \$50 payment made to appellants by Murray & Hatcher. Appellants claim that when this sum was paid by Murray & Hatcher they did not designate on what account they desired it credited, and the appellants placed the credit on another account due by Murray &

Hatcher to them. Hatcher, the person who paid it, gives it as his recollection that at the time he made the payment he directed it to be credited on the account charged for materials furnished to erect appellee's house, and was positive that the money paid them was received from appellee. To allow this credit to appellee reduces the claim of appellants to \$106. It is shown by the proof that appellants committed some errors in keeping their accounts. Murray & Hatcher had, at the time appellee's house was being erected, other houses in the course of erection, and, in some few instances, material for other houses was charged to the account of material furnished to appellee's house. It also appears that Murray & Hatcher had appellee's house erected by contracting the different kinds of work to other parties, and the job cost \$3,332, and the appellee had paid the contract price of \$2,974. Appellee contends that by virtue of section 2463 of Kentucky Statutes appellants have been paid more than their pro rata parts; that part of this section which is applicable to the question here presented reads as follows: "The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price among said lien holders."

Appellants contend that as the laborers and persons who furnished materials in the erection of this house did not assert or file with the county clerk a statement of their claims as required by statute, they did not have or obtain a lien, and that their claim was the only lien on appellee's house; that it was not as much as the contract price, and, therefore, they are entitled to their whole claim. Appellants are mistaken in this. Each and every person who performed labor and furnished materials in the erection of this house had a lien on appellee's property to secure the payment of same. (Section 2463, Kentucky Statutes.) Section 2468, says: "The liens mentioned in the preceding sections shall be dissolved unless the claimant within six months after he ceases to labor or furnish material as aforesaid, files in the office of the clerk of the county court of the county in which said building or improvement is situated, a statement of the amount due him, etc."

In one of appellants' amended petitions they present an order drawn by Murray & Hatcher in favor of appellant on appellee for the sum of \$400, which was endorsed by appellee accepted, and on which \$300 had been paid, and asked that appellee be adjudged to pay this sum of \$100 balance. It is shown that this order covers part of the claim sued on in the original petition. Appellants had never credited Murray & Hatcher with the amount of this order or any part of it, except as it was paid. It appears that appellee accepted this order under the belief that the amount covered all liens and claims against his property, but afterwards found that the Mayfield Lumber Co. held a claim also for materials furnished in the erection of these improvements. He then informed appellants of this fact, and refused to pay anything further on this order. It does not appear that appellants have lost any rights, lien, or other thing, by reason of appellee's acceptance of this order. They were not placed in any more unfavorable situation with reference to their claim. Their lien on the property remained. We are of the opinion from the evidence that the order was without consideration to the

extent of the amount unpaid thereon. In view of the excess of the cost of the improvements over the contract price, and that the contract price has been paid in full, and deducting from appellants' claim their pro rata part of the loss or excess of cost of building over the contract price, and also the small errors referred to in their accounts, we are not prepared to say that the lower court erred in dismissing appellants' action.

Wherefore, the judgment of the lower court is affirmed.

WOOD v. HOWK, &c.

(Filed April 14, 1904.)

Sales of land—Liens—In an action by appellant against appellee for the enforcement of a lien upon a tract of land, it was error in the lower court to declare the note executed for the land void, it appearing from the evidence that by agreement appellant bought the land in controversy at a sale under a judgment for the accommodation of appellees, permitting them to continue to occupy it, after paying all but \$55 which had been paid by appellant on the sale bond. Upon a settlement appellees owed appellant a merchandise account of \$245, which added to the \$55 made \$300, for which amount the wife, appellee Mary Howk, executed her note to appellant upon his conveyance to her of the land, the evidence conducing to show the settlement to be a correct one, and the appellees remaining silent six or seven years making no objection to the deed, or that it failed in any way to correctly set forth the contract, the conveyance must be upheld.

Browder & Browder and Newton Belcher for appellant.

Jonson & Wickliffe and R. Y. Thomas, Jr., for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Settle.

The appellant, P. S. Wood, sued the appellees, Mary Howk and G. W. Howk, in the lower court to recover of the former \$300 and interest upon a note executed to him by her, May 27, 1895, and which became due May 27, 1896, and also to enforce a lien upon a fifty acre tract of land appellant by deed conveyed the appellee, Mary Howk, at the time of the execution of the note, wherein a lien was expressly retained as security for the payment of the note.

After the appellees were duly summoned a default judgment was rendered in appellant's favor by the lower court in accordance with the allegations and prayer of the petition, but at a subsequent term of the court, the same, upon appellees' motion, and with appellants' consent, was set aside, and appellees allowed to file answer, wherein it was denied that the land had been sold to the appellee, Mary Howk, or that she had accepted the deed of conveyance made by the appellant, and averred that the note sued on was without consideration, and that its execution was procured by the fraudulent representation of appellant that certain of the creditors of appellee, G. W. Howk, would or were about to levy executions upon and sell the land in payment of his debts, which could be prevented by its conveyance to Mary Howk, his wife.

It is also averred in the answer in substance that the land was purchased

by, paid for, and deeded to the appellee, G. W. Howk, in 1890, who lived upon it until it was later sold under a judgment of the court and by its commissioner, at which sale it was purchased by appellant for \$324.28, under an agreement with appellee, G. W. Howk, that he (appellant) would pay for it the amount of his bid and take the title thereto to himself by deed from the commissioner, but that appellee, G. W. Howk, should remain in possession of the land and repay to appellant the amount of his bid at the commissioner's sale, whereupon the latter was to make him a deed re-investing him with the title to the land; that appellee pursuant to this agreement repaid to appellant the amount of his bid at the commissioner's sale, but that the latter in violation of his undertaking, instead of reconveying to him the land, attempted to convey it to his wife, the appellee, Mary Howk, by deed expressing a false consideration, and retaining a fraudulent lien to secure the payment of the same.

The material averments of the answer, except as to the manner and purpose of appellant's purchase of the land at the commissioner's sale, were controverted by the reply filed by him. As to that matter the reply admits that appellant purchased the land for the benefit of appellee, G. W. Howk, and with the understanding that upon the payment by the latter to appellant of the amount paid by him for the land at the commissioner's sale, appellant would convey him the land, but it is averred in the reply that \$55 of the amount due appellant on the land was never paid by the appellee, G. W. Howk, and that he and appellant made a settlement at the time of the execution of the note sued on, whereby it was ascertained and agreed by them that in addition to the \$55 due appellant from appellee in redemption of the land, the latter then owed the former upon account for merchandise the sum of \$245, and by further agreement between the parties, for these sums aggregating \$300, the note in controversy was executed by the appellee, Mary Howk, and the lien expressed in the deed executed to her by appellant, was retained to secure its payment.

It is also averred in the reply that the appellee, Mary Howk, was treated as the purchaser of the land at the instance of her husband, at whose request the land was deeded her to prevent its being reached by his creditors. The lower court rendered judgment declaring the note void, but held that there was due appellant from appellee, G. W. Howk, \$55 of the purchase money on the land, and for this sum judgment was entered against G. W. Howk, in appellant's favor, with interest from February 7, 1899, and costs. In addition, the land in controversy was ordered to be sold in satisfaction thereof, and from that judgment both parties have appealed. It appears from the evidence that appellant is and for years past has been a merchant at Belton, Muhlenberg county, dealing in general merchandise, and in logs, cross ties, lumber, staves, etc. It also appears that business relations between appellant and the appellee, G. W. Howk, began as far back as 1890, and continued with but little interruption until about the commencement of this action. During this time, covering a period of about eleven years, appellant lent appellee, G. W. Howk, money, extended him credit, and in more than one instance paid his debts when he became involved, satisfied attachment liens against his property, sold him supplies for his family and hands, and at one time even shipped him groceries and other provisions to

Tennessee, where he and his family were temporarily residing. Covering the period of their dealings appellant seems to have been unusually accommodating to appellees, and to have faithfully kept an account of all the transactions between himself and the appellee, G. W. Howk.

In the year 1891, the latter's farm of fifty acres, upon which he then lived, was sold under a judgment of the Muhlenberg Circuit Court for a debt, going to one E. S. Bradley. Appellant, at the request and solely for the accommodation of appellee, G. W. Howk, bought the land for him, paying therefor \$324.28, and after the confirmation of the sale and payment of the purchase money, received of the court, through its commissioner, a deed conveying him the land, which deed was absolute and unconditional upon its face. It was, however, agreed between appellant and appellee, G. W. Howk, which agreement was never reduced to writing, that the latter should remain in possession of the land, and at its maturity pay the sale bond executed by appellant to the commissioner for the land, which became due in six months after its execution, but if he failed to pay the bond at maturity, thereby compelling appellant to do so, he would surrender possession of the land to appellant, and be barred of the right to redeem it.

This agreement was not complied with by Howk. He failed to pay the sale bond at maturity, and it was paid by appellant. But notwithstanding such failure, appellant permitted appellees to remain in possession of the farm, rent free, from the date of the maturity of the sale bond, December 26, 1891, until May 27, 1895, at which last named date, he, at the request of G. W. Howk, conveyed it to his wife for the consideration of \$300. and for this sum she gave her note, secured by lien on the land, payable one year after date without interest. It is manifest that the land was conveyed the appellee, Mary Howk, to prevent its being subjected to the husband's debts, and further that it was so conveyed at the request of appellee, G. W. Howk, for appellant could have had no interest of his own to subserve in so conveying it. A deed to the husband and the note of the latter secured by lien on the land would have answered appellant's purpose as effectually as the arrangement that was entered into by the parties, and G. W. Howk's creditors could as well have attacked the deed to the wife as if it had been made to him.

The claim of appellees that there was no acceptance on their part of the deed from appellant to appellee Mary Howk, seems to be without support from the evidence. Appellant and James Forgy, the latter a disinterested witness, say the deed was accepted; its acceptance is denied only by appellees, both of whom testified, without objection from appellant, though only one of them was a competent witness. But aside from the depositions of appellant and Forgy, the acceptance of the deed by both of the appellees is conclusively shown by its delivery to them by the appellant, and their retention of it, by the execution and delivery to appellant of appellee Mary Howk's note for the consideration expressed in the deed, and by the further fact that appellees kept the deed from the time it was received by them, May 27, 1895, until January 15, 1902, the date of the filing of their answer, without ever at any time during these six or seven years, giving notice or making objection to appellant, or others, that they were dissatisfied with the deed, or that it failed in any way to correctly set forth the true contract between the

parties thereto. It is true that appellees have not had the deed recorded, but in the absence of any complaint as to the deed, it would perhaps do no violence to appellees' rights to indulge the presumption that the failure to put it to record arose from the desire of appellees to have it understood by G. W. Howk's creditors that the title of the land was still in appellant, thereby making the deed to the wife less liable to attack from G. W. Howk's creditors in the effort to subject the land to the payment of his debts.

It is contended by the appellee, G. W. Howk, that he was owing appellant, nothing at the time the note sued on was executed. This contention is not sustained by the evidence. Appellant and James Forgy, his former clerk, both testified that a settlement was made between appellant and appellee G. W. Howk at the time of the execution of the note and deed, whereby it was ascertained that the latter was indebted to the former \$245, upon account for merchandise, and \$55 balance on the land, and the aggregate of these sums constituted the \$300 for which the note was given by appellee, Mary Howk. It is denied by appellee G. W. Howk that such a settlement was made, but allowing his denial of the settlement to offset the testimony of appellant, that it was made, we find the latter corroborated by Forgy, who is a wholly disinterested witness, and there being nothing in the record to discredit his intelligence or character, it is but fair and just to accept his testimony as the truth of the controversy on this point. Furthermore, the books of appellant containing all the transactions between himself and the appellee, G. W. Howk, were before the parties at the time of the settlement, and according to the evidence they furnished the data for the settlement, and their correctness was not then questioned by the appellee. Unfortunately, the books were afterwards burned in a fire that destroyed the appellant's storehouse and goods; therefore, the only evidence that can be produced as to the settlement, is found in the depositions of appellant and Forgy, which evidence finds support and corroboration in the note and deed; and this evidence, we think, should be accounted as outweighing the bare unsupported denial of appellee G. W. Howk that there was such a settlement between the parties.

The correspondence between appellant and appellee G. W. Howk tends to support the testimony of the former that there was \$55 due from the latter upon the land, and also an indebtedness owing by him upon account, and there is no satisfactory evidence anywhere in the record that tends to contradict the testimony of appellant and Forgy that appellee's indebtedness to appellant upon account was \$245 at the time of the execution of the note and deed. We refrain from attempting to present a detailed statement of account between the parties; indeed, owing to the condition of the record, such a statement would be well nigh impossible. We are, therefore, forced to rest our decision upon the settlement that was made between the parties which showed an indebtedness of \$300 upon the part of appellee G. W. Howk to appellant.

In this view of the case, it follows that the chancellor erred in rendering the judgment appealed from. It is, however, insisted for appellees that the judgment of the chancellor upon the questions of fact involved in this case, should be as favorably regarded as would the verdict of a properly-instructed jury; hence, unless palpably against the evidence, it ought not to be dis-

turbed. This rule applies in purely ordinary or common law actions, where the court takes the place of a jury in trying the facts. But a different rule obtains in an equitable action like the one at bar. In such action this court will, upon appeal, determine the weight of the evidence. (*Scott v. Mitchell*, 19 Ky. Law Rep., 218; *Edwards-Bernard Co. v. Pfanz*, 24 Ky. Law Rep., 2206.) And as in our opinion the judgment appealed from is against the weight of the evidence, the same is reversed, and cause remanded, with directions to the lower court to set aside the judgment, and in lieu thereof enter judgment in appellant's behalf for the amount of the note sued on, with interest from its maturity, and costs, and for the enforcement of the lien retained in the deed from appellant to appellee Mary Hawk, and a sale of the land in controversy, or enough thereof to pay appellant's debt and costs, and for such further proceedings as may not be inconsistent with the opinion herein.

NEW YORK LIFE INSURANCE CO. v. MEINKEN'S ADM'R.

(Filed April 15, 1904—Not to be reported.)

Insurance—Payment of premiums—Where a policy of insurance contained two options, the first being that the insured should be entitled to extended insurance for the full amount for a definite period, or second if he should make demand therefor and surrender the policy within six months after default, he would be entitled to paid-up insurance for a stipulated sum, having failed to demand paid-up insurance and the term for which the policy was continued in force expiring before the insured's death, there could be no recovery, the policy having lapsed by its own terms.

Humphrey, Burnett & Humphrey and James H. McIntosh for appellant.

C. H. Shields and Eli H. Brown for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

On the 8th of November, 1893, the appellant insured the life of Herman P. Meinken for \$2,500 in consideration of \$50.50, and the payment of a like sum annually in advance on the 8th of November of each year during the continuance of the policy. The policy contained the following provisions:

"This policy can not be forfeited after it shall have been in force three full years, as hereinafter provided.

"1st. If any premium subsequently due is not paid as hereinbefore provided, this policy will be continued for its full amount, as provided in the table below, subject to the conditions of this policy, but without further payment of premiums, and without loans, participation in surplus and premium-return; or,

"2d. If any premium subsequently due is not paid as hereinbefore provided, this policy will be endorsed for the reduced amount of paid-up insurance provided in the table below, if demand is made therefor with surrender of this policy within six months thereafter, subject to the conditions of this policy, but without further payment of premiums, and without loans, participation in surplus and premium-return.

"TABLE OF GUARANTEES, IF PAYMENT OF PREMIUMS
IS DISCONTINUED.

"Provided there is no indebtedness against this policy. (Pursuant to the Insurance Law, chapter 690, Laws of 1892, of the State of New York.)

If the premiums are paid.	(1st.) This policy will be continued for its full amount, \$2,500, as herein- before provided—	Or (2d.) This policy will be endorsed for the re- duced amount of paid up insurance as hereinbefore pro- vided.
To November 8, 1896	To April 8, 1899	Of \$167 (0)
To November 8, 1897	To May 8, 1901	Of 225 (0)
To November 8, 1898	To July 8, 1903	Of 285 (0)
To November 8, 1899	To June 8, 1905	Of 342 (0)
To November 8, 1900	To June 8, 1907	Of 400 (0)
To November 8, 1901	To July 8, 1909	Of 457 (0)
To November 8, 1902	To July 8, 1911	Of 515 (0)
To November 8, 1903	To July 8, 1913	Of 572 (0)
To November 8, 1904	To June 8, 1915	Of 630 (0)
To November 8, 1905	To April 8, 1917	Of 687 (0)
To November 8, 1906	To Jan'y 8, 1919	Of 742 (0)
To November 8, 1907	To Sept. 8, 1920	Of 800 (0)
To November 8, 1908	To March 8, 1922	Of 855 (0)
To November 8, 1909	To Sept. 8, 1923	Of 910 (0)
To November 8, 1910	To Jan'y 8, 1925	Of 965 (0)
To November 8, 1911	To April 8, 1926	Of 1,020 (0)
To November 8, 1912	To July 8, 1927	Of 1,072 (0)

The annual premiums of \$59.50 each were paid for the first three years in cash, and entitled the insured to extended insurance for the full amount of the policy up to the 8th of April, 1899, or to paid-up insurance for \$167. On the premium due November 8, 1896, the insured paid \$15 in cash, and executed the following note to the company for the balance of the premium:

"November 8, 1896.

"Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Co. \$44.50, at the Second National Bank, St. Paul, Minn., value received, with interest at the rate of 5 per cent. per annum.

"This note is given in payment of the premium due November 8, 1896, on the above policy with the understanding that all claims to further insurance, and all benefit whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Co., if this note is not paid at maturity, except as otherwise provided in the policy.

(Signed) "H. P. MEINKEN."

At the maturity of this note the insured paid \$14.50 in cash, and executed the following note for the balance of the premium:

"Without grace, three months after date, I promise to pay to the order of the New York Life Insurance Co. \$30 at the Second National Bank of St. Paul, Minn. Value received, with interest at the rate of 5 per cent. per

annum. This note is given in payment of the premium due on the above policy with the understanding that all claims to further insurance and all benefits whatever, which full payment in cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Co., if this note is not paid at maturity, except as otherwise provided in the policy itself.

"H. P. MEINKEN."

This note was never paid, and on the 16th of August, 1897, the company wrote across its face in red ink: "Note and Policy, August 16, 1897, cancelled." No demand for payment was ever made therefor of H. P. Meinken or his personal representative, but the note was retained in the possession of the insurance company, these facts being set forth in the answer of the company, to which a general demurrer was sustained. H. P. Meinken died on the 15th of February, 1901, and shortly after his death, this suit was instituted by the appellee, as his administrator, seeking to recover \$2,500, the full amount of the policy. The company denied liability, and alleged that the partial payment of the \$59.50 due on November 8, 1896, did not carry the policy under the terms of the contract up to the date of the death of the insured, and that the policy had lapsed. A general demurrer was sustained to the answer, and judgment given by the trial court for the full amount of the policy, upon the theory that the company was indebted to the insured for paid-up insurance at the date of the default in at least \$167; and that it was its duty to have paid off the \$90 note out of this fund, which would have had the effect to extend the insurance until May 8, 1901, and would have entitled the insured to paid-up insurance for \$225.

If this reasoning is sound, the insured could in the same way have used the \$225 paid-up insurance to pay the premium due November 8, 1897, and so on to the end. We are unable to concur either in the reasoning or conclusions of the trial court, and fail to find any support therefor in the case of *Montgomery v. Phoenix Life Ins. Co.*, 77 Ky., 51, relied on as authority. In case of default in the payment of the annual premium, the insured had two options: First, the policy provided that he should be entitled to extended insurance for the full amount of the policy for a definite period, or, second, if the insured should make demand therefor and surrender the policy within six months after default, he was entitled to paid up insurance for a stipulated sum. But he could not claim both of these surrender values. Having failed to demand paid-up insurance, the policy was by its terms continued in force for the full amount of \$2,500 for a definite period, but which had expired before his death. The validity of similar provisions in life insurance policies has been repeatedly upheld by this court. In the *St. Louis Mutual Life Ins. Co. v. Grigsby*, 73 Ky., 810, the court said: "Where as a matter of favor to the insured, credit is extended him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy will be forfeited."

Similar rulings were made in *Manhattan Life Ins. Co. v. Myers*, 109 Ky., 372; *Manhattan Life Ins. Co. v. Petecoste*, 106 Ky., 642; *Noeland v. Union Central Life Ins. Co.*, 104 Ky., 129; *Union Central Life Ins. Co. v. Duval*, 20 Ky. Law Rep., 443; *New York Life Ins. Co. v. Warren Deposit Bank*, 25 Ky. Law Rep., 326, and in numerous other cases.

Having failed to pay all of the premium due in 1896, the policy lapsed, and the retention of the notes by appellant, as explained by it was not inconsistent with its intention to treat the policy as void. (*Manhattan Life Ins. Co. v. Savage's Adm'r, &c.*, 28 Ky. Law Rep., 446.) This question is too thoroughly settled in this State to justify argument or further citation of authorities.

We conclude that the trial court erred in sustaining the demurrer to the second and third paragraphs of defendant's answer, and in giving judgment for the amount of the policy, and the judgment is reversed and cause remanded for proceedings consistent herewith.

HARRIGAN, &c. v. THE ADVANCE THRESHER CO.

(Filed April 15, 1904—Not to be reported.)

Practice—Failure to file schedule not ground for dismissal—Since the repeal of the section of the Code requiring the assignment of errors, the failure to file a schedule within ninety days is not a ground for dismissal where the appellant files a transcript of the entire record.

G. W. Whitesides for appellant.

John J. Milliken for appellee.

Appeal from the Simpson Circuit Court.

Opinion of the court by Judge Paynter.

The appeal was granted by the court below. The appellant did not, as provided by subsection 4a, section 737, Civil Code of Practice, file within ninety days after the granting of the appeal or at all a schedule. Instead of doing that a complete transcript of the record was filed in this court. Since the repeal of the section of the Code requiring the assignment of errors, the failure to file a schedule within ninety days is not a ground for dismissal where the appellant files a transcript of the entire record. (*Louisville & Nashville R. R. Co. v. Brice*, 88 Ky., 210.) The correctness of this decision was recognized in *Nelson County v. Bardstown & Louisville Turnpike Co.*, opinion delivered March, 1903. (24 Ky. Law Rep., 2056.) As a complete transcript of the record was filed, the necessity of filing a schedule within ninety days after the appeal was obviated.

The motion to dismiss the appeal is overruled.

COMMONWEALTH V. STANDARD OIL CO.

(Filed April 15, 1904—Not to be reported.)

Indictment—Construction of statutes—Where appellee was charged in an indictment with selling lubricating oil from a wagon without a license, the indictment averring that the oil was sold as coal oil, it was error for the lower court to sustain a demurrer to the indictment. Section 4234, Kentucky Statutes, requiring that a license shall be paid for each wagon used in transporting or retailing "petroleum, lubricating or other oils," the court can not say that coal oil is not a lubricant, it being a question of fact for the determination of the jury.

F. B. Hays, W. R. Howell and Conn Linn for appellant.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Nunn.

The indictment charges the appellee with selling by retail lubricating oil from a wagon used in transporting and retailing same without having license so to do. In describing the offense the indictment avers that the lubricating oil so sold was coal oil. The court sustained a demurrer to and dismissed the indictment. To review that action this appeal is prosecuted.

The indictment is based upon a provision of section 4224, Kentucky Statutes. It requires that a license shall be paid for each wagon used in transporting or retailing "petroleum, lubricating or other oils." The grand jury charged in effect that coal oil is a lubricating oil. The court can not say that coal oil is not a lubricant, or lubricating oil, this being true the court could not determine the question by demurrer to the indictment. It is a question of fact for the jury to determine whether or not coal oil is a lubricating oil. If the indictment charged that a certain kind of oil was sold by retail from a wagon transporting it without a license, the defendant could not be convicted upon the proof that some other kind of oil was so sold.

The judgment is reversed for proceedings consistent with this opinion.

HOPKINS v. COMMONWEALTH.

(Filed April 15, 1904.)

1. Homicide—Wound not necessarily fatal—Death of deceased hastened thereby—If one unlawfully wounds another and thereby hastens or accelerates his death by reason of some disease with which he is afflicted, the wrongdoer is guilty of the crime thereby resulting, although the deceased would probably not have lived much longer.

2. Continuance—Where appellant's affidavit as to what an absent witness would testify to, was allowed to be read as a deposition, the court did not err in refusing a continuance.

F. D. Sampson for appellant.

N. B. Hays and Loralne Mix for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker.

Appellant was indicted by the grand jury of Knox county, charged with the willful murder of George M. Cole. A trial resulted in a conviction of the accused, and his sentence to the penitentiary for the term of fifteen years.

The grounds urged for a new trial are, first, that the verdict was against the law and the evidence; second, that the court misinstructed the jury in this, that the first instruction directs the jury to convict the defendant "if the jury believe beyond a reasonable doubt * * * that the shot caused or 'hastened' the death of the deceased within a year and a day;" third, because of the discovery of new and important evidence on behalf of the defendant. The evidence discloses that, prior to the difficulty, appellant had been in the employ of the deceased as a laborer; that on the day of the shooting, he left

deceased's employ without notice; whereupon the deceased hunted him up and abused him for leaving him, using profane and vile language to him; that, at the time, deceased had a stick in his hand, with which he threatened the accused, but did not strike him. A settlement was then had between the two men, the employer paying off the employe, giving him, as a part of his wages, an order on the neighborhood store for \$2, and they then parted. Afterwards the deceased came to the neighborhood store, where he found appellant in the act of purchasing a pair of shoes, and again abused him, using vile and insulting language to him. In a short while the deceased left the store, and started home. Afterwards appellant surreptitiously took a pistol belonging to a clerk in the store, and placing it in his pocket, followed the deceased, overtaking him on the public road, where he shot him, inflicting a wound from the effects of which he died in about two months thereafter.

Cole, at the time he was shot, was in a very feeble condition of health, being in what is known as the second stage of consumption, and would probably not have lived very long, even if he had not been wounded. The injury inflicted by the shooting was not necessarily fatal, and, but for the enfeebled condition of the deceased's health, he would, more than probably, have recovered. The evidence of the physicians show that his death was accelerated or hastened by the wound received at the hands of appellant. Appellant's testimony is to the effect that he fired in self-defense, but the evidence of the Commonwealth tends to show that the shooting of Cole was an act of wanton assassination. The verdict of the jury was not contrary to the evidence. The trial court did not err in the instruction complained of. Although the wound which appellant inflicted upon the deceased would not probably have caused his death had he been a well man, he is not, therefore, guiltless of the crime with which he stands charged. If one unlawfully wounds another, and thereby hastens or accelerates his death by reason of some disease with which he is afflicted, the wrongdoer is guilty of the crime thereby resulting. The rule upon this subject is thus stated by Bishop, in his work on Criminal Law, volume 2, section 638, subsection 3: "Though the person would have died from some other cause already operating, it is enough that the wound hastened the termination of life; as, for example, if he had already been mortally wounded by another. And if the one attacked was enfeebled by disease, and what was done would not have been mortal to a well person, still, whether the assaulting person knew his condition or not, after he did what was mortal to the other, the offense is committed."

Clark, in his Criminal Law, page 129, says: "The fact that the person killed was diseased, and in ill health, or wounded by another, and was likely or sure to die when the blow was given, or that after the blow was given he neglected or refused to take proper care of himself, or submit to an operation by which he could have been cured, is no defense."

Hale, in his Pleas of the Crown, volume 1, page 428, says: "If a man be sick of some such disease which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been, is homicide or murder, as the case happens, in him, that gives the wound or

hurt, for he doth not die simply by the visitation of God, but the hurt that he receives hastens it, and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned judge, Justice Rolfe, frequently direct." (State v. Morea, 2 Ala., 275; People v. Moan, 65 Cal., 533; Commonwealth v. Fox, 7 Gray, 585; State v. Costello, 62 Iowa, 404; People v. Ah Fat, 48 Cal., 61.)

There was no pretense by appellant to maintain his third ground for a new trial, as he filed no affidavits, or other evidence, in support of it. Although not set forth as a ground for a new trial, appellant complains of the court's failure to grant him a continuance based upon the absence of a witness, one Dr. Crit. Jones. The record shows that appellant's affidavit, as to be what Dr. Jones would testify, was allowed to read as a deposition, and we do not think the court erred in refusing a continuance. Upon the whole case, we are satisfied that appellant received a fair and impartial trial, and that the verdict was lighter than the facts warranted.

The judgment is affirmed.

JOHNSON'S TRUSTEE v. JOHNSON.

JOHNSON v. MERRITT.

(Filed March 16, 1904—Not to be reported.)

1. Wills—Alienation—A devise to a trustee for the benefit of the children of decedent's son by which the property should be held until his youngest child should arrive at the age of twenty-five years was void because it went beyond the period of a life or lives in being and twenty-one years and ten months thereafter contrary to the statute of perpetuities.

2. Same—Where, by the terms of a will the period of distribution fixed by it being void, the will will be construed as if no such conditions were imposed, and upon the death of one for whom it was held in trust it descended immediately to his children.

George V. Triplett for appellant Johnson.

Miller & Todd and Chas. S. Walker for appellee Merritt.

Little & Slack and R. L. Greene for appellees.

Appeal from Davless Circuit Court.

Opinion of the court by Judge O'Rear.

Harriott T. Johnson, senior, by her will dated November 7, 1878, and a codicil dated March 30, 1882, all probated the 21st of August, 1882, devised her property to a trustee, the income to be applied to the use of her son and his family during her son's life. The testatrix had but one child, the son named Philip. The latter was at the time of the making of the will, and date of the death of the testatrix, married to appellee, Alice H. Johnson, and had then living two children. The clauses of the will necessary to be considered are:

"4th. It is my will, and I do so now bequeath, that upon the death of my son, Philip, then all my property of every description, after paying the legacy to his widow, if he shall leave one, shall be held by the trustee as aforesaid, the interest, and income arising from same to be held for the use

and benefit of any children left by my son, Phillip, until the youngest child shall reach the age of twenty-five years, and then be equally divided between them.

"5th. If my son, Phillip, shall die leaving no children, or if the children left by him shall die before they reach the age of twenty-five years, then I will that all my property held by the trustee for the purposes aforesaid, shall be sold, and turned into cash, and the proceeds so realized be distributed."

* * *

Then follows a disposal of the property to other persons.

By the 7th clause of the will it is provided: "No part of my property shall be sold, or alienated, except for the purpose of paying my debts, or unless by the consent of my executor hereinafter made, but I hereby authorize and empower my executor to sell, and convey any part of same, provided, however, that the proceeds arising from any sale made by him shall be reinvested, and held in trust by him for the purposes set forth in this my will and testament, and with the same conditions annexed in the other clauses of this my will."

The devisee, Phillip, died in 1902. He had children surviving him, six in number, two of whom, the two first named herein, are over twenty-five years of age, and the others are less than twenty-five, and some of them under twenty-one. It is claimed that where the words "twenty-five years" occur in the clauses above quoted, that they had been changed by the testatrix in her lifetime so as to read twenty-one years. In each instance there is written over the word one the word five. The will, as recorded, read twenty-five years. Witnesses were introduced to testify to their opinion as to whether the testatrix had first written the term twenty-five years, and then altered it to twenty-one years, or vice versa. The weight of the evidence seems to us to be, and such was the finding of the chancellor, that she had written first twenty-one years, and had then altered it to twenty-five. This is confirmed by the inspection of the original paper which is before us.

A devise of the income of property may be equivalent to a devise of the property, depending upon the context as evincing the testator's intention with reference thereto. Here, the testatrix was evidently attempting to provide a life estate and support, by converting the total income of her estate into an annuity, for the benefit of her only child. As he was the person beneficially seized, although a trustee was appointed to hold the title, a life estate therein for his benefit was created. It might have been subjected to his debts under the statutes. (Section 1681, Kentucky Statutes.)

The will gives the property, upon the death of the testatrix's son, to his children and widow. As the son's children must of necessity have been born or begotten in his life time, the remainder thus created inevitably must have vested within twenty-one years after a life in being, and was, therefore, not within section 2360, Kentucky Statutes. Had the will stopped there, there would have been no doubt of its validity in so far as the nature of the estate created was concerned. But, the testatrix went further and attempted to prevent the alienation of the estate for a period of twenty-five years, which was in excess of her power, and was void as being against the statute and rule of perpetuities. The result is that the testatrix devised the property to persons whose lives were then in being, to wit, her son, Phillip,

and to two of his children, the two then born, and then sought to limit the estate further by prohibiting its alienation for at least twenty-five years thereafter. As if Phillip should have had other children born alive after the death of the testatrix, the period of distribution was postponed for a longer period than is allowed by the statute against perpetuities, to wit, a life or lives in being and twenty-one years and ten months thereafter. (Section 3960, Kentucky Statutes.)

The will disposed of all the property thus: The title resting in the trustee for, first, a life estate in the son, Phillip; second, with remainder to Phillip's children, subject to the payment of \$5,000 to Phillip's widow, if he left one. The only part of the will that is void is the provision forbidding the alienation of the estate for a period not allowed by the statute, and the attempt to exempt it from liability for the son's debts. Therefore, the period of distribution fixed by the testatrix being void, the will will be construed as if no such conditions were contained in it. Upon the death of Phillip, his widow was entitled to receive \$5,000 in cash, and the residue of the estate should have been distributed equally among his six children. The widow contends that the limitation sought to be imposed by the will being void, the testatrix must have died intestate, and that Phillip took by inheritance under the statute, and was consequently invested with the fee entitling his widow to dower in the realty. This contention is disposed of adversely by the construction above given the will. There is a line of cases (of which *Fidelity Trust Co. v. Lloyd*, 25 Ky. Law Rep., —, decided February 24, 1904, is the latest, and which cites the earlier cases of a similar nature) holding that an attempt to suspend the vesting of the title and the consequent suspension of the power of alienation for a longer time than twenty one years, and the utmost period of gestation, is void, and that in such event the testator died intestate as to the property so affected. There is a marked and vital distinction between all of those cases and this one, viz.: In those cases the title did not vest, the person who was to take was not to be, and could not be, ascertained till after the utmost period of postponement allowed by the statute, and, therefore, the property had not been devised at all; as devising it to a trustee to hold for a wholly void purpose, is manifestly no devise. (*Stevens v. Stevens*, 21 Ky. Law Rep., 1815.) In this will the property was given over after Phillip's death to his children without any contingency. The persons to take were thus selected and made certain. The time of distribution among them, i. e., the time of payment, was postponed, or attempted to be, till the youngest of them became twenty-five years old.

The true rule of construction, by which the test of the validity of such provisions is to be made, is clearly expressed in 3 Williams on Executors, 515, thus: "But when future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent, according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it. In ascertaining the intention of the testator in this respect, the courts of equity have established two positive rules of construction: First, that a bequest to a person payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determined term, confers on him a vested interest im-

mediately on the testator's death, as debitum in presenti solvendum in futuro, and transmissible to his executors or administrators; for the words 'payable' or 'to be paid' are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time; second, that if the words 'payable' or 'to be paid' are omitted, and the legacies are given at twenty-one, or if, when, in case, or provided, the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for his payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy."

In *Moore v. Offutt*, 94 Ky., 572, this court wrote: "It has been said by both Blackstone and Kent, and often quoted, that 'it is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which makes the distinction between a vested and contingent interest.'" (*Roberts v. Brinker*, 4 Dana, 570; *Allen v. VanMeter*, 1 Met., 264.)

In *Roberts v. Brinker*, supra, the court said: "A legacy to an infant in presenti, to be paid in futuro, is deemed to be vested, and as not depending on his living until the time fixed for payment."

It was said in *Fidelity Trust Co. v. Lloyd*, supra: "The statute concerns itself with the vesting of estates, and not with their termination."

By all these authorities we see that the estate vested in the infants immediately upon the death of their father, the life tenant. After having designated the persons to take, testatrix vainly attempted to prevent their alienating the property for a period repugnant to the statute. It is always held that where the devise is valid in part, and void in part, that which is good, if severable from the bad, will be allowed to stand. (*Attorney-General v. Wallace*, 7 B. Mon., 611; *Armstrong v. Armstrong*, 14 Ben Mon., 269.)

Judgment affirmed on the original appeals and on the cross appeal.

COMMONWEALTH, BY, &c. v. WALKER, &c.

(Filed April 19, 1904—Not to be reported.)

1. Taxation—Lien on bonded warehouse for taxes on whisky—Under Kentucky Statutes, section 4021, providing that "the Commonwealth, each county, city, town or taxing district shall have a lien on the property assessed for the taxes due them respectively," the mere fact that part of the taxpayer's personal property was assessed by one set of officers, and part by another, can not reasonably be presumed to be intended to affect the lien of the Commonwealth for the tax on all the property, including the bonded warehouse.

2. Sale of land before personalty is exhausted—Authority of auditor to institute equitable proceedings—Section 4112, Kentucky Statutes, provides that "on failure of the proprietor of a warehouse to pay the taxes within five days after they are due he shall be deemed delinquent and the officer authorized to collect the taxes shall at once cause such proceedings to be instituted for their collection as may be provided by law for the collection of other delinquent taxes." By sections 4091, 4092 and 4104 other delinquent taxes due the State may be recovered by suit. By section 4111, it is the duty of the ware-

houseman to pay his taxes to the officer of the State entitled to receive them. When he failed to pay his taxes into the treasury he became a delinquent debtor of the State and might be sued for his taxes under sections 976, 4188, Kentucky statutes. When judgment was entered in the Franklin Circuit Court and the execution thereon was returned "no property found," the auditor was authorized by section 4169, Kentucky Statutes, to institute an action by equitable proceedings in the Franklin Circuit Court, or in any court of competent jurisdiction, to enforce the lien on the warehouse for their collection.

Lillard H. Carter and W. H. Morgan for appellants.

L. W. McKee for appellee John Dowling.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Hobson.

J. R. Walker owned a bonded warehouse in Anderson county in which there was stored a large number of barrels of whisky which were assessed against Walker in the years 1898, 1899 and 1901. Walker made withdrawals of whisky from bond so that there was due the Commonwealth on September 1, 1899, \$125.94, on January 1, 1900, \$158.76, and on May 1, 1900, \$339.37. On June 20, 1900, Walker sold and conveyed his warehouse and ground to John Dowling in satisfaction of a mortgage in favor of Dowling of date May 14, 1892. On August 20, 1900, the Commonwealth instituted ordinary actions in the Franklin Circuit Court in which it recovered judgment against Walker for the taxes above referred to, with interest and certain penalties. Execution was issued on these judgments and returned no property found. Then this suit was brought by the Commonwealth in the Anderson Circuit Court against Walker and Dowling asserting a lien on the land. The circuit court dismissed the petition, and the Commonwealth appeals.

The first question made is that the State has no lien on the real estate of the owner of a bonded warehouse for the taxes due by him on the whisky therein. The lien for taxes is wholly a matter of statute. Section 4021, Kentucky Statutes, is as follows: "The Commonwealth, and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively, in the manner provided for by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

Our attention is called to the fact that in the general statutes this provision after the words "property assessed" contains also the words "and on all other property of such person," and that these words have been omitted from the present statute. But we do not see that the omission has changed the sense except as to property which is not assessed for taxation. The change seems to have been made to avoid the construction that a lien was given on property not liable to assessment; for in the present statute these

words are added which are not in the General Statutes, "and nothing shall be exempt from levy and sale for taxes and costs incident to the sale." It has been a settled legislative policy in Kentucky to give a lien on all the property of the taxpayer in his entire list for all his taxes and not a lien on each piece of property for the tax on it alone. We see nothing in the present statute to indicate a legislative intent to change the well settled policy of the State in this regard extending back as far as the act of 1799. And if the whisky had been assessed for taxation by the county assessor like the land, we do not think it would have occurred to the distinguished counsel for appellee that there was not a lien on the land for the entire tax of the taxpayer. But the provisions of sections 4105-4114, Kentucky Statutes, are part of the same act as section 4091, the only difference being that the whisky is required to be assessed by a board which can act more intelligently than the assessor and the taxes are required to be paid at a different time for the convenience of the warehousemen. The value when fixed by the board is certified to the county clerk to whom the assessor's books are returned and the two returns taken together constitute the assessment of the taxpayer's property. The land sought to be subjected was a part of Walker's tax list and we see no reason why there should not be a lien on it for the whisky tax as well as for the tax on the personal property of Walker assessed by the assessor. The mere fact that part of his personal property was assessed by one set of officers and part by another can not reasonably be presumed intended to affect the lien of the Commonwealth for the tax, and if the Commonwealth has no lien on his other property for the whisky tax, then it is without security for the collection of this tax, for the whisky can not be disturbed in bond, and when taken out of bond it is usually at once disposed of. There seems to be the greater reason for presuming that the legislature contemplated that the whisky tax would be secured by the lien provided by section 4021 for the reason that this tax is not required to be placed in the hands of the sheriff, who is responsible on his bond for diligence in collecting taxes coming to his hands. We, therefore, conclude that the Commonwealth has a lien on the land for the taxes properly assessed against Walker, but it is not liable in Dowling's hands for the assessment of 1901 made after the deed to him was executed. There seems to be no evidence of an assessment for the year 1900, but the assessments for 1898 and 1899 seem to be sufficient.

But it is insisted that no action can be maintained against the land until the personality is exhausted, including the whisky in the bonded warehouse. The whole proceeding is statutory. The rights of the parties depend, therefore, on the terms of the statute. Section 4112 provides that on the failure of the proprietor of a warehouse to pay the taxes within five days after they become due, he shall be deemed delinquent, and the officer authorized to collect the taxes shall at once cause such proceedings to be instituted for the collection of the taxes as may be provided by law for the collection of other delinquent taxes. By sections 4091, 4092, 4104, other delinquent taxes due directly to the State treasury may be recovered by suit. By section 4111 it is made the duty of the warehouseman to pay his taxes to the officer of the State authorized to receive them. When he failed to pay his taxes into the treasury he became a delinquent debtor of the State and might be sued for

his taxes under sections 976, 4188, Kentucky Statutes. (Commonwealth, v. Lyddane, 21 Ky. Law Rep., 1514.) When judgment was entered in the Franklin Circuit Court and the execution was returned no property found, the auditor was authorized by section 4169, Kentucky Statutes, to institute an action by equitable proceedings in the Franklin Circuit Court, or any other court of competent jurisdiction.

Judgment reversed and cause remanded for further proceedings consistent herewith.

GOLDEN, &c. v. RUPARD.

(Filed April 19, 1904—Not to be reported.)

1. Necessity for passway—Parol proof—While there is parol proof that appellee's vendor, True, was entitled to the outlet in controversy as a way of necessity, it was not conveyed to him by the deed, and the inference shown by the parol proof may be rebutted by parol proof which conclusively establishes the fact that True did not claim the passway as a matter of right.

2. Notice—Appellee, who bought from True, was not a bona fide purchaser of anything but what was embraced in his deed, and it was then notorious in the neighborhood that the passway which had been used by True for a time had been closed up by appellant.

3. Adverse possession—The facts showing that appellant during all the time he allowed appellee's vendor and others to pass through his land, he had draw-bars across the passway, and that he moved it from time to time when it suited his convenience and at one time he had a chain across the way at which nobody complained, and all the facts proven, we conclude that there has been no such adverse possession as to create a right of way by prescription.

Beckner & Jouett for appellants.

Pendleton & Bush for appellee.

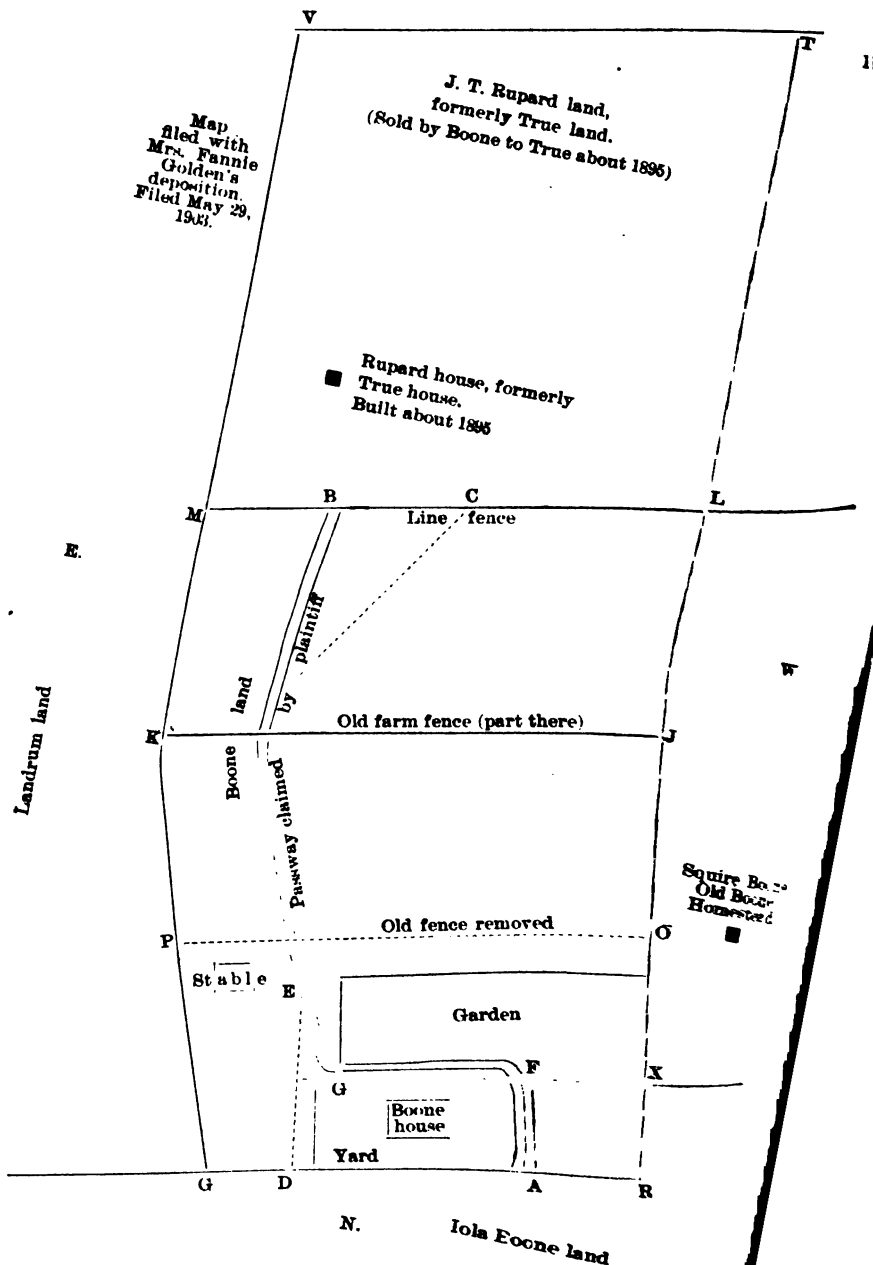
Appeal from Clark Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this suit to obtain an injunction requiring appellants to remove certain obstructions placed across a passway claimed by him, which he alleged was not less than twenty feet in width, beginning at a point on the line between him and appellants and running thence in a westerly direction following the ridge to a point near appellant's house where the yard fence corners with what is now the garden fence, and running thence next to the yard fence to the southeast corner of the yard fence and thence in a westerly direction through the fence and through the yard to the land of Iola Boone, as shown on the following plat by the letters B, E, G, F, A:

GOLDEN, & O. V. RUPARD.

8.



Squire Boone owned a tract of 125 acres of land. His house stood at the point marked on the plat, "Squire Boone, old Boone homestead." After his death, in the division of his estate between his children, this tract fell to three of his sons, one receiving the part where the old homestead stood and lying west of the line L, J, X, on the plat. Another received the northern end of the farm indicated on the plat by the words "Iola Boone land;" and there fell to I. N. Boone, the remainder of the tract indicated on the plat by the lines V, T, J, R, Q, G, K, M, V, containing fifty-three acres. This division was made about twenty years ago or a little more. For some years after the division was made, I. N. Boone was a bachelor and lived at the old homestead with his brother. About five years after it was made he began building him a house at the point marked "Boone House," near the letter A on the plat. This house he finished in a about three years and married and moved into it. About five years after this, I. N. Boone conveyed to J. T. True the south seventeen acres of his tract indicated on the plat by the lines M, V, T, L. True built a house at the point marked "Rupard house" near letter B, and after living there for several years sold the land to appellee Rupard, who then owned the Julia Bunch land lying westward on the plat, and was living in the Bunch house. After his purchase from True, Rupard moved to the True house and was living there when this controversy arose. I. N. Boone, after the deed to True was made, conveyed the remainder of his tract to his wife, Fannie Boone, who is now Fannie Golden, having married a second time since Boone's death. Appellee Rupard bases his claim to the passway on two grounds: First, the seventeen acres which he got of True is a part of the Boone farm and the passway is necessary as an outlet to this seventeen acres; second, he owns sixty-three acres of the Bunch farm and for over fifteen years has had, together with those under whom he claims, adverse possession of the passway.

There are two pikes known as the Schollsville and the Iron Works pike, which are something over two miles apart, the land in controversy lying between them and about a mile and a quarter from the Schollsville pike. From the point A there is an outlet passing through the land of Iola Boone and over the land of John H. Thompson to the Schollsville pike. The way over Thompson's land is claimed by the Boones as a matter of right from long adverse use. Mrs. Iola Boone concedes the right of I. N. Boone and those claiming under him to pass over her land. It also appears that Rupard has the right of way from A out to the pike. So the only question is his right to pass over appellants' land from B to A.

The facts in regard to the first ground of claim to the passway are few and clearly shown by the evidence. When True bought the seventeen acres from Boone he wanted Boone to convey with the land the right of way in question. This Boone refused to do, saying that rather than do this he would lose the sale of the land; but that he would let True pass through there as long as it suited him, or substantially this. True did pass through there for a while, and then Boone closed up the way, and would not let him use it any longer. After this True sold to Rupard. The rule is that a presumption which is raised by parol evidence may be rebutted by parol evidence. While there is evidence from which it might be inferred that True was entitled to this outlet as a way of necessity, it was not conveyed to him

by the deed, and the inference shown by the parol proof may be rebutted by the parol proof showing what was the actual agreement of the parties. This question was fully considered in the case of *Lebus v. Boston*, 107 Ky., 98. Under the rule laid down in that case the parol agreement between True and Boone as to the passway, which is conclusively established by the evidence, cut off True from claiming the passway as a matter of right under the deed; for the deed was silent as to the passway, and it was competent for Boone to show that True had agreed to take the land according to the terms of the deed. Rupard bought the land from True, and has no better standing than he. It is insisted for him that he is a purchaser without notice and that the road was a visible outlet when he bought. Boone is dead, and we think the circumstances preponderate in favor of the conclusion that Rupard bought with notice of the agreement between Boone and True; for it is shown he said that True was obliged to sell as he had no outlet, and while he now denies saying this, his subsequent conduct is confirmatory of the evidence. Besides, he was a near neighbor, and the trouble between Boone and True had gone so far that Boone had struck up notices around, and it would seem that the matter was notorious in the neighborhood. Not only so, but Rupard could not be a bona fide purchaser of anything but what was embraced in True's deed. By purchasing from True he could not acquire any rights in Boone's lands not embraced by the deed. We, therefore, conclude that on the first ground the plaintiff's case fails.

On the other ground on which the passway is claimed the proof is very conflicting. The proof for the plaintiff, by a number of witnesses, is to the effect that the passway, as claimed by him, has been used by the public as a public way along the route claimed by him for something like forty or fifty years. On the other hand, the proof for the defendant is that while there was in Squire Boone's lifetime a passway from one of these pikes to the other, it ran down nearer his house and was not on the land of I. N. Boone. The witnesses who testify to this, are the Boones who lived on the farm and were raised there and have no interest in the controversy. While the proof for the plaintiffs is in the main by persons who lived at some distance and were only along the road at intervals. It is shown that when I. N. Boone got the land there was an old farm fence from K to J, which had no break in it. There was also at another time from P to O an old fence. Three witnesses who cultivated the land at different times after it was set apart to I. N. Boone and before he married and moved into the house which he built, one of them cultivating it that year, testify to cultivating the whole field, leaving no break for a road or passway. At no time were there any gates on the passway. I. N. Boone had across it either fences or bars and he seems to have put either a fence or draw-bars as suited his pleasure without complaint from anybody. Rupard had a difficulty with I. N. Boone while he was living in the Bunch house and about nine or ten years before this controversy arose. Boone then forbade his coming on his land, and from this time he did not use the passway much, if at all, until after he bought the True place. The fact that Boone forbade Rupard's coming on his land, and afterwards refusing to convey to True the right of way over it, is strong evidence that he did not then recognize any right of public way over his land, and his entire conduct from the time that he got the land, to his death,

shows the same thing. At one time he put a chain across the way. It is said he did this because he had a blind horse which pulled down the bars; still, the fact that he put up the chain and nobody complained of it, is strong evidence that it was not recognized as a public way. Besides, it ran close to the back of his house and between it and the spot of ground which he used as a garden or truck patch, passing through his yard, among his trees and near his well. At one time the road entered his land at C. He changed it to B to suit his own convenience. When the trouble came up he proposed to Rupard to let him go out from E. to D, Rupard coming to him and saying that he wanted the way chiefly on account of his father, and when a man couldn't buy, he must beg. This proposition was conditioned on Iola Boone's consenting to it. She lived in Bourbon county, and Rupard then went to see her, telling her in effect the same as he had said to Boone, and agreeing that he would fence the way and put up the gates if she would let him go that way. This she declined to do. Rupard denies making these statements, but he has a way out to the other pike, and the preponderance of the evidence is against him as to these admissions. On all the evidence, considering the way the passway was used, the fences across it, and all the circumstances, we conclude that there has been no such adverse possession as to create a right of way by prescription.

Judgment reversed and cause remanded, with directions to dismiss the petition.

WATTON v. COMMONWEALTH.

(Filed April 19, 1904—Not to be reported.)

Criminal law—Verdict—Where appellant was convicted upon an indictment charging him with the offense of maliciously cutting with intent to kill, there being no evidence erroneously admitted against the appellant, the instructions being correct, the verdict will not be disturbed.

Oliver & Reed for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges the defendant with the offense of willfully and maliciously cutting another with a knife with intent to kill. The court has not been favored with any briefs in this case. We have examined the record with a view to determine whether a new trial should have been granted for the reasons filed on the motion therefor. There seems to have been no evidence erroneously admitted against the defendant which was prejudicial to his substantial rights. The court did not err in the admission of testimony in rebuttal of which complaint is made. It was evidence which should have been admitted in rebuttal and not in chief. We have examined the instructions and find that they are substantially correct.

The judgment is affirmed.

BOTTO'S EX'OR v. BOTTO.

(Filed April 19, 1904—Not to be reported.)

Decedent's estate—Claims against—Pleading—In an action by the executor of an estate against one for the accounting of certain property, and defense was interposed that there was an action pending involving the same defendant for a settlement of the estate, it was error to sustain a demurrer to a reply to this answer, because, taking the averments of the reply to be true, it appeared that the two causes of action were not identical, but were in reality for a wholly different purpose.

Wm. Marshall Bullitt for appellant.

Dodd & Dodd and O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Burnam.

This suit was brought by the appellant, the Fidelity Trust Co., as executor of Florence Irvin Botto, against the appellee, Cloteal B. Botto, on the 14th day of May, 1901. After setting out the probation of her will and their qualification as executor, they allege in substance that for four years preceding the death of Florence Irvin Botto, the defendant, Cloteal B. Botto, was her steward, business manager, confidential agent and adviser; and that in this capacity she had received moneys of Florence Irvin Botto, aggregating \$37,999.89, the particular items and dates of which are set out in the petition; and that in addition to these several amounts there had come into her hands as agent various additional sums aggregating between ten and fifteen thousand dollars, the particular items of which they were unable to give; that she had in the same capacity been put in possession of a large amount of personal property belonging to the estate of testatrix, consisting of jewelry, silver ware, household furniture, china, silks, ornaments, books, papers, etc., of which she had failed to render any account, and prayed that she be required to account for the money which came into her hands as such agent, manager and adviser of testatrix and for a judgment for the balance which might be found due to the estate of testatrix and for a judgment requiring the defendant to deliver to the plaintiff the personal property belonging to the estate of testatrix in her hands or for the value thereof in money. The defendant, Cloteal B. Botto by her answer, said that prior to the institution of this action on the 13th of April, 1901, the plaintiff had instituted an action against the defendant and others calling on her to set up any demands existing in her favor against the estate of testatrix; and that the defendant had answered in that action and had fully accounted for all the money and property sued for in this action; that this suit was unnecessary and involved the same parties and the same issues which had been asserted in the former action. To this plea of another suit pending the plaintiff replied that it was true that on the 13th of April, 1901, they had brought a suit against the legatees, and creditors of Florence Irvin Botto for the purpose of settling the estate of their testatrix; and that it had made the defendant, Cloteal B. Botto, a party; that she might set up any claim due her by the estate of testatrix, but that they did not in that suit seek to hold her responsible either for money or property, which had been received by her as agent of testatrix;

that it was simply a suit for the settlement and distribution of the estate of decedent. A general demurrer was interposed to this reply by the defendant, Cloteal B. Botto and sustained, and plaintiff declining to plead further, it was ordered that their petition be dismissed without prejudice, however, to their right to assert its claim against the defendant in the settlement suit, and they have appealed.

"Pleas in abatement, as they do not deny the merits of plaintiff's claim, but simply tend to delay the remedy, are not favored by the courts and the greatest strictness is applied to them, and they will not be aided in construction by any intendment. To support such a plea it must appear that the two suits are for the same cause or causes of action, or the identity of the matters involved must be such that a judgment in the first could be pleaded in bar as a former adjudication." (1 Encyclopedia of Pleading and Practice, 23 and 761; Newman's Pleading and Practice, 481, and Thomas v. Thomas, 26 Ky., 589.) There is a very material difference between a suit brought for the settlement and distribution of an estate, and a suit by the personal representative against a debtor of the estate to require her to account for such indebtedness. It has never been the practice in this State and would not be proper for the personal representative of a decedent to sue the debtors of the estate in the same action for its settlement and distribution. Such a practice would introduce into the action great confusion and uncertainty. Taking the averments of the reply to be true, as we must upon demurrer, it is evident that these actions were not prosecuted for the identical cause of action, but in reality for a wholly different purpose. We are, therefore, of the opinion that the trial court erred in sustaining a demurrer to the reply to the plea of another suit pending, and the judgment is reversed and cause remanded, with direction to overrule the demurrer and for other proceedings consistent herewith.

BOWMAN v. RAY, SUP'T, &c.

(Filed May 3, 1904.)

1. Injunction—Pleading—Relief—The appellant who holds a second class certificate as teacher, filed a suit in the Monroe Circuit Court and obtained from the circuit clerk in vacation a temporary injunction to prevent the superintendent of schools of said county from investigating a charge of drunkenness against appellant with the view of revoking his certificate, to which petition the judge of the Monroe Circuit Court sustained a demurrer and dissolved the temporary injunction, from which judgment this appeal is prosecuted. Held—That section 90 of the Civil Code requires the plaintiff to demand in his petition the specific relief to which he considers himself entitled, and as the petition in this case contains no prayer for relief of any kind, the court had no jurisdiction to decree any.

Duff & Hutchinson, Baird & Richardson and W. L. Porter for appellant.
Harlin & White for appellee.

Appeal from Monroe Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Willie Bowman, asks a reversal of a judgment of the Mon-

roe Circuit Court sustaining a special and general demurrer to his petition and dissolving a temporary injunction granted by the circuit clerk in vacation. The petition alleges in substance that he holds a second class certificate as a teacher in the common schools of Monroe county, which was issued to him by the board of examiners, of Monroe county after having been duly examined therefor on the 11th day of July, 1908; and that subsequently on the same day he contracted in writing with the trustees of district No. 22, to teach the common school for a term of five months, beginning on the 27th of July, 1908; and that on the same day the appellee, S. B. D. Ray, County Superintendent of Common Schools, had the following notice served upon him:

"Office of School Superintendent,

"Tompkinsville, Ky., July 11, 1908.

"Mr. Willie Bowman:

"You are hereby notified that charges of drunkenness and immoral conduct have been preferred against you; and that your certificate be revoked. The charges are specifically to the effect that you were drunk at Ing. Bartlett's, and also at Joe Carter's. You will take notice that at 2 o'clock, p. m., Friday, July 17, 1908, the case will be heard in my office, and you will then and there attend and make such plea and proof as may seem to you consistent with truth and equity.

"S. B. D. RAY,

"County Superintendent."

That the defendant in giving the notice was actuated by malice and spite, and had publicly declared that he would prevent plaintiff from teaching the school under his contract; that the pretended charges of drunkenness specified in the notice were malicious and without foundation, and were so known to be by the defendant, and referred to occasions which antedated the issuance of the certificate to him more than two years; that prior to the issuance of the certificate to him on the 11th of July, 1901, he held a similar certificate as a common school teacher for Monroe county; and that the board of examiners, who issued and delivered the last certificate to him, had examined into the truthfulness of the alleged charges and had decided in his favor; and further alleged that the defendant had no jurisdiction or power to determine upon charges affecting his moral character which antedated the issuance of his last certificate to him; that the defendant would not fairly or impartially investigate the charges. The allegations of the petition apparently look to relief from the impending action of the defendant by writ of prohibition, but the petition contains no prayer for such relief.

Section 4417 of the Kentucky Statutes, which is a provisions relating to common schools, provides that for incompetence, neglect of duty, immoral conduct, or other disqualification, the county superintendent may suspend or remove from office any trustee or teacher of any school under his supervision, after five days' notice of the charges made against him. Section 4418 provides for an appeal from the action or decision of the county superintendent to the superintendent of public instruction, in conformity with such rules and requirements as the superintendent of public instruction shall, from time to time, prescribe. Section 4425 imposes the duty upon the county superintendent and other examiners to make investigation as to the moral character of applicants. And section 4503 further provides that if at any

time the holder of a county certificate shall be found incompetent, inefficient, immoral, or otherwise unworthy to be a teacher, the county superintendent shall revoke the certificate of such person.

These various sections of the statutes contemplate that the county superintendent shall investigate the moral character of all applicants for teachers' certificates, and imposes upon him the duty of suspending or removing from office any trustee or teacher for incompetency, neglect of duty, immoral conduct, or other disqualification. There can be no doubt that a teacher who habitually uses intoxicating liquors to excess, or while in the discharge of his duty as a teacher, would not be a fit or competent person under the statute to perform the duties imposed by law upon common school teachers, and it would be the duty of the county superintendent to revoke the certificate of such person. But this is not an arbitrary power on his part, and can not be exercised without just cause. The specific charges in the notice served upon the plaintiff are, that he was drunk at Ing. Bartlett's and Joe Carter's. There is no intimation as to the date of these alleged acts of intemperance. So far as the notices go, they may have occurred many years before he obtained his certificate as a teacher, and might not have affected either his moral character or competency at the date of the notice. Unless the alleged intemperance was subsequent to the date of his certificate as a teacher, or was so close thereto in point of time as to affect his moral standing at that time, they would not be sufficient to authorize the revocation of the certificate, or their investigation to that end by appellee. But section 90 of the Civil Code provides: "The petition must state facts which constitute the cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled."

As the petition in this case contains no prayer for relief of any kind, the court had no jurisdiction to decree any.

Judgment affirmed.

HARP v. CUMBERLAND TELEPHONE AND TELEGRAPH CO.

(Filed May 4, 1904—Not to be reported.)

Damages—Instructions—Where appellant was ordered by appellee's chief workmen to complete the digging of a hole in which dynamite had been left by other workmen of appellee, no information of which was given to appellant and he was seriously and dangerously injured by an explosion of the dynamite when he began the work of digging the hole, the evidence showing that the explosive could not be seen; and further, that appellant was unused to explosives, it was error to instruct the jury that he was not entitled to recover unless the jury believed from the evidence that appellee, or its agent in charge of the work knew, or by the use of ordinary care could have known, that the explosive remained in the hole, because it is the duty of the employer to furnish the servant with reasonably safe and suitable tools and a reasonably safe place in which to perform his work.

Gilbert & Gilbert and George Nicholas for appellant.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Settle.

The appellant sued appellee in the Shelby Circuit Court for personal injuries alleged to have been caused by the negligence of appellee, its employees and servants.

Appellant was employed by appellee in the work of digging holes and setting poles for the use of its telephone wires, and while so engaged he was ordered by appellee's chief workman in charge of the hands to complete the digging of a hole which had been partially made some days before by another of its hands. It further appears that the workmen in appellee's service were in the habit of using dynamite in making such holes, and that some of that explosive had been left without appellant's knowledge, by one or more of appellee's other workmen, in the hole at which he went to work, and though the servant or servants of appellee who had left the dynamite in the hole was present, no information was given by him or them to appellant that it was in the hole, and when he went to work upon the hole it caused an explosion of the dynamite which threw him off his feet, broke his nose, nearly destroyed his eyes, and otherwise greatly injured him. It also appears that the dynamite was concealed from view by mud and water in the hole, that it could not be seen by appellant when or before it exploded, and that he had not previously worked at that hole, and further that he was not experienced in the use of dynamite or other explosives.

The answer of appellee denied any negligence on the part of its servants or employees, alleged contributory negligence on the part of appellant, and that his injuries were caused thereby. This was controverted by reply. Upon the trial the jury returned a verdict for appellee. Following which the appellant entered motion and filed grounds for a new trial, and the motion having been overruled, he seeks at the hands of this court a reversal of the judgment of the court below. It is manifest from the evidence that appellant did not know of the presence of the dynamite in the hole, or have cause to even suspect its presence therein. Furthermore, if it had been incumbent on him to use ordinary care to discover its presence, we are satisfied that the use of such care would not have enabled him to do so. The chief complaint of appellant is that the lower court erred in instructing the jury. The instructions told the jury in substance that the appellant was not entitled to recover unless they believed from the evidence that appellee or its agent in charge of its work knew, or by the exercise of ordinary care could have known, that unexploded dynamite remained in the hole which appellant was digging, and failed to exercise such care, and that appellant, without knowledge of that fact, and while exercising ordinary care, received his injuries. An instruction as to contributory negligence was also given.

We think it was error for the court to so instruct the jury. As has been repeatedly held by this court, it is the duty of the employer to supply the servant with reasonably safe and suitable tools and machinery to perform the work required of him, and equally his duty to furnish him a reasonably safe place to work, and to see that it is kept so.

"This duty of the employer is the first and primary duty, and should at all times by the trial court be kept in view, and no construction of the law should be tolerated that needlessly exposes the servant to danger in the prosecution of the business of the master. Humanity itself demands this

much consideration by the employer for the lives and safety of his servants, and the greater the danger to the servant, the greater should be the care and caution demanded by the law of the employer." (Angel v. Jellico Coal Co., 25 Ky. Law Rep., 108; Ohio Valley Ry. Co. v. McKinley, 17 Ky. Law Rep., 1028.)

The appellant had the right to assume that the foregoing rule would be observed by the foreman and other servants of appellee on the occasion of receiving his injuries, and it was their duty to know that there was dynamite in the hole in which he was ordered to dig, and to remove it, or warn him of its presence in time to have prevented his injuries. It is manifest from the evidence that some of the appellee's servants then present did know that there was dynamite in the hole, for they had a few days previously left it there, and further manifest that appellant did not know it was there. It could not be seen because covered by both mud and water. It matters not that it was left in the hole by a fellow servant of appellant, as the negligence of such servant was and is imputable in such a case to the appellee as master. There was no evidence upon which to base the instruction as to contributory negligence, and, therefore, it should not have been given. Upon a retrial of the case the instructions should be made to conform to the views herein expressed.

Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial, and for further proceedings consistent with the opinion herein.

FLOOD v. CHESAPEAKE & OHIO RY. CO.

(Filed April 19, 1904—Not to be reported.)

Railroads—Trespasser—One who enters a passenger train and refuses to pay fare is a trespasser, and he is none the less a trespasser if he tenders a fare which the conductor is not authorized to receive.

J. C. Beckham & Son for appellant.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hobson.

In April, 1902, appellant, a deputy sheriff of Shelby county, came to Frankfort to bring a prisoner, and on the morning of the 16th desired to return to his home at Bagdad, a station between Frankfort and Shelbyville. He and a companion left the State House just before the coming in of the westbound C. & O. train and reached the station just as the train was pulling out. They had no time to get tickets and were not asked by the flagman where they were going, but got on the train just as it was leaving the station. When the train had gone about a mile and a quarter the conductor came to Flood and he handed the conductor 42 cents, the regular fare to Bagdad. The conductor asked him "Where to," he said, "Bagdad." The conductor said he did not stop at Bagdad; Flood asked him when he quit, and he said that that was neither here nor there, pay him 75 cents to Shelbyville or he would put him off. Flood said "I am not going to Shelby-

ville, I don't want to detain you, but if you don't stop there I will pay you my fare." The conductor refused to agree to this and Flood refused to pay his fare to Shelbyville, so the train was stopped and Flood was put off. He filed this action to recover damages for the ejection. At the conclusion of all the evidence the court instructed the jury peremptorily to find for the defendant, and of this he complains.

The C. & O. trains are run between Lexington and Louisville on the track of the L. & N. R. R., under a traffic arrangement between the two companies. One of the rules governing the train in question is that it stops at Bagdad to let off passengers getting on the train east of Lexington, and also stops there when flagged to take on passengers for Shelbyville; but it did not carry passengers from Frankfort to Bagdad as there was a local L. & N. train following it in a few minutes which carried the local passengers. No tickets were sold from Frankfort to Bagdad for this train and the conductor was not authorized to accept cash fares from Frankfort to Bagdad. Appellant, after he was put off, came back to Frankfort and went home on the local train, reaching there about an hour later than the train from which he was ejected. On that morning the conductor had an order to stop at Bagdad to pass the eastbound train and leave there the dining car which was to come back on the eastbound train.

As the C. & O. trains are operated on the L. & N. track under an agreement with the L. & N. company, they are required to be operated according to the terms of the agreement, and the C. & O. Co. can not do local business on its trains which is forbidden by the agreement. It has no right to do a local business between Frankfort and Bagdad, and to have carried the plaintiff from Frankfort to Bagdad would have been a violation by the conductor of his orders, although on that particular morning he had to stop in the yard there to set off the dining car and allow the other train to pass. A railroad company may run local trains for local business and may also run through trains for through business. The plaintiff had no right to demand of the conductor that he should carry him to Bagdad and the conductor properly refused to do so under his orders; although if the plaintiff had paid his fare to Shelbyville the conductor would have been bound to have accepted it, and the plaintiff might have gotten off when the train reached Bagdad and stopped to put the dining car on the side-track.

The train in fact did not stop at Bagdad that morning to land passengers, and if the conductor had accepted the fare as tendered to him it would have been his duty to stop at the station and let the plaintiff get off in the usual way. The plaintiff had no right to require that he do this and the conductor properly refused to receive the money. The plaintiff knew when he got on the train that it was a through train and he should have learned whether it stopped at Bagdad before getting on it.

He got on the train as it was moving out without any inquiry as to whether it would stop at the point to which he wished to go and was not misled in any way by the defendant. One who enters a passenger train and refuses to pay fare becomes a trespasser and may be ejected by the conductor. He is none the less a trespasser if he tenders a fare which the conductor is not authorized to receive or offer to pay fare only to a station for which the train does not receive passengers. We, therefore, conclude that the court properly instructed the jury to find for the defendant.

Judgment affirmed.

LOUISVILLE PRESBYTERIAN THEOLOGICAL SEMINARY, &c. v.
BOTTO, &c.

(Filed April 19, 1904.)

1. Executor—Settling estate—Numerous legatees—Will contest—Expenses incurred by some for benefit of all—Distribution—Rejection of codicils—Fraud and undue influence—Wrongdoers—In a suit by the executor of the will of Florence Irvin Botto to settle her estate, it appears that out of a large number of legatees named in her will, five of them contested the will, thereby expending a large sum for counsel fees and other expenses in preparing the case for trial, in which none of the other legatees participated, resulting in sustaining the original will and defeating three codicils as having been procured by fraud and undue influence, thereby saving about \$100,000 to the beneficiaries under the original will. Held—Under the provisions of section 489, Kentucky Statutes, the expenses and fees incurred by the five contestants, being for the benefit of all the legatees under the original will, should be paid out of the general fund before any distribution is made, as all the legatees thereunder must share the burdens as well as the benefits; and the fact that the contestees, who were also large legatees under the original will, as well as chief beneficiaries under the fraudulent codicils, were losers by the contest and had to pay their own costs and counsel fees therein, will not relieve them from sharing in the general loss, as they were the wrong-doers that caused the expenditure.

Wm. M. Bullitt and T. W. Bullitt for appellants.

Dodd & Dodd and O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Burnam.

James F. Irvin, a resident of Louisville, died in March, 1883, leaving surviving him his widow, Florence Irvin, and one son, Guy F. Irvin, an infant. He left a large estate in the hands of the trustees for the benefit of his wife and son. The son died in 1895, intestate, and unmarried. His will provided, in this contingency, that his wife should have the entire net income of his estate during her life, with the power to dispose of the entire estate in the event she failed to marry again and have children. On the 8th of January, 1896, Mrs. Irvin executed a will, in which she bequeathed to the following persons the sums set opposite their respective names:

Louisville Presbyterian Theological Seminary	\$10,000
Louisville Presbyterian Orphanage	10,000
Charles R. Hemphill	15,000
Irvine Lindenberger	10,000
Phillip T. Chinn	3,000
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Total legacies to petitioners	\$48,000
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Also:

Belle C. McVey	\$15.00
Second Presbyterian Church	10.00
Polytechnic Society of Kentucky	10.00
Young Men's Christian Association	10.00
John Norton Memorial Infirmary	10.00
Anna Foster	5.00
Home of the Innocents	5.00
St. James' Association, etc.	1.00
Rodman Grubbs	15.00
Cloteal B. Botto	15.00
Wm. M. Botto	35.00
Jane Ballard for life	\$6,000
Mary Costello for life	12,000
Jemima Johnson for life	12,000
Jane Jackson for life	12,000
Alex. McHarry for life	12,000
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	54.00
Total legacies to other	188.00
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Total legacies under original will	\$236.00
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On the 30th of June, 1897, she executed a codicil, and on the following day, July 1, 1897, was married to William M. Botto, a young man many years her junior, about the age and an intimate friend of her dead son. On the 23d of April, 1898, and the 15th of January, 1900, she executed two additional codicils, the effect of which was to make a radical change in the disposition of her estate from that made in her original will. By these codicils the following legacies were revoked:

Louisville Presbyterian Theological Seminary	\$10.00
Polytechnic Society of Kentucky	10.00
Young Men's Christian Association	10.00
Phillip T. Chinn	5.00
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Total legacies revoked	\$35.00
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The following legacies were reduced in the amounts, to wit:

\$15,000 to Charles R. Hemphill reduced to	\$5.00
\$10,000 to Irvine Lindenberger reduced to	5.00
\$10,000 to Louisville Presbyterian Orphanage reduced to	5.00
\$10,000 to Second Presbyterian Church reduced to	5.00
\$10,000 to John N. Norton Memorial Infirmary reduced to	5.00
\$15,000 to Belle C. McVey reduced to	1.00
\$12,000 to Mary Costello reduced to	1.00
\$82,000 of legacies being reduced to	27.00
A reduction of	55.00

The following legacies were given:

Dr. W. O. Roberts	\$5.00
News Boys' Home	10.00

Children's Free Hospital	\$5,000
Cloteal B. Botto, trustee for her niece, Florence I. Harrison	5,000
New legacies given	25,000

While the legacies to her husband, Wm. M. Botto, and his mother, Cloteal B. Botto, were increased from approximately \$50,000 to approximately \$150,000, and the legacies to the Bottos, and to some others, were by the codicils made preferred devisees. Mrs. Florence Irvin Botto died on the 12th of February, 1900, leaving an estate estimated to be worth about \$200,000. The original will and the three codicils were duly probated on the 7th of March, 1900, and on the following day the Fidelity Trust and Safety Vault Co. qualified as her executor. On the 30th of March thereafter, Hugh Irvine and some of the heirs at law of James F. Irvin, prosecuted an appeal to the Jefferson Circuit Court from the order of the county court probating the will; and the Louisville Presbyterian Seminary, the Louisville Presbyterian Orphanage, Charles R. Hemphill, Irvine Lindenberger and Philip T. Chinn, five of the legatees named in the original will, employed Thos. W. and Wm. Marshall Bullitt as their attorneys to have the codicils to the will of Mrs. Florence Irvin Botto set aside on the ground that they were fraudulent and had been obtained by the undue influence and fraud of Cloteal B. Botto and W. M. Botto, and the cost, labor and trouble of the conduct of this litigation fell upon these appellants and their attorneys. The trial in the circuit court occupied the entire month of December, 1900. Counsel for appellants spent nearly two months' time outside of the State of Kentucky, taking depositions, hunting up proof, and preparing the trial, expending in this necessary work nearly \$27,000. A jury trial in the circuit court resulted in a verdict sustaining the original will and setting aside all three codicils upon the ground that they had been obtained by fraud and undue influence on the part of the Bottos. As a result of this contest about \$100,000 was secured to the devisees under the original will. After the termination of this contest, the Fidelity Trust and Safety Vault Co. instituted this suit for a settlement of the estate, making all of the devisees and creditors of Florence Irvin Botto parties. The five contesting legatees filed their answer, counterclaim and cross petition against the executors and colegatees, averring that the execution of the codicils had been obtained by the fraud of the Bottos; that they had employed counsel and secured the necessary testimony to show this fact; that none of the other legatees had participated in the expense of the preparation or trial of the contest; that they only had a common interest with the other colegatees, and prayed that the extraordinary expenses and counsel fees incurred by them in making the contest for the benefit of all the legatees, should be allowed out of the common fund and so recovered before distribution. The remaining legatees demurred to this answer, counterclaim and cross petition, and the Bottos, who were legatees under the original will, filed their answer and cross petition, in which they allege that the contest and the expense incurred therein by the appellants, were hostile to their interest; and that they had employed, at large expense, their own counsel in defending the contest proceedings. Appellants replied to the answer of the Bottos that the expense incurred by them was wholly due to their fraud, deception and undue influence in procuring the execution of the codicils, and in their efforts to

uphold them. A general demurrer was interposed to this reply by the Bottos, and sustained, and appellants' answer and conterclaim, in so far as it sought to recover cost and expense incurred by them out of the common fund, dismissed, and they have appealed.

It is conceded by the demurrer that if the codicils had stood, none of the legatees named in the original will would have received any substantial benefits therefrom, but that the whole estate left by testatrix would have been absorbed in the payment of the costs and expenses and the preferred devisees made to the Bottos in the rejected codicils. The result of the contest made by appellants was to recover for the common benefit of the legatees under the original will, a fund sufficient to pay between 60 and 70 per cent. of such devisees. If the cost of this contest, including attorneys' fees, is thrown upon the contesting legatees, they would receive a much smaller pro rata than their colegatees, who were the equal recipients of the benefits resulting from such contest. It was to meet this state of case that section 499 of the Kentucky Statutes, was enacted. It provides: "In actions for the settlement of estate, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, if it shall be made to appear that one or more of the legatees, devisees, distributees or parties in interest have prosecuted, for the benefit of others interested with themselves, and have been at trouble and expense in conducting the same, it shall be the duty of the court to allow such person or persons reasonable compensation for such trouble, and for necessary expenses, in addition to the fees and costs; said allowance to be paid out of the funds recovered before distribution, the persons interested having notice of the application for such allowance."

In construing this section, in *Taylor, &c. v. Minor, &c.*, 90 Ky., 548, it was decided that the successful contestant of a will was not entitled to have the extraordinary cost of the contest paid out of the estate where the contest was for his benefit alone, the portion of the other heirs being diminished by the rejection of the will. But in the opinion in that case, the court used this language: "Where, however, one person has prosecuted an action at extra expense and trouble, and the recovery inures equally to the benefit of others, the chancellor may, in the exercise of his power to compel parties to do equity, require them, as a condition to sharing in it, to contribute their proper proportion of the expenses, and may order it paid out of the common fund."

In *Boresig & Lawson v. Jarbo & Campbell*, decided by the Superior Court, the syllabus of which is found in 13 Ky. Law Rep., 398, it was held that where a creditor had successfully assailed a fraudulent conveyance made by an insolvent debtor with the design to prefer one or more creditors, that the attorneys who brought the suit were entitled to a reasonable fee out of the estate for their services. And in *Davis, &c. v. The H. Feltman Co.*, 23 Ky. Law Rep., 1513, the doctrine of the Superior Court was upheld, the court saying: "The H. Feltman Co. instituted the suit seeking to hold the mortgage of Davis to Walker & Sengstak void under the act of 1856, and their attorneys took all the proof upon the question, wrote the judgment, advised the receiver with regard to the management of the property, argued the case orally in the circuit court and briefed it in the Court of Appeals. As a re-

sult of these services the mortgage to Walker & Sengstak for \$16,000 with many years interest was set aside, and the property therein mortgaged, inured to the benefit of all the creditors equally. If this mortgage had stood, the general creditors would have received practically nothing upon their claim, as in the end they only realized about 80 per cent. We think the attorney was entitled to a reasonable fee out of the estate for his services."

In *Mitchell v. Tyler & Apperson*, 90 Ky. Law Rep., 1252, it was decided, that attorneys who, by their services, have added to the assets of the trust estate, are entitled to a reasonable fee, to be paid out of such increase, although they may not have represented the assignee, but have opposed him. The court in that case said: "Exception is taken to the allowance of a fee of \$500 to Tyler & Apperson out of the trust fund. It appears that they were not employed by the assignee, and that their services were rendered in hostility to him, to make him account for the profit on the above property and on other exceptions to the settlements of his accounts. They were manifestly entitled to a reasonable fee out of the additions made to the trust fund by reason of their services."

In *Mattingly's Trustee v. Mattingly, & Co.*, 24 Ky. Law Rep., 2080, the above case was cited with approval, and it was decided that attorneys employed by the assignee to surcharge the settlement of the assignee who succeeded in reducing his credits about \$4,600, were entitled to an attorney's fee. And this seems to be the general doctrine. In the note to *Campbell v. Providence Saving Loan Co. Society*, decided by the Supreme Court of Tennessee, and reported in 54 L. R. A., 817, a large number of decisions bearing upon this question have been collated, and the editor of the note sums up his conclusions in these words: "The fees of attorneys for creditors who bring suit in behalf of themselves and other creditors will always be allowed out of the fund going to the creditors in the same class with the plaintiff, if the suit is beneficial to them, on the ground that otherwise the one incurring the risk and conferring the benefit will be in a worse condition than those who do nothing towards realizing the fund, although the mere fact that a suit proves beneficial to other creditors will not justify the allowance of such fees out of the fund, if the plaintiff brought the suit solely in his own behalf."

These cases are not in conflict with *Thirwell's Administrator, & Co. v. Campbell's Guardian, & Co.*, 74 Ky., 168. As in that case all the parties to the litigation were represented by counsel who participated therein, the court in that case simply held that one jointly interested in a recovery could not be compelled to pay counsel employed by others when he had himself employed counsel to represent what appeared to be his interest. It seems to us that there can be no doubt in this, that all the legatees in the original will of Mrs. Florence Irvin Botto equally shared in the benefits which accrued from the litigation instituted by the appellant for their common benefit. It is true that the contest of the codicils was inimical to the pecuniary interest of the two Bottos, W. M. and Cloteal B., who were the principal beneficiaries in the fraudulent codicils, and who were represented in the entire litigation, by counsel of their own selection. But we can not shut our eyes to the fact, that these defendants occupy a dual attitude. They were large legatees under the original will, as well as the chief beneficiaries of the alleged

fraudulent codicils, to invalidate which all of the cost and expenses were incurred, and we are unable to see any reason why they should be exempt from the burden cast upon the legatees, especially as they were the chief, if not the only, upholders of these fraudulent codicils.

In the case of *Weed's Estate*, Appeal of McGinnis, 168, Pa. St., 595, the litigation was instituted by the unsecured creditors of an insolvent estate, to set aside conveyances made and judgment confessed by the trustee for the purpose of giving a preference to other creditors, and the litigation was resisted by the preferred creditors. It was decided that the counsel fees of the contesting creditors should be paid out of the trust estate. The court said: "Why should not the expenses incurred in achieving this result be paid out of the common fund without discrimination between the parties entitled to it? What equity have the parties, who were baffled in their effort to obtain more than their share of the estate, to demand discrimination in their favor? We have failed to discover any. It was their greed for more than they were entitled to under the trust that made the expenses necessary, and it seems to us that under the circumstances they ought not to complain that the burden of paying them is laid on the common fund. It is argued, however, that they were losers by the litigation, and, therefore, they are not within the rule recognized and enforced in *Trustee v. Greenough*, 105 U. S., 527, and kindred cases. But in what sense were they losers? In the same that he is a loser who fails to acquire what he has no right to, or who, having unlawfully obtained possession of the property of another, is compelled to restore it to the owners. The equity which the wrong-doer has in consequence of such a loss is not easily discoverable. If the allowance in this case was for services in a suit to recover the trust property from a stranger who had unlawfully taken it into his possession, there could be no doubt that equity would require that it should be paid from the trust fund. The fact that the wrong-doers were creditors of the estate ought not to shift the burden from the trust fund to that portion of it which the creditors were entitled to receive on a pro rata distribution of it. In either case, the services were for the benefit of the estate, and it should pay for them."

The same rule was followed in *Anniston Loan and Trust Co. v. Ward*, 108 Alabama, 85; *Merwin v. Richardson*, 52 Conn., 122, and in numerous other cases cited and relied upon in the foregoing cases, and in our opinion is equitable and applicable to the facts of this case. The Bottos having occasioned all the cost and expenses incident to the rejection of the codicils, their share of the trust estate should not be exonerated from its part of these expenses. The other legatees being equal beneficiaries with appellants, should share the burden as well as the benefits of the litigation.

For reasons indicated the judgment is reversed and cause remanded, with instructions to overrule the demurrers filed by appellees, and for further proceedings not inconsistent with this opinion.

CARMAN v. CARRICO, &c.

(Filed April 19, 1904—Not to be reported.)

1. Bills and notes—Fraud—Consideration—It appears that in August, 1892, appellant borrowed \$750 from J. L. S. and gave his note for said sum, with S. C. as his surety, and at the same time gave S. C. his note and a mortgage on his farm for \$752.10 to indemnify him as his surety, the \$2.10 in the latter note being to pay for recording the mortgage. After making some payments on the J. L. S. note appellant renewed it for \$429.69, with S. C. as surety. He also renewed the \$752.10 note to S. C. for \$904.30, being the one sued on, which S. C. assigned to his father, H. J. C. It is admitted that it was the practice of S. C. and appellant to manufacture fraudulent mortgages between themselves to protect appellant from his creditors. Held—The court being of the opinion from the evidence that the appellant who is an ignorant negro, was dominated by S. C., who is a shrewd white man, adjudges the note sued on to be fraudulent and without consideration.

2. Building and loan associations—Insolvency—Mode of computing interest—The appellant having negotiated a loan from the Farmers Saving Building and Loan Association with which to pay off the J. L. S. note, it was agreed by S. C. that said association should have a first mortgage lien on the farm of appellant to secure said loan, then amounting to \$500, which is also sued on in this action. Held—The record shows that this association was insolvent and in the hands of a receiver, and in such case the rule is to compute the interest at 6 per cent. on the money actually received by the borrower, crediting from time to time, under the system of partial payments, all interest and premiums paid, and the balance thus reached is the amount due.

Webb & Johnson and Jas. G. Husbands for appellant.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Graves Circuit Court by the appellee, H. J. Carrico, to recover a judgment on a note of \$904.30, which had been executed and delivered on the 30th day of January, 1894, by appellant, to Sam Carrico, and assigned by him to appellee; and also to enforce a mortgage on a quarter section of land in Graves county, Kentucky, belonging to appellant, executed and delivered for the purpose of securing the payment of the note. The Farmers Saving, Building and Loan Association, of Nashville, Tenn., who also held a mortgage on the same land, was made defendant, and set up a claim by way of answer and cross petition. As the validity of both of these debts is questioned by appellant, we will consider them in the order named.

Appellant is a negro man, engaged in the business of farming in Graves county. Sam Carrico was, during the time covered by the transaction out of which grew this litigation, engaged in the grocery business in Mayfield, Ky. Appellant was his customer, and seems to have been an energetic man, exceedingly desirous to get financially forward in the world, and to pay off the purchase price, constituting a lien upon his farm. He and Sam Carrico, for a period of four or five years preceding the execution of the note in question had many dealings of various kinds with each other. Carrico sold

Carman groceries on credit, indorsed his notes, and occupied the position of his general financier and protector. In return, Carman cut cord wood, the proceeds of which, when sold, he turned over to Carrico; he seems also to have raised large crops of tobacco, the proceeds of which he, from time to time, gave his patron. With this money, Carrico paid off his own indebtedness from Carman, and such other debts as he was security for; in the meantime, it was a part of his scheme of protection to have Carman execute to him notes for large sums, when nothing was owing to him, backed by fraudulent mortgages, both on his farm and crops, ostensibly for the purpose of securing the notes, but really to defraud the creditors of the grantor, and to prevent any seizure by them of the property so fraudulently covered up.

It is not necessary to give all of the details of the complicated dealings between appellant and Carrico; to do so would be to make this opinion a mere commissioner's report of a very long and intricate account; it is sufficient for our purpose to say that the particular note sued on had its origin on August 2, 1892. On that day appellant, Carman, in order to obtain money to pay off pre-existing debts, borrowed from J. L. Stunston \$790. for which he executed his note, with Carrico as his surety. At the same time he executed and delivered to the surety his promissory note for \$792.10, secured by a mortgage on the property involved in this litigation. This last-named note and mortgage, Carman says was given by him to Carrico for the purpose of securing the latter from any loss by reason of his suretyship on Stunston's note, and also to protect him from his creditors; that at the time of its execution and delivery he owed Carrico nothing; that the difference of \$2.10 in the two notes simply represented the sum necessary to pay the clerk's fee for recording the mortgage. On the contrary, however, Carrico claims that the note represented a genuine indebtedness due from Carman to him at the time. Subsequently, Carman paid off a part of the Stunston note, reducing it to \$429.69; and on January 30, 1894, he executed to Stunston a new note for this balance, with Carrico, as his surety. and, on the same day, he executed and delivered the note and mortgage sued on, and took up the original note from him to Carrico for \$792.10. Afterwards, Sam Carrico assigned this note to his father, H. J. Carrico, who, in 1901, instituted this action to enforce payment.

Appellant, in his answer, set up four defenses, the first of which was want of consideration for the note sued on. Having reached the conclusion that this plea is sustained by the evidence, it will not be necessary to examine the other three.

Ordinarily, great weight is, and should be, given to the presumption imported by the execution and delivery of the instrument itself, that a note is based upon sufficient consideration; but in a case like this, where it is admitted that it was not an uncommon thing in the dealings between parties to execute and deliver fraudulent notes, the weight usually due to such instruments is largely deceased, if not altogether destroyed; and a man who deliberately admits that he has been engaged in such fraudulent actions can not complain that the court attaches but little importance to his evidence. Nor can it be answered that appellant stands in the same attitude with reference to the fraudulent transactions as did Sam Carrico; he is an igno-

rant negro, and, as such, was largely dominated by the keener intellect of the educated white man, and his actions are not to be judged by the same moral standard as is justly applicable to those of the former; therefore, where it becomes a question of fact between the two, we are inclined to give greater weight to the evidence of appellant than to that of Carrico. With the admission in the case, that it was the practice of Carrico and Carman to manufacture fraudulent notes and mortgages between themselves for the protection of the latter from his creditors, it seems to be just to attach considerable weight to the fact that, on the same day that the note for \$792.10 was executed and delivered to Stunston, Carman also executed and delivered to Carrico his note for \$792.10, and there is great plausibility in the explanation of appellant, that the difference of \$3.10 represented the sum necessary to record the mortgage by which the note was secured.

Carrico was not able, in his deposition, to give any very lucid or satisfactory account of how the consideration for the note sued on was created. His answers are exceedingly vague, and on most of the crucial points his memory was entirely at fault. It was an unfortunate fatality, too, that his books, wherein were kept the accounts between him and appellant, had been burned; and his explanation of this fact was as unsatisfactory as the rest of his testimony. He says that his books were kept by him at his office; but in his absence, a house in the neighborhood was burned, and he supposes the books were burned therein, as he never could find them thereafter; that he does not know who carried them from his office to the burned building; that he did not authorize any one so to do. No explanation is offered for the long time elapsing between the maturity of the notes and the action upon it. Appellant's evidence is very much more satisfactory and lucid than that of Carrico.

After appellant had negotiated a loan from the Farmers Saving, Building and Loan Association, by which to pay off the balance of the Stunston note, the corporation would not complete the transaction, unless it could secure a first mortgage lien upon appellant's farm. As the money to be borrowed was to pay off the Stunston note, there would only remain upon the land the mortgage involved in this litigation, which would constitute a prior lien to that of the building and loan association. It was necessary, therefore, that Carrico's consent should be obtained, that the note of the building and loan association should take priority over his; to this, he agreed. J. P. Evers, an attorney of Mayfield, who represented the building and loan association, explained to Carman that it would be necessary, in order to effectuate the loan he was seeking, that the corporation should have a first lien. What happened on this subject is fully explained in an answer of Evers in his deposition, which is as follows: "During the time I was preparing this abstract, I called Marshall Carman's attention to a lien that appeared on his land in favor of Sam Carrico, and he gave me to understand that that was satisfactory between him and Mr. Carrico; but I sent him after Mr. Carrico, and had him come up to this office, I was then officing in this room, and he and Marshall Carman, after we had talked about this matter some, stepped out in the hall, and was gone some time; some few minutes,

and when they came back, I don't think Mr. Carrico sat down, that's my recollection, but just told me that so far as he was interested, that whenever the Stunston business was settled that that settled his affairs, and to go ahead and prepare it."

This testimony of Evers is corroborated fully by Brice Carman, who was present at the time, so that, taking the evidence upon the question of the consideration of the note sued on, as a whole, we think it largely preponderates in favor of appellant's position, that there was none. This conclusion has been reached after a careful reading of the whole record; there is other evidence corroborative of appellant's position, with a recitation of which we do not feel it necessary to encumber this opinion. With the highest respect for the finding of the chancellor as to the facts, we are constrained to the conclusion that he erred in adjudging for appellee upon the issue joined between the parties.

At the time he obtained the loan from the building and loan association to pay the balance of Stunston's debt, appellant executed and delivered to that corporation his note for \$500, secured by a mortgage upon his farm. As a defense to its claim, he pleaded that he had more than paid off the debt which it originally held against him. The difference between appellant and the building and loan association largely grows out of the question as to whether the debt of the corporation should be treated as that of a "going concern," or of an insolvent one. The record shows that the building and loan association was insolvent, and in the hands of a receiver; therefore, the debt must be treated as that due an insolvent concern. This court has so often declared the difference in the modes of settling the debts due an insolvent, and those due a "going" building and loan association, that it is not necessary to cite the cases here. It is sufficient to say that, as to an insolvent corporation, the rule is to compute the interest at 6 per cent. upon the money actually received by the borrower, crediting from time to time, under the system of partial payments, all interest and premiums paid; the balance thus reached is the amount due.

Appellant did not cease to be a member of the association prior to its insolvency; to accomplish this, it was necessary to have had a settlement with it prior to the appointment of the receiver; this was not done, and, therefore, he could only settle as above outlined. But we think the court erred in adjudging that he was indebted to the building and loan association in the sum of \$345.50 as of April 8, 1903. Mr. Raymond, the receiver of the court, and who had been prior to his appointment, secretary and treasurer of the corporation for ten years, and who is the only witness testifying for it, after setting forth the mode of his calculation, in answer to question 10, says: "Upon the basis set forth above, the amount now due the association by Carman, after allowing a credit for dividends paid, is \$278.58. I file as exhibit 'E' to this, my deposition, a calculation showing the balance due by said Carman."

In exhibit "E" is a detailed statement of Carman's account with the corporation, worked out mathematically, and which shows a balance due by appellant, on June 1, 1902, of \$278.58. From this date until the date of the judgment there elapsed ten months and seven days, and, therefore, with interest added, the balance due the corporation, when the judgment was en-

with any great particularity. Under the rule above laid down, the ascertainment of the exact amount due from appellant to the building and loan association is one of mathematical calculation only, and can be made when the case returns to the trial court, if there is any dispute as to the figures.

For the reasons indicated the judgment is reversed for a judgment consistent herewith.

FLOYD v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 19, 1904—Not to be reported.)

1. Railroads—Undivided interest in land—Title by prescription—In 1864, C. D. Prewitt, who then owned three undivided sevenths in the land, conveyed to appellee his undivided interest therein in a strip 66 feet wide for its right of way. He afterward acquired the other four sevenths and conveyed the entire tract to appellant, who had sued appellees for damages and to quiet his title. The evidence shows that appellee has had an irregular strip 36 to 40 feet wide, under fence for many years last past. Held—That appellee is entitled by prescription to so much of the strip as it has actually used by adverse possession, not to extend beyond its line of fencing.

2. Action to quiet title—Allegation of possession—In an action to quiet title there can be no recovery by the plaintiff in the absence of an allegation in his petition that he is in possession of the piece of land in controversy.

Hugh P. Cooper for appellant.

B. D. Warfield and William C. McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

This record involves the claim of appellee to a right of way 66 feet wide, running through the middle of a 70-acre tract of land situated in Marion county, Kentucky, belonging to appellant.

Appellant instituted this action by filing a petition in the Marion Circuit Court, in two paragraphs. By the first, he sets up the fact that more than thirty years before the institution of his action, appellee built its roadway through the land he now owns, actually occupying a strip about 14 feet wide, the possession of which it has held and used continuously since; that this strip of land is worth the sum of \$250, and that by reason of the use of this easement by appellee, the remainder of the tract has been injured in the sum of \$500; and he, therefore, prays for a judgment for the sum of \$750.

The pleadings and undisputed facts show that what is known as the Lebanon branch of appellant's road was built in 1864, running through the land now owned by appellant; that, at the time of the alleged trespass, it was owned in part by one C. D. Prewitt, who afterwards obtained title to the whole, conveyed it, and, by a regular succession of title, it came into the ownership of appellant more than thirty years after the injury complained of. The cause of action, if a trespass, was set up in the first paragraph, accrued to C. D. Prewitt and his ten co-tenants, and it is difficult to see upon what principle appellant can assert a

that in the second paragraph, and it is difficult to see upon what principle appellant can assert a

remote vendors, and barred by the statute of limitation for more than twenty years. The court would, doubtless, have sustained a demurrer to the first paragraph had one been filed. In the second paragraph appellant alleged that, although he was the owner of the land in question, appellee, in addition to the strip 14 feet wide, which it had actually occupied for thirty years, was wrongfully claiming title to a strip 66 feet wide through the whole of his boundary; that this claim was wrongful and unwarranted, and cast a cloud upon his title to the remainder of the strip of land, and he, therefore, prays that the cloud be removed, and appellee be adjudged to have no interest in it beyond the 14 feet, which it had actually held in adverse possession since 1864.

The first question that meets us is, whether or not this second paragraph states a cause of action. Appellant nowhere alleges that he is in possession of the land from which he desires to remove the cloud. The statute authorizing this action is contained in section 11, Kentucky Statutes and was originally enacted in 1854; it is as follows: "It shall and may be lawful for any person having both the legal title and possession of lands, to institute and prosecute suit by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other persons setting up claims thereto; and if the plaintiff shall be able to establish, and does establish, his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto."

In Pomeroy's Code Remedies, section 369, in speaking of the subject of suits to quiet title, it is said: "Originally, and independent of statute, this particular jurisdiction of equity was only invoked when either many persons asserted titles adverse to that of the plaintiff, or when one person repeatedly asserted his single title by a succession of legal actions, all of which had failed, and in either case the object of the suit was to settle the whole controversy in one proceeding. The action, however, has been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: 'The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest.'"

In the Encycl. of Pleading and Practice, volume 17, page 306, the rule is thus stated: "As a general rule, both in equity and under the statute of most of the States, it is held that a bill either to quiet title or remove a cloud can be maintained only where the plaintiff is in actual possession." Also, *Kinlead v. McGowan*, 88 Ky., 91; *Landrum v. Farmer*, 7 Bush, 49; *Harris v. Smith*, 2 Dana, 10; *Whipple v. Barrick*, 93 Ky., 121; *Campbell v. Campbell*, 23 Ky. Law Rep., 869, and many other cases from this court, cited in the note in support of the text above quoted.

As appellant failed to state a cause of action in his petition, we would have been constrained to affirm this case, but for the fact that the learned chancellor below awarded appellee a judgment over for the recovery of so much of the strip of land 66 feet wide as exceeded the right of way actually occupied by it. This judgment was, evidently, based upon the grant pleaded by appellee from C. D. Prewitt to a strip 66 feet wide, and the assumption that Prewitt undertook to grant the easement in its entirety; whereas an

divided interest in the strip. There is no date to the grant, and we can only surmise, by the date of acknowledgment of some of the other grantors in the instrument, that it was made prior to 1864; but how long prior does not appear. C. D. Prewitt was one of seven children who inherited the tract of land in question from their father; originally, he owned only one undivided seventh interest; in 1860 he bought out the interest of one of his sisters; in 1868 he purchased that of another. The other interests, he purchased after 1864; so that we can safely reach the conclusion, and, indeed, the instrument on its face shows, that, at the time of the grant, C. D. Prewitt did not own, or undertake to convey, the whole of the right of way involved in this litigation, but only his undivided interest, whatever that was. Appellee, therefore, did not acquire a grant of the whole strip 66 feet wide, but only such interest therein as C. D. Prewitt at the time had, and it was not entitled to a judgment in this case to recover the strip of land of the full width of 66 feet, based alone upon the grant relied on.

The evidence shows that appellee had under fence for many years last past an irregular strip, probably averaging from 36 to 40 feet. To this, we think, it established its right by prescription; but the title so acquired is limited to so much of the strip 66 feet in width as it actually used by adverse possession, and does not extend beyond its line of fencing on either side of its roadway.

For the reasons indicated the judgment is reversed, with directions to dismiss appellant's petition and to set aside so much of the judgment as awards appellee a recovery of any land outside of its line of fencing as established at the institution of this action.

WOOLFOLK v. CITY OF PADUCAH.

(Filed April 20, 1904—Not to be reported.)

Municipal corporations—Submission of three ordinances for issuing bonds at one election—The act of the board of council of the city of Paducah, a city of the second class, in submitting at one election to the voters of the city, three ordinances for issuing bonds of the city; one for street improvements, one for a city hospital, and one for a city market house, is valid, and not in conflict with chapter 797 of the act of the legislature of 1869-70, providing that "it shall be unlawful for any county judge, or any incorporated company in this State, to submit more than one proposition for taxation, direct or indirect, to the voters of a county, city or town, or part thereof, at any one election held therein."

Campbell & Campbell for appellant.

E. H. Puryear for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court delivered by Judge O'Rear.

In due season prior to the November election, 1903, the board of councilmen of the city of Paducah submitted to the voters of the city, which is a city of this Commonwealth of the

second class, duly passed three separate ordinances: One entitled "An ordinance authorizing and providing for the issual of \$150,000 of the bonds of the city of Paducah, Ky., for the purpose of street improvements, and submitting same to the voters of Paducah;" another entitled, "An ordinance authorizing and providing for the issual of \$25,000 of the bonds of the city of Paducah, Ky., for the purpose of erecting a city hospital in said city, and submitting same to the voters of Paducah;" and the third entitled, "An ordinance authorizing and providing for the issual of \$25,000 of the bonds of the city of Paducah, Ky., for the purpose of erecting a market house in said city, and submitting same to the voters of said city."

On the following day (to wit, September 30, 1903), the board of aldermen of the city in special session gave the three ordinances their first, and on the next day, at another special session, their second and final passage. The ordinances were duly signed and approved by the mayor. At the November election, held in 1903, more than two-thirds of the voters of the city, voting at that election, and on those questions, voted in favor of each and all the three ordinances; the result was so declared and certified by the board of canvassers. This suit is to test the validity of the vote by which the indebtedness was authorized. Appellant's contention is, that more than one vote can not be taken on the same day to incur a municipal bonded indebtedness.

A general law passed at the session of the legislature held in 1869-1870 reads as follows:

"CHAPTER 797.

"AN ACT in Relation to Submitting Questions of Taxation to a Vote of the People.

"Section 1. That it shall be unlawful for any county judge, county court, police judge, justice of the peace or any incorporated company in the Commonwealth, to submit more than one proposition for taxation, direct or indirect, to the voters of a county, city or town, or part thereof, at any one election held therein.

"Sec. 2. Any tax, subscription or donation, or any authority to tax, make subscriptions or donations, or otherwise directly or indirectly, to impose a tax upon the people of such county, city or town, or part thereof, voted or granted by the voters at an election, at which more than one question was voted upon, shall be held null and void.

"Sec. 3. All acts and parts of acts, public or private, inconsistent with the provisions of sections 1 and 2 of this act, are hereby repealed.

"Sec. 4. This act to take effect and be in force from and after its passage."

This act has not been expressly repealed. At the time of that enactment there were some general and many special or local statutes permitting counties and cities to become indebted by vote of their people for many things, including aid to railroad and other quasi public enterprises, and to an almost unlimited extent. The purpose of the act quoted was to prevent, as far as might be, combinations and logrolling by promoters of several disconnected projects, by whose united efforts and interest all would be made to carry, when if made to stand each on its own merits, maybe none would. (Christian County v. Smith, 11 Ky. Law Rep., 884.)

But since the adoption of the Constitution of 1891, no county or munici-

pality can lend its aid to any corporation or private enterprise. Taxes can not now be levied for any but public purposes. And as to these, limitations are imposed as to amount and the manner of incurring them, that are new in our system. In consequence the legislature has, by general laws, provided for what purposes and how bonded indebtedness may be incurred by cities of the various classes, which excludes every other method heretofore allowed. The legislation on this subject is comprehensive and general, making an entirely new and complete system on that subject. Fragmentary legislation suited alone to conditions no longer existent, and repugnant to the general laws since enacted, are deemed to have been repealed by the latter. (*Broadus v. Broadus*, 10 Bush, 299.)

No other question being urged against the validity of the election, and the ordinances and vote appearing regular, the judgment of the circuit court adjudging the bonds valid, and refusing the injunction restraining their issue and sale by the city, is affirmed.

Whole court sitting.

AMERICAN NATIONAL BANK v. MOREY.

(Filed April 20, 1904—Not to be reported.)

Banks—Depositors—Checks—Upon a second appeal from a judgment in favor of appellee against appellant for dishonor of her check, the last trial conforming in all respects to the former opinion of the Court of Appeals and the evidence authorizing the verdict, it will not be disturbed, it appearing that it is not excessive.

Humphrey, Burnett & Humphrey for appellant.

R. C. & J. J. Davis for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Nunn.

This is the second appeal in this case. The first opinion is reported in 24 Ky. Law Rep., 658, and is referred to for a history of the facts relative thereto. In that opinion the court said that the instruction on punitive damages should not have been given; that she was only entitled to recover for the loss of credit, of business or of instruction in her art that she sustained by reason of the dishonor of her check. On the return of the case to the lower court, the appellee filed an amended petition setting forth these matters of damage as permitted by the former opinion. Another trial was had before a jury and the court gave to the jury the following instruction: "It will be your duty in this case to find for the plaintiff in such sum as you may believe from the evidence will fairly and reasonably compensate her for any loss of credit she may have suffered, or for any loss of time or instruction which she otherwise would have enjoyed, and for any expense she may have incurred in telegraphing by reason of the nonpayment of the check mentioned in the petition."

The evidence produced on the last trial in substance showed that, by reason of the dishonor of the check, she lost the confidence of her instructor and was compelled to desist from further instruction for four weeks which she had intended to take. It was her intention, after finishing her course of instruction, to open a shop for her business and art in the following December, but, by reason of the dishonor of this check, she was compelled to delay her opening until the following March. Also she expended \$3.86 in telegraphing to appellant in trying to induce them to honor her check and to her relatives in Louisville to obtain money to meet this dishonored check. The jury returned a verdict on this last trial for \$500 in favor of appellee which the court refused to set aside and rendered judgment thereon and the appellant has appealed. The last trial conformed in all respects to the former opinion of this court in this case. The only question to be determined is, whether or not the amount of the verdict is excessive. She certainly was entitled to recover some damages.

In the former opinion it is shown that a judgment for \$300 for dishonoring was affirmed. (*Patterson v. Marine National Bank*, 130 Pa., 419.) The court in that case charged the jury that the plaintiff was entitled to recover substantial damages and in a certain state of case they might find punitive damages.

In the same opinion the case of *Schafner v. Ehrman*, 139 Ill., 109, was referred to where a judgment for \$450 was affirmed, where the dishonor of the check was due to a mistake of the bookkeeper in charging the checks of another customer to the account of the plaintiff. In the former opinion in this case the court quoted from the above Pennsylvania case the following language: "Individual and corporate business could hardly exist for a day without banking facilities. At the same time the business of the community would be at the mercy of banks if they could, at their pleasure, refuse to honor their depositor's checks, and then claim that such action was a mere breach of an ordinary contract for which only nominal damages could be recovered unless special damages were proven. There is something more than a breach of contract in such cases; there is a question of public policy involved and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages."

While this verdict, in a sense appears large, yet, we are unwilling to invade the province of the jury, especially after a second trial, and determine the damages recovered are anything more than substantial.

Wherefore, the judgment of the lower court is affirmed, with damages.

HESCH v. COMMONWEALTH.

(Filed April 20, 1904—Not to be reported.)

Appeal—Insufficient transcript—Where the transcript fails to show that the bill of exceptions was approved, or filed by an order of court, or signed by the judge, and there is no certificate of the clerk that it is a transcript of the record upon which appellant was convicted, the appeal will be dismissed.

James M. Guthrie for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

The record upon which this appeal is prosecuted is too indefinite and without such certificate as will warrant the court's undertaking to act upon it. There is no certificate by the clerk to the transcript that it is a transcript of the record upon which appellant was convicted, or that it is a copy of any record. The transcript as presented, does not show that the bill of exceptions was approved or filed by an order of court, nor does it appear to be signed by the judge.

The record is condemned and the appeal dismissed.

HUGHES v. COMMONWEALTH.

(Filed April 20, 1904—Not to be reported.)

1. Affidavit for continuance—Conduct of counsel—One charged with crime, being of years of understanding, must take notice of the requirements and privileges of the law, and the neglect of his counsel to defend for him can not avail as ground for continuance.

2. Same—An affidavit filed by the accused for a continuance can not be rebutted by counter affidavits. Generally its truth must be admitted on the hearing.

Powers & Sampson for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant's affidavit for continuance, filed at the second term of the court after the return of the indictment, relied upon the absence of certain witnesses who, it was asserted, would depose to important facts bearing on appellant's defense. It also sought to excuse appellants apparent lack of diligence by pleading his ignorance of the proceedings in criminal trials, and that his counsel appointed by the court to defend him, he having been unable to employ counsel, neglected to take necessary and usual steps to obtain the attendance of the absent witnesses.

The continuance at the first term after the indictment was returned was brought about by the absence of the two witnesses mainly relied on in this motion. It was then claimed, and is yet claimed, that they reside in an adjoining county. No process was taken for them so far as the record shows, until the case was called for trial at the term at which the last application for continuance was made. The court is of opinion that one charged with crime at the court, being of years of understanding, must take notice both of requirements and privileges of the law, and furthermore, that the neglect of counsel, whether it be of employed counsel or those appointed by the

court to defend for him, can not avail the accused as a ground of continuance. In the order overruling the motion for a continuance the court recited that at the previous term of the court he explained to the defendant in open court, and in the presence of his counsel, that he would be afforded, and was thereby awarded compulsory process to obtain the presence of all his witnesses. The propriety of the court's recital is questioned. An affidavit filed by the accused for a continuance can not be rebutted by counter affidavits. Generally its truth must be admitted on the hearing. As the purpose of the affidavit is to apprise the court of the state of facts with which he is not presumed to be acquainted, that he might act upon it with intelligence and fairness, it would, of course, not be necessary to file an affidavit at all if the only matter sought to be shown was something that had occurred in the presence, or was presumably within the knowledge of the court. Such fact might be shown in the record merely by a bill of exceptions. If, though, the accused sees proper to set it out in an affidavit the court should not be bound to admit that as true which he knows is not true. To do so would put the court and the administration of justice virtually in the hands of a conscienceless person accused of crime. It was not inappropriate, in our opinion, for the court to recite in an order, or to have incorporated in a bill of exceptions, an occurrence in court that would set it right upon the record for the protection of all parties to the suit, and for the guidance of this court upon an appeal if an appeal should be taken. The trial judge did postpone the last trial for four days, and awarded compulsory process for appellant's absent witnesses, and appointed a special bailiff to go to the adjoining county to find them. The process was returned not executed because the witnesses could not be found. The court has done all that it should reasonably have done, and all that appellant had the right to ask in the matter of awarding process to require the attendance of witnesses, and in bringing about a speedy and fair trial of the case. Indeed, it was not incumbent upon the court to have allowed read the affidavit as the depositions of certain absent witnesses who lived in the county, and whose presence might have been obtained apparently by even slight diligence. The instructions given by the court, to which some complaint is made, have been frequently approved heretofore in other cases from the same and other circuits. Perceiving no error prejudicial to the substantial rights of appellant the judgment is affirmed.

BALTIMORE & OHIO SOUTHWESTERN RY. CO. v. HUDSON.

(Filed April 20, 1904.)

1. Excursion ticket—Identification of holder—Reasonableness of rule—A condition upon a return excursion ticket sold by the railroad company at a reduced rate, requiring the holder to identify herself as the original purchaser of the ticket, by writing her signature on the back thereof, and if this is not satisfactory to the validating agent of the company, to produce other proofs of identity, is neither unreasonable nor unusual, and has been universally held to be based upon sufficient consideration.

2. Burden of proof—If the validating ticket agent was not satisfied from

a comparison of the signatures of the claimant, as to her identity, the burden of producing such proof, if required by him, was upon her, and it was so stipulated in the contract. Nor was he required to have accepted her mere verbal assurance of her identity or instituting other inquiries with a view of satisfying his mind on this point.

8. Instructions—An instruction given by the trial court, making the liability of appellant turn upon whether the jury believed the ticket agent wrongfully refused to validate the ticket, was misleading. Appellant was entitled to have the jury decide, not whether they believed the agent acted wrongfully in refusing to validate the ticket, but whether the proof of her identity as purchaser of the ticket was such as would have satisfied the mind of a reasonable, conscientious and prudent man who had been selected by the parties to pass upon the question.

Gibson, Marshall & Gibson for appellant.

Harvey Myers, J. C. Dodd and W. H. Smith for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The appellee, Susie C. Hudson, instituted this suit against the appellant, the Baltimore & Ohio Southwestern Ry. Co., to recover damages for the refusal of their agent in Cincinnati to validate an excursion ticket, alleged to have been purchased by her from St. Louis to Cincinnati and return, and without which the ticket could not have been used by her. She alleges in substance that on the 22d of December, 1900, she purchased of the defendant at St. Louis, Mo., a round trip ticket over their road to Cincinnati, O., good until the 2d of January, 1901; that on the 26th of December, 1900, she presented her ticket to the agent of the defendant at Cincinnati and signed it, as required by its terms, for return passage to St. Louis, and that defendant's agent wrongfully refused to validate the ticket or to admit the plaintiff to its train, and publicly charged that she was attempting to use a ticket of which she was not the original purchaser; that she was employed as a teacher in a stenographic school in the city of St. ———, and had contracted to return to her place of duty on the morning of the 27th of December, 1900; that by the refusal of the defendant's agent to stamp her ticket, she missed the regular train by which she could have complied with her obligation, and was compelled to buy another ticket and go on the next train, which did not leave Cincinnati until 2 o'clock, a. m., on the morning of December 27th, and which did not arrive in St. Louis until the afternoon of the 27th; and that she consequently lost her position as a teacher and was made sick and nervous by the delay and treatment which she received. Appellant's original answer is a traverse, and the amended answer alleges that a round trip ticket was sold on December 22 to some one who represented herself to be Susie Hudson by signing her name on the face of the ticket, which was not by its terms transferable, and contained, among other stipulations, the following: "I further agree that on the day of my departure returning, I will identify myself as the original purchaser of this ticket by writing my signature on the back of this contract, and by other means if necessary, in the presence of the ticket agent of the Baltimore & Ohio Southwestern Ry. Co., at Cincinnati, and when so officially executed and signed

by said agent, this ticket shall then be good for one continuous passage beginning on the day of such execution."

That when this ticket was presented to appellant's agent in Cincinnati by a person representing herself to be the original purchaser, he required her to identify herself by signing her name on the back of the ticket, as required by the contract, which she did, signing her name "Susie C. Hudson;" that the signature of the original purchaser on the face of the ticket was so dissimilar from that appearing on the back, that the agent refused to validate the ticket on the ground that they were not the same signatures, and referred the holder to the depot passenger agent of the company, at that time in the depot, who was also not satisfied with the identification, and advised the plaintiff to pay her fare to St. Louis, with the assurance that it would be refunded to her if she should sufficiently identify herself as the original purchaser. The amended answer was controverted of record, and the trial resulted in a verdict and judgment for \$1,000, which the railroad company seeks upon this appeal to reverse.

Appellee testified that she was employed as a teacher in a stenographic school in St. Louis at \$45 per month; that she purchased the ticket in controversy after 12 o'clock at night, and left St. Louis on the train leaving for Cincinnati at 2 o'clock, a. m., on the morning of December 22; that on the evening of December 26, she presented this ticket at 7:30 o'clock to defendant's agent at their station in Cincinnati, O., and in his presence signed her name on the back of the ticket, and requested him to validate it for the train leaving Cincinnati at 8 o'clock, which he refused to do, remarking, in the presence of several persons, in an offensive manner, that she was not the Susie Hudson who signed the ticket on its face, and that she had bought it of a scalper; that she thereupon assured him she was the original purchaser and was compelled to be in St. Louis the next morning at 8 o'clock by contract with her employer, or lose her position; and that she could not arrive there unless he validated her ticket so that she could go on the next train, and informed him that she had a valise in the baggage room which contained letters and papers by which she could identify herself, if he would examine them, which he declined to do, and referred her to another officer of the company, who was at that time on the floor of the waiting room, and to whom she preferred the same request, but who, after examining the signatures on the face and back of the ticket, refused to interfere, and who advised her to purchase another ticket and make claim to have the money refunded to her in St. Louis. Plaintiff testifies that after the second refusal, she left the depot, went over to Covington to see her attorney in this case, and found his partner, to whom she explained the situation, and left the ticket with him, with instructions to institute this suit; that she then returned to the depot in Cincinnati and bought a ticket and left for St. Louis on the train leaving Cincinnati at 2 o'clock, a. m., six hours later; that as a result of this delay she lost her position in the stenographic school in St. Louis, and was made sick by the delay and exposure in her trip to Covington. She also introduced as witnesses two bystanders, who testify that the ticket agent in Cincinnati was impolite and disrespectful at the time he refused to validate her ticket in Cincinnati. The agent of the railway company in St. Louis, who sold the ticket in controversy, testified that it was

sold and stamped in St. Louis after 6:30 a. m., on the morning of December 22, some hours after the departure of the train on which the plaintiff testified that she left St. Louis; that he knew this to be true because he did not go on duty until 6:30 on the morning of December 22, and that he recognized the signature of Henry Lytho as his handwriting. The agent in Cincinnati testified that he refused to validate the ticket because the signature on the back of the ticket did not correspond with the signature on the front; that it contained the letter "C.," and was wholly dissimilar in appearance; that he asked appellee if she always wrote her name with "C.;" that she replied that she did; that he then asked her to sign her name over again on a small envelope which he handed her; that she did so, and her signature was exactly like the one on the back of the ticket; that he then asked her if she had any means of identification about her person; that she replied that she had none with her, but had some baggage; that he referred her to the depot passenger agent, which was the last that he saw of her. Both witnesses testified that there is a striking difference in the appearance of the two signatures. The railroad company also introduced a number of experts who testified to a very radical difference between the signatures on the face and on the back of the ticket. The following are fac simile of the two signatures:

Lusie Hudson
Susie C. Hudson

No testimony was introduced by appellee to rebut the testimony of these experts. Upon the trial the court instructed the jury as follows:

"A. The court instructs the jury that if they shall believe from the evidence that on the 22d of December, 1900, the plaintiff bought from the defendant at St. Louis a round trip ticket from St. Louis to Cincinnati, and that within the time limited by the terms of the contract, that is, upon the 28th of December, 1900, she presented the ticket to the agent of the defendant at Cincinnati and signed her name upon it in his presence, as required by the terms of said ticket; and that said agent wrongfully refused to validate the ticket and refused to admit her to the train for her said return trip upon said ticket to St. Louis, and charged her with presenting a fraudulent ticket, then the law is for the plaintiff, and they should so find."

"B. But unless the plaintiff bought the said round trip ticket at St. Louis and signed her name upon it at Cincinnati, as required by the contract therein, and requested the defendants to validate it, and the agent wrongfully refused to do so, then the law is for the defendant, and the jury should so find."

A condition upon a return excursion ticket sold by the railroad company at a reduced rate requiring the holder to identify herself as the original purchaser of the ticket by writing her signature on the back thereof, and if this is not satisfactory to the validating agent of the company, to produce other

validity of such conditions have, we believe, been universally upheld as based upon a sufficient consideration. (Hutchinson on Carriers, section 580b; Ray on Negligence of Imposed Duties, Carriers of Passengers, sections 511 and 512.)

If the validating ticket agent was not satisfied from a comparison of the signatures of the claimant of the ticket as to her identity, the burden of producing such proof, if required by him, was upon her, and it was so stipulated in the contract. Nor was he required to have accepted her mere verbal assurance of her identity, or instituting other inquiries with a view of satisfying his mind on this point. (Railway Co. v. Barlow, 80 S. E., 732; Head v. Georgia Pacific Railway Co., 79 Ga., 358.) If it be conceded that the dissimilarity in the signatures on the face and back of the ticket was sufficient to have justified a conscientious and reasonably prudent agent in requiring additional proof of her identity, then the question arises whether the proof produced by appellee, or offered to be produced by her, was sufficient for this purpose, and this is a question of fact for the decision of the jury. The instructions given by the trial court make appellant's liability turn upon whether the jury believed the ticket agent wrongfully refused to validate the ticket. This is not a full and clear statement of the law of the case. Appellant was entitled to have had the jury decide, not whether they believed the agent acted wrongfully in refusing to validate the ticket, but whether the proof of her identity as purchaser of the ticket offered to the ticket agent was such as would have satisfied the mind of a reasonable, conscientious and prudent man, who had been selected by the parties to pass upon the question. As a general proposition, it is more important for the railroad company that the identity of the holder and purchaser of the ticket should, be satisfactorily established, than to the ticket holder, for the reason that a genuine purchaser can always require the company to refund her money if the validating agent wrongfully refused to stamp her ticket, whilst, on the other hand, a mistake against the company in this matter would leave them practically without remedy.

For reasons indicated the judgment is reversed and caused remanded for proceedings consistent with this opinion.

PIERCY v. SMITH, &c.

(Filed April 20, 1904.)

1. Superintendent of schools—Fixing salary—Fiscal court—Change in law after election—It was not competent for either the legislature to change the law raising the minimum of salaries to be allowed to county superintendents, nor for the fiscal court to change the rate per capita allowed and first fixed under the statute during the term of those who were in office.

2. Same—Per capita—Under section 4419, Kentucky Statutes, prior to the amendment of March 21, 1902, it appearing there was no general order fixing the salary before the election in November, 1901, the salary should have been

pupil child reported, but could not be less than \$250 per year, nor more than \$1,500.

E. Bertram for appellant.

Stone & Stone for appellees.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was elected county superintendent of common schools for Clinton county November, 1901, when the law as to the compensation of such officers was as embraced in section 4419, of Kentucky Statutes, that is, his salary should be allowed annually by the fiscal court of his county, based on the number of children reported in the census report of the district trustees of such county; which salary should not be less than 8 cents nor more than 20 cents for each pupil child thus reported, but wherein it was provided "that no salary shall be less than \$250 nor greater than \$1,500." After appellant had assumed the duties of his office, by an act approved March 21, 1902, section 4419, supra, was amended so as to provide that the minimum salary to be paid the superintendent should not be less than \$400, and that the maximum should not be greater than \$1,500 annually. The minimum and maximum per capita rate by which the salary might be regulated, was not altered by the amendment. Clinton county had not exceeding 2,600 population within the school age. At the first term of the fiscal court, after appellant's election, it fixed his salary at \$275 per year. This suit is to increase the allowance to the minimum of \$400 provided in the amendment of March, 1902. The circuit court adjudged that the amendment did not apply to those in office when the amendment was adopted.

Sections 161 and 235 of the Constitution prohibit the changing of any official's salary after his election or appointment, or during his term of office. These sections have been construed in *Marion County Fiscal Court v. Kelley*, 22 Ky. Law Rep., 174; *Barrett v. Falmouth*, 109 Ky., 151; *Bright v. Stone, Auditor*, 20 Ky. Law Rep., 817, and *Butler County v. James*, 25 Ky. Law Rep., 301. In the last-named case, construing the foregoing constitutional provisions, the court said: "It is the duty of the fiscal court to fix the salary of the county judge and other county officers, to be allowed by it, before their election, that is, there should be a general order fixing the salaries, and not an allowance each year for that year; and when the salaries are once fixed, they can not be changed to affect those already elected or appointed, and any change will not take effect until after the next election or appointment."

In the last-named case it was held that although the fiscal court had not by a general order fixed the salary of the county official, they could do it after his election, as otherwise it could not be fixed at all, and that the failure of the fiscal court to do its duty in that respect could not be permitted to deprive the official of his reasonable compensation guaranteed him by law.

The statute under consideration in this case did not fix the county superintendent's salary at either any other specific sum. It conferred

restriction that it should not be less than 8 cents nor more than 20 cents for each pupil child reported, and providing that the total sum thus arrived at should not be less nor greater than the extremes stated. It occurs to us that it was the purpose of the legislature in this provision that the fiscal court in making the allowance should base it upon a rate per pupil reported, which was to be definitely stated in the order and within the limitation above noticed. But it was also contemplated that the number of pupils in certain counties might be so few, and in certain others so great, as that in the one instance inadequate compensation would thus be provided, while in others, based upon the same rate, exorbitant salaries might be allowed, the further limitation was imposed that the minimum and maximum amounts allowed upon the per capita rate should control the fiscal courts. An appropriate order in this case, if the fiscal court deemed that \$275 would be a fair compensation for the service of its county superintendent, would have been to have allowed, say 15 10-13 cents for each pupil child reported. It was evidently contemplated in thus fixing salaries of these officials in this manner that it would be a special inducement to them to be vigilant in looking after and reporting the full number of child population entitled to be enrolled in the school census. As the total number so enrolled might increase or decrease in the different years of the official's term, the total amount of his salary would be increased or diminished by that fact, yet the rate of allowance originally fixed would remain the same. For example, a statute fixing certain fees for the service of clerks of courts is deemed, under this section of the Constitution, to be irrevocable during the term of the incumbent, although that officers' salary in the aggregate might fluctuate according to the business done each year. This was expressly held in Brights' case, supra.

It was not competent for either the legislature to change the law raising the minimum of salaries to be allowed to county superintendents, nor for the fiscal courts to change the rate per capita allowed and first fixed under the statute during the term of those who were in office. The effect of the allowance for the first year, made after appellant's election, it appearing that there was no general order fixing the salary before the election, when divided by the total number of pupil children reported for that year, will show the per capita allowance to be taken as the basis for fixing the salary of future years of the term, and the minimum to be allowed could not be less under the statute then in force, to wit, \$250 per year whatever may be the number of children reported for such year.

The judgment of the circuit court is affirmed.

TURNER v. COMMONWEALTH.

(Filed April 20, 1904—Not to be reported.)

1. Jury—Overlooking name in jury box—Summoning bystanders—The fact that the clerk, by oversight, failed to draw one name from the jury box, and the court believing that all the names therein were exhausted, ordered the sheriff to forthwith summon bystanders to complete the panel, if an error, was not such an error as this court has authority to revise under section 281, Criminal Code.

2. Delay in trial—Discretion of trial court—The court did not abuse its discretion in refusing on motion of defendant, after the evidence was all in, to allow him time until the following day to procure the attendance of new witnesses with whom he had not talked, and whose whereabouts were unknown, only one of whom could certainly be produced and whose evidence was merely cumulative in his effort to establish an alibi, upon which point he had introduced a number of witnesses.

3. Additional instruction after argument—The fact that the court gave the jury an additional instruction after defendant's counsel had closed the argument, while to be condemned is not a reversible error when the instruction was a proper one and favorable to defendant, and especially when the court offered to allow counsel for defendant to reargue the instructions, which was declined.

E. N. Ingram for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

The appellant, General Turner, was tried and convicted in the Bell Circuit Court, at the January term, 1904, under an indictment for murder, his punishment being fixed by the jury at imprisonment in the penitentiary for life.

His motion for a new trial having been overruled by the lower court, he seeks by this appeal a reversal of the judgment of conviction. It appears from the record that he was jointly indicted with nine others, whose names appear in the indictment, for the murder of Charles Cecil, who lost his life at what is known as the Quarter House, in Bell county, it being charged in the indictment that he was shot and killed by one or more of the defendants named in the indictment, the others aiding and abetting in the act, but that the name of the one who actually fired the shot causing the death of Cecil was, to the grand jury, unknown.

Appellant was accorded a separate trial. It was shown by the evidence that W. C. Thompson, a deputy sheriff of Bell county, having in his possession warrants of arrest against Lee Turner, a brother of appellant, and Boone McQuary, summoned a posse comitatus, of whom Charles Cecil was one, and went to the Quarter House, in which Lee Turner was at the time keeping a saloon, for the purpose of arresting the persons named in the warrants. It does not fully appear whether or not the deputy sheriff then had in his possession a warrant for the arrest of appellant, though he did, as he testified, about that time have a warrant in which appellant was charged with the murder of one Pridemore. Upon reaching the Quarter House,

which was surrounded by a stockade enclosing from three to five acres of ground, the deputy sheriff and his posse entered the stockade, and finding the doors of the Quarter House closed, he went to one door of the house with some of the posse, and Charles Cecil, with others of the posse, went to another door. The deputy sheriff then demanded the surrender of the persons for whom he had warrants, telling them with what they were charged and that if they would come out and yield themselves to arrest they would be protected. The only reply to this demand was a voice from the house which said "We'll give you warrants in hell." About that time two or three shots were fired from the bushes of a hill on the one side of the house, immediately followed by shots from the house. At the first fire Cecil fell, mortally wounded, and shortly thereafter died. The firing then became general, shots coming from several points on the hills surrounding the Quarter House, as well as from the house itself, which were returned by the deputy sheriff and his posse.

According to the statements of many of the Commonwealth's witnesses, the shooting continued in a desultory manner for nearly or quite an hour, though none of the parties on either side besides Cecil was killed or wounded. During the shooting the Quarter House was burned. After dark the deputy sheriff and those associated with him again ventured inside of the stockade, but found that the persons who had been in the Quarter House had all escaped. They then took the dead body of Cecil and returned to Middlesboro.

Some of the witnesses for the Commonwealth testified that there seemed to be from twenty to thirty persons engaged in shooting at the deputy sheriff and his posse, and it is evident that the attack was the result of a preconcerted plan on the part of those resisting the officer and his posse, for the deputy sheriff testified that on the afternoon before the fight he called up Lee Turner at the Quarter House from Middlesboro and informed him that he had the warrants of arrest for him and McQuary, and that he would be out on the afternoon of the following day for the purpose of making the arrest, and that to this message some one in a voice which he took to be that of Turner replied over the telephone in a laughing way, "All right. I will take care of you."

The appellant's defense was an attempted alibi. He testified in his own behalf that he had received information on that day that the deputy sheriff would come out to the Quarter House to make the arrests, and that a few minutes before the arrival of that officer and his posse, he, in company with a number of women, whom he advised to seek a place of safety, left the vicinity of the Quarter House and went down the dirt road toward the railroad and the Mingo Coal Mine, and that about the time they reached the railroad at a point some three or four hundred yards from the Quarter House, the shooting began at the Quarter House, and continued for some time, as he and his party pursued their way down the railroad, and until they finally got out of hearing of the firing; that he took no part in the shooting upon that occasion and was not at the Quarter House or near enough thereto to engage in the shooting, and in fact that he left the Quarter House in order to keep out of the trouble.

These statements of appellant were corroborated by several of the women who claimed to have been with him when he left the Quarter House, and by

two or three other persons who testified to meeting him on the dirt road and railroad, at a distance from the Quarter House that apparently made it impossible for him to have taken part in the fight. Upon the other hand, two of the Commonwealth's witnesses testified that they were at the Quarter House when the deputy sheriff and his posse arrived, and that they saw appellant in the Quarter House, and so near the time of the fight that it would seem impossible that he could have reached the point on the railroad where he claimed to have been when the shooting began. One of these witnesses further testified that appellant and others were discussing in the saloon of the Quarter House the coming of the arresting party shortly before their arrival, and that appellant then said in substance that if they did not drive the party off, his brother, Lee Turner, who was absent, would "bounce them." In addition, two of the deputy sheriff's posse testified that they saw the appellant at the time the shooting began, and while it was going on, that he was with one of the groups on the hill side, and they saw him shooting at their party with what seemed to be a Winchester rifle, and that the first shot that was fired came from the group of men with which he was associated. Furthermore, not fewer than four witnesses were introduced by the Commonwealth who testified that in conversation with appellant after the fight at the Quarter House, he told them that he had shot Charles Cecil, and to some of the witnesses he even showed the Winchester rifle with which he claimed to have killed Cecil, and a pistol which he said he had used in killing a man by the name of Pridemore. He also exhibited at the same time a piece of wood, containing blood stains, which he said he had taken from a false or wooden leg of Cecil that was left at the Quarter House when his body was removed. It appears that Cecil had lost a part of one leg, by reason of which he was compelled to use a piece of wood attached to what was left of that leg to aid him in walking, and several of those who assisted in removing his body from the Quarter House testified that the wooden leg was left on the ground.

From all this testimony the jury reached the conclusion that appellant was guilty of the crime with which he was charged, either as principal or accessory, and we are unable to find any fault with their verdict.

The grounds presented by appellant for a new trial, and now urged as authorizing a reversal of the judgment of conviction, are: First, that the trial court erred in refusing to allow appellant to file a motion to discharge the jury; second, in overruling his motion to withdraw the jury and continue the case, or pass it from 5 o'clock in the afternoon of one day until 9 o'clock of the following morning, to allow appellant to procure the attendance of certain witnesses, whose names, together with the alleged facts to which it was claimed they would testify, were set forth in an affidavit filed by him at the time of making the motion; third, in admitting certain alleged incompetent evidence, and, fourth, in giving instruction No. 4, at the time, and in the manner, in which it was given.

The first of these grounds is bottomed upon a mistake of the clerk in omitting to draw the jury box the name of one member of the regular panel, which overlooked, by reason of which mistake it appears that the court, believing that the names in the jury box had been exhausted, ordered

the sheriff to summon forthwith enough bystanders to complete the jury, which was done accordingly.

It is claimed by counsel for appellant that this mistake of the clerk was discovered by him before the jury selected by the parties to try the case had been sworn, and that he at once offered to enter motion to discharge the jury, and asked the court to summon others in their stead, which motion the court refused to entertain, upon the ground, as recited in the order, that it came too late, and after the jury had been sworn to try the case and after the appellant had waived a formal arraignment, and entered his plea of not guilty. In determining this point, we are compelled to accept as true the statement of fact contained in the order of the court which appears in the bill of exceptions, and from which it conclusively appears that the motion of appellant's counsel was not offered until after the jury was sworn to try the case, and the appellant had waived an arraignment, and entered his plea of not guilty.

In offering the motion the ground therefor was fully stated by the appellant's counsel. It would seem, therefore, that the action of the court in refusing to entertain the motion must be given the same effect as if the motion had been formally entered of record and formally overruled by the court. The objection of appellant to the jury went to the entire panel of twelve, but if there was error in selecting the jury, it is not subject to revision by this court.

In *Curtis v. Commonwealth*, 23 Ky. Law Rep., 276, it was held that the manner of selecting the jury in that case was unlawful. But as section 281, Criminal Code of Practice, provides that "the decisions of this court upon challenges to the penal and for cause, upon motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exception," this court is without power or jurisdiction to revise such an error, and though in one or two cases previously decided the court appeared to have held otherwise, it has, since the decision in *Curtis v. Commonwealth*, *supra*, uniformly adhered to the rule therein expressed.

As to the alleged error of the trial court in refusing to lay the case over from 5 p. m. one day until 9 a. m. the next, to allow the appellant to obtain the testimony of certain witnesses named in his affidavit, we find it disclosed by the record that the evidence was all in, and the instructions written by 5 o'clock p. m., which was the time appellant's motion to lay the case over to the following day for the introduction of further evidence in his behalf was made. In fact, the argument for appellant to the jury seems to have been concluded that evening. Trial courts are allowed wide discretion in the matter of regulating the admission of testimony and granting continuances, which will not be interfered with by a court of revisory power, unless exercised to the prejudice of the substantial rights of the defendant.

We find the affidavit filed by appellant in support of the motion for further time to procure the newly-discovered evidence, does not state that he had seen or talked with the witnesses named therein, or how or from whom he had obtained information that they would make the statements attributed to them in the affidavit. And while the affidavit states that the witnesses then lived in Bell county, it does not show in what part of the county they resided, whether they were accessible to the sheriff or his deputies so as to

be reached by the process of the court, or that he had received from them any assurance that they would attend court in time to be introduced as witnesses by 9 o'clock on the following morning. Upon the contrary, it is stated in the affidavit that the attendance of three of the four witnesses named therein could not be procured until the next term of the court, and that only the fourth witness could be gotten to court by 9 o'clock of the following morning. It will be seen, therefore, that the affidavit was not sufficient to authorize the court to lay the case over for further evidence. Besides, the evidence would have been cumulative, as it related to the alibi, and was similar to that of several witnesses who testified for appellant on that point.

There is no complaint of the instructions, but it is insisted that one of them was given after the argument of counsel for appellant had been made to the jury, which prevented him from discussing the instruction or showing its bearing upon the case, though the attorney for the Commonwealth, whose argument followed the giving of the instruction, had full opportunity to discuss it. Though it is true that the instruction in question was given after argument for appellant was closed, it appears from the record that his attorney was given and offered an opportunity by the court to re-argue the case to the jury upon that instruction, but declined to do so. The instruction was proper and highly favorable to appellant and so self-explanatory that it is doubtful whether any argument was needed to enable the jury to understand it. However, the giving of instructions, after the completion of the argument in whole or in part, is to be condemned. While it is the duty of the court to give the whole law in a criminal case, it should be done before the case is argued to the jury. We are, however, of opinion that the appellant was not prejudiced by the giving of the instruction in this case, after the conclusion of the argument made by his counsel.

We have been unable to find any error in the admission or rejection of evidence by the lower court, and finding nothing in the record to convince us that appellant did not have a fair trial, the judgment is affirmed.

Whole court sitting.

GARROTT, &c. v. RIVES, &c.

RIVES, &c. v. GARROTT, &c.

(Filed May 5, 1904—Not to be reported.)

1. Settlement of estates—Advancements—Under Kentucky Statutes, section 1407, providing "that advancements shall be estimated according to the value of the property when given" the value of land actually received by an intestate's grandchildren, and not their father's debt to the intestate, constituted the amount of the advancement to such grandchildren from their grandfather's

2. Transacted and used by deceased person—Where one of intestate's heirs occupied land belonging to intestate prior to the death of intestate, his statements that he had paid the rent to his father are incompetent as relating to actions with a decedent.

3. Use of land by intestate—Where one of the heirs uses the land of an intestate must account for such use of it as an advancement.

C. H. Bush and Hunter Wood & Son for appellants.

Jas. Breathitt and John T. Edmonds for appellees.

Appeals from Christian Circuit Court.

Opinion of the court by Judge Hobson.

The above two appeals from the same judgment will be determined together. Robert W. Garrott died intestate in Christian county in November, 1898, the owner of considerable estate, and the only question to be determined is as to advancements made to his children and grandchildren. He had a daughter, the wife of H. P. Rives, who died before he did, leaving several infant children. Her husband, H. P. Rives, about the year 1882, bought a tract of land of 304 acres, and Robert W. Garrott lent or advanced to him \$3,000 or \$4,000 to pay for this land or improvements made on it. On September 7, 1896, this debt, with interest, amounted to \$7,214.76, and in consideration of it H. P. Rives and his second wife conveyed to his three infant children by his first wife the tract of land referred to at the request of Robert W. Garrott and in settlement of the debt. The land was then incumbered by a mortgage to the Fidelity Trust and Safety Vault Co. for \$4,200 and interest. The mortgage was foreclosed, and 187 acres of the land, which included the dwelling house and most of the improvements, were sold to satisfy the mortgage, leaving the three infant children with 167½ acres, the balance of the tract, without improvements. The special commissioner to whom the case was referred charged the infants with an advancement of the 167½ acres of land at \$35 an acre. The other heirs at law filed exceptions to the commissioner's report because he did not charge the infants with \$7,214.76, the full amount of the debt which Robert W. Garrott had against H. P. Rives. The court, upon the hearing of the exceptions to the commissioner's report, charged the infants with \$5,448 93, which includes interest from the death of Robert W. Garrott. From this judgment both parties have appealed.

The amount of the debt which Robert Garrott had against H. P. Rives is entirely immaterial. The thing that the infants received was not the debt, but the land. H. P. Rives seems to have been influenced only by the idea of doing justice to the children of his first wife. He may have had some defense to part of the debt, or it may be that the debt could not have been made out of him. By section 1407, Kentucky Statutes, 1903, advancement shall be estimated according to the value of the property when given. The intention of the testator in making the advancement does not control, the cardinal object of the statute being to secure equity in the distribution of his estate. (Bowles v. Winchester, 13 Bush, 1; Stevenson v. Martin, 11 Bush, 485.) We, therefore, conclude that the court properly refused to charge the infants with anything more than the value of the land they got, and on the appeal of Isaac Garrott, &c. v. Harry A. Rives, &c., the judgment is affirmed.

The special commissioner's report which fixed the value of the 167½ acres at \$25 an acre is supported by the weight of the evidence, or this is at least as high as the evidence warrants, considering the fact that the improvements were on the other end of the tract. The infants took the land incumbered by the mortgage. What they got was the value of the land less the mort-

gage. The mortgage was soon thereafter foreclosed, and so what they really got was the 167½ acres that was left. This at \$25 an acre amounts to \$4,181.83, and is as much as, under the evidence, should be charged to the infants on account of the advancement to them.

L. O. Garrott, one of the sons, for five years before his father's death occupied a tract of land belonging to his father, of the fair rental value of \$500 a year. The infants insist that he should be charged with this rent as an advancement. He admits using the land, but claims that he paid his father the rent. He produced four receipts from his father, given from time to time, aggregating \$209.83. The commissioner credited him by this amount, and charged him with the remainder of the rent as an advancement. The court sustained his exceptions to the commissioner's report above mentioned, and entered a judgment on said exceptions pursuant to the report as herein indicated, and refused to charge him with the rent. His statements that he had paid the rent to his father are incompetent, as he can not testify for himself to a transaction with the decedent. We do not find any competent evidence in the record that he paid the rent to his father. It has been often held that where one of the heirs uses land of the intestate, he must account for the use of it as an advancement. (*Hamilton v. Moore*, 24 Ky. Law Rep., 982, and cases cited.) Under the proof L. O. Garrott must be charged with the use of this land as an advancement as reported by the special commissioner.

Judgment reversed on the appeal of H. A. Rives, &c. v. Isaac Garrott, &c., and cause remanded, with directions to overrule the exceptions to the commissioner's report above mentioned, and enter a judgment on said exceptions pursuant to the report as herein indicated.

LOUISVILLE BANKING CO. v. BUCHANAN.

(Filed April 20, 1904.)

1. Defense to note—Discharge in bankruptcy—Limitation—Fraud in obtaining money on note—In an action not to obtain relief on the ground of fraud or mistake, but to recover on a note for \$6,700, the payors defense being that he has been relieved of all liability thereon by his discharge in bankruptcy, which he pleads, in avoidance of which appellant pleads fraud by appellee in obtaining the money for which the note was given, to which plea of fraud appellee pleads the statute of limitation of ten years. Held—That the action not being bottomed on fraud, the plea of limitation does not apply to the cause of action, but to the defense, and can not be relied on to defeat a recovery on the note.

2. Res judicata—On a former trial of the action, the court held that the note sued on was not placed on the footing of a foreign bill of exchange, and that the five years' statute of limitation did not apply thereto. Held—That this was not such a judgment as would prevent appellee from pleading the statute of limitation upon a separate and distinct matter subsequently raised, affecting the question of fraud in obtaining the money on the note as applying to appellee's release therefrom by his discharge in bankruptcy.

Shackelford Miller and Barnett & Barnett for appellant.

D. W. Sanders for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle.

This case is before us on a second appeal. After the filing of the record on this appeal, Thomas S. Buchanan, in whose favor the judgment went in the court below, died intestate, and by order of revivor Percival Moore, administrator of his estate, was substituted as appellee.

On February 8, 1888, Buchanan borrowed of the appellant, Louisville Banking Co., \$6,700, for which the note in controversy was executed, payable four months after date. On June 1, 1896, this action was instituted upon the note against Buchanan by appellant and judgment prayed for the amount thereof, with interest from June 11, 1888. Among other defenses relied on in the answer was the plea of the five years' statute of limitation, it being averred therein by Buchanan, that the note sued on had been discounted by appellant and thereby placed upon the footing of a foreign bill of exchange, and that as more than five years elapsed between the maturity of the note and the institution of the action thereon, the five years' statute of limitation barred a recovery.

Upon the trial of the case the lower court rendered judgment sustaining the plea of limitation and dismissing the action. An appeal was taken from that judgment, and on November 20, 1899, this court held that the note was not on the footing of a bill of exchange, and, therefore, that the action was not barred by the five years' statute of limitation. Consequently the judgment of the lower court was reversed and the cause remanded for further proceedings. (Louisville Banking Co. v. Buchanan, 107 Ky., 125.)

After the return of the case to the lower court, to wit: December 2, 1899, Buchanan, who, during the pendency of the appeal, had filed his petition in bankruptcy and obtained a discharge from his debts, filed a supplemental answer to the appellant's petition, in which he pleaded and relied on his discharge in bankruptcy in bar of any recovery upon this note.

On February 26, 1900, appellant filed a reply to the supplemental answer, in the second paragraph of which it was averred that his discharge in bankruptcy did not release Buchanan from the payment of the note sued on, as he procured from appellant the money for which it was given by fraud, and that by the provisions of the bankrupt law, as well as by the terms of the discharge itself, that instrument does not operate as a release from debts created by the fraud of the bankrupt. A demurrer filed by Buchanan to the second paragraph of the reply was overruled, and he thereupon filed a rejoinder, in the third paragraph of which, limitation was pleaded. It being therein alleged that the fraud complained of in the reply, if any there was, "was committed more than ten years before the filing of said plaintiff's reply * * * and that more than ten years have elapsed since plaintiff discovered said alleged fraud."

A demurrer to this paragraph, and also a motion to strike it out, was filed, but both were overruled, and appellant then filed its surrejoinder, the second paragraph of which controverted the plea of ten years' limitation relied on by Buchanan. The third paragraph set out the former plea of the five-years statute of limitation made by Buchanan, and which this court held did not apply to the note sued on, and relied upon the decision of this

court as an adjudication of that question, and a bar to the right of Buchanan to rely upon the ten-year statute pleaded in the rejoinder. The fourth paragraph recited the facts relating to Buchanan's discharge in bankruptcy, and averred that it was not until then that appellant could plead the fraud of Buchanan, which is relied on only in avoidance of his plea of a discharge in bankruptcy.

By agreement of the parties the case was submitted to the judge of the lower court upon the issues of *res judicata* and limitation raised by the pleadings, and as evidence upon these issues the pleadings in the case of the Louisville Banking Co. v. Buchanan & Crowder, &c., were filed and made a part of the record.

The court, upon the trial, sustained the plea of limitation and dismissed the petition. Appellant entered motion and grounds for a new trial, but the motion was overruled, and he complains of the judgment and seeks its reversal. The only question presented by the record for our consideration is: Did Buchanan's plea of ten years' limitation bar a recovery upon the note? It may be remarked that section 17 of the present bankrupt act expressly excepts from the discharge that may be granted a bankrupt, debts created by fraud. Indeed, it does not seem to be denied by counsel for appellee that if the money for which the note was executed by Buchanan was obtained by fraud, his discharge in bankruptcy did not relieve him from liability upon the note. The sole contention on behalf of his administrator is that there can be no recovery by appellant upon the note, because the fraud was committed more than ten years before the reply complaining thereof was filed.

Section 2515 of the Kentucky Statutes provides: * * * "An action for relief on the ground of fraud or mistake * * * shall be commenced within five years next after the cause of action accrued."

Section 2519, Kentucky Statutes, provides: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

It is manifest from the language of the statute, *supra*, that both refer to actions for relief on the ground of fraud or mistake.

In 19 Am. & Eng. Ency. of Law, 163, it is said: "The statutes (of limitation) effect remedies, not defenses. But the word 'defenses,' as here used, is limited to matters purely of defense, and does not embrace matters which may be used as the basis of a counterclaim or a cross petition. The rule is further qualified in many of the States by statutory provisions and judicial decisions to the effect that a claim sought to be used as a set-off can not be so pleaded, unless it appears that it was not barred when the plaintiff's action was begun."

We have examined the authorities cited by counsel for appellant, and find that they support the doctrine announced in the above quotation. Among the authorities referred to is *Amaker v. New*, 38 S. Car., 28 L. R. A., 687, the facts of which to be as follows: One Inabnet being financially involved and under his debts, in 1866, made a voluntary conveyance by deed of 30 d, all he owned, to his son-in law,

Bennett, in trust for the grantor's wife for life, with remainder to his children. The land was levied upon and sold in 1868, under nulla bona proceedings at the suit of Sistrunk, a creditor of Inabnet, at which sale Sistrunk became the purchaser, and thereafter got possession of the land. In the meantime Inabnet died and his widow, by proceedings in and judgment of the probate court was allotted in 1869 as dower 158¼ acres of the 300 acres of land. Sistrunk died in 1864, and the 158¼ acres of land were included in partition proceedings between his heirs and was sold subject to the widow's dower to Amaker in 1835. In the following year the widow, Mrs. Inabnet, died, and her daughter, Frances New, thereupon took possession of the dower land. Amaker sued in ejectment to recover the land of Mrs. New, claiming it under his deed from Sistrunk's heirs. Mrs. New resisted the recovery of the land by Amaker and relied upon the statute of limitation which, in South Carolina, is six years, insisting that Amaker's grantor, Sistrunk, should have sued to set aside the voluntary conveyance within that time after obtaining his title, and the lower court so adjudged. But upon appeal to the Supreme Court of the State that tribunal in an opinion by Judge McIver, said:

"The plea of the statute, as it is called improperly, as I think, for such a plea must be directed to the cause of action (set forth in the complaint), is not directed to the plaintiff's cause of action, but is interposed as a protection against an attack made by the plaintiff upon the defense set up by defendants. The plaintiff having made out a prima facie title, as shown by the refusal of the motion for a non suit, to which no exception was taken, the defendants undertook to show a superior title in themselves under the deed in question, and surely the plaintiff was entitled to show any defect in that deed which would render it insufficient to vest title in the defendants, either by showing that it was not under seal, or not executed in the presence of two subscribing witnesses, or that the grantor was non compos, or that it was not recorded. If so, why may it not also be shown that it was void for fraud?

"I do not understand that it was ever the rule that a deed or other instrument could not be attacked for fraud after the lapse of the prescribed time, in any way, but only that it could not be attacked by an action instituted for that purpose. I can very well understand how the law, from considerations of public policy, may forbid one from invoking its aid by bringing an action to set aside a deed for fraud after the time limited for the purpose, but I am unable to understand upon what principal, either of law, equity or good morals, one who had made out a prima facie case for the relief he demands, can be forbidden from showing that the defense set up against his claim is founded in fraud, simply because such fraud has been committed so long ago as to bar an action brought to obtain relief from such fraud; but I do not think any case can be found which could sustain such a doctrine."

In *Jackson v. Plyler*, 38 S. Car., 496, the same doctrine was upheld, and the case of *Amaker v. New*, supra, cited and approved, and again adhered to in *Gaborth v. Gaborth*, 47 S. Car., 126. In all these cases the facts were, in many respects, similar to those of the case at bar.

We also find the courts of last resort of Arkansas, Indiana and California

to be in full accord with the Supreme Court of South Carolina upon the question under consideration. (*Rhea v. Bagley*, 66 Ark., 98; *Robinson, &c. v. Glass*, 94 Ind., 211; *Hart v. Church*, 126 Cal., 471.)

In *Hart v. Church*, *supra*, it appears that a note and mortgage were executed by Mrs. Hart through the compulsion of her husband, and that she subsequently brought suit to cancel them. By cross action Church set up the mortgage and asked that it be enforced. To which Mrs. Hart answered, pleading the fraud by which the note and mortgage were procured to be executed by her. Church replied, relying on limitation. Upon the issues thus presented the Supreme Court of California said: "It is insisted that the complaint itself shows a lack of equity, in that plaintiff's delay in commencing her action for cancellation is not sufficiently explained, and it is argued that the same omissions which render her complaint defective make her defense to the cross complaint upon the ground of fraud itself, insufficient. It is true, as appellant contends, that where a party seeks a rescission of a contract he must act with promptness, and that the question as to whether or not a prompt effort to rescind must depend in each case upon its own peculiar facts. It is also true that where a party seeks relief upon the ground of fraud or mistake the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake, but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three years' statute does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and where enforcement is sought against him, excuse himself from performance by proof of the fraud. Of course, in such a case he incurs the risk of defeat by the intervention of the rights of innocent parties."

While this court has never decided the question of limitation here presented upon the precise state of case now before it, it has in effect held that it did not apply in a practically similar case. In *Avritt v. Russell*, 29 Ky. Law Rep., 752, it appears that on January 4, 1888, Avritt executed to Russell his note for \$733.46, in renewal of an elder note and due bill which had theretofore been given by the former to the latter upon partial settlements of fees growing out of a former partnership between them in the practice of the law.

Subsequently a payment of \$200 was made by Avritt upon the note of \$733.46; some time after which he learned through his brother, Samuel Avritt, who had acted as his agent, that Russell had collected a partnership fee of \$1,356.70, in the case of one Holt, Avritt's part of which had been retained by Russell, in payment of the \$733.46 note.

"At the September term, 1895, appellant, Avritt, brought suit against Russell for the surrender of the \$733.46 note, alleging concealment by Russell of the fact of the collection of the Holt fee, and that the note was executed by Avritt in ignorance of the fact that he was indebted to Russell, seeking also a recovery of the amount paid on the note, which was averred to have been paid by his mistake and the fraud of Russell in withholding the true

state of the firm's account from him. A suit was also brought by Sylvester A. Russell, son of Judge Russell, against appellant upon the \$733.46 note, it being alleged that it was assigned by W. E. Russell to his wife, Sue E. Russell, and by her to S. A. Russell. To this suit a plea of no consideration was interposed, it being averred that when the partnership was dissolved it was agreed that appellant's share in all fees thereafter collected from the unfinished business of the firm, should be applied to the discharge of the notes, and the surplus accounted for, to appellant. A plea of the statute of limitation was interposed by appellees, the Russells, upon the theory that relief was sought by appellant against fraud or mistake as to the date of the collection of the Holt fee."

The plea of limitation made by Russell was to the defense interposed by Avritt that it was procured by fraud. The two suits between the parties, the one brought by Avritt and the other by S. A. Russell, were consolidated and tried together. The issue was whether Avritt owed the note. His defense was that the note had been procured by fraud, to which limitation was pleaded by Russell. As to the plea of the statute of limitation this court said: "The statute of limitation in our judgment has no application whatever in this case. It is not sought here to set aside or annul any transaction as of the date of the collection of the Holt fee. Had the new note not been executed the plea would have been a plea of payment. As a new note was executed the plea relied upon was the plea of no consideration, to which the statute of limitation is equally inapplicable." * * *

In the case at bar the statute of limitation can not, in our opinion, be relied on to defeat a recovery upon the note. In fact it is not pleaded against the note, but by Buchanan for relief against his own fraud. The action is not one to obtain relief on the ground of fraud or mistake, but to recover \$6,700 evidenced by a note. The payors' defense is that judgment can not go against him because he has been relieved of all liability upon the note by reason of his discharge in bankruptcy, which instrument is formally pleaded and filed. In avoidance of the discharge in bankruptcy, appellant pleads the alleged fraud committed by Buchanan in obtaining the money for which the note was executed, and that by reason of such fraud the discharge in bankruptcy does not operate as a release to Buchanan, and for the purpose of making his discharge effective as to the note, the latter pleads that the fraud of which complaint is made was committed more than ten years before the presenting of the complaint, and, therefore, can not, by reason of the statute of limitation, be relied on to exclude the note sued on from the operation of the discharge in bankruptcy.

The action not being bottomed on fraud or mistake, the fraud of Buchanan did not affect the validity of the note sued on, but only the question of whether he was relieved of liability thereon by the discharge in bankruptcy. It was not necessary to allege or prove the fraud in order to recover on the note. That question was injected into the case to avoid the discharge in bankruptcy, but for which it would not have been mentioned. It seems to us, therefore, that the plea of limitation in this case goes not to the cause of action, but is directed to the defense.

We have examined the authorities cited in support of the contention of appellee, but do not find that they militate against the conclusions herein

on as against any new or additional cause of action that may be set up by way of amendment in a pending action, and time computed up to the introduction of the new matter. But no new cause of action was brought into this case, as already explained. The fraud of Buchanan does not constitute a new cause of action, but is only pleaded as against and in avoidance of the discharge in bankruptcy, hence the rule announced in the cases cited by counsel for appellee is inapplicable.

It is, however, insisted for appellee that the case of *Treadway v. Pharis*, 90 Ky., 664, fully sustains the plea of limitation made in this case. We do not think so. It will be found in that case that the action was instituted by the appellant's children and heirs at law of Pharis by his first wife against his children and heirs at law by his second wife, the latter also being made a defendant, for a division of his lands fairly, but in such manner as to exclude a tract of fifty-eight acres conveyed to the decedent in 1848, by one Tarleton Embrey, which they prayed be adjudged to belong to them to the exclusion of the decedent's second wife and children born to him by her. The ground, as averred in the petition upon which appellants' based their exclusive right to the tract of fifty-eight acres was, that "the consideration was paid to Embrey out of the estate of their mother, and that though there was an agreement between her and their father the deed therefor was to be made to her, he fraudulently and without her knowledge or consent procured same to be conveyed to himself."

The plea of the statute of limitation set up by way of defense to the claim of appellants to the sole ownership of the fifty-eight acres was sustained by the lower court and affirmed by this court in an opinion by Judge Lewis for the reason that "as the ground of relief is the alleged fraud of their father in causing the deed to be made to himself instead of their mother, they had a cause of action, if ever, upon her death, and not having sued within either five or ten years thereafter, they can not now maintain an action to set aside the deed which has to be done before they can recover the land. While they could not recover the land during the lifetime of their father, there was nothing to prevent institution of an action to set aside the deed, and thereby change the character of his claim and possession from that of absolute ownership to a tenancy by curtesy."

It will be seen that the case *supra*, in so far as it was sought to exclude the last wife and her children from any interest in the fifty-eight acres of land, was an action for relief upon the ground of fraud, it being distinctly averred in the petition that the fraud of the father caused the title to the land in which the money of his first wife, plaintiff's mother, had been invested, to be conveyed to himself without the knowledge or consent of the wife, and in violation of the agreement that it should be conveyed to her. Therefore, the plea of the statute of limitation interposed by the answer went to and effected the cause of action and the remedy.

We do not think a plea of *res judicata* interposed by the appellant can be sustained. It is based upon the theory that because this court held that the five years' statute of limitation relied on as a bar to a recovery upon the note did not apply, that, therefore, an action could not on any ground whatsoever again

plead limitation in this case. The question of limitation raised and decided on the former appeal was as to the five-year statute relied on to bar the note, which it was alleged had been placed on the footing of a bill of exchange. The question of limitation now raised is a separate and distinct matter, which arose after the filing of Buchanan's supplemental answer, and because of appellant's plea that he had procured the money on the note sued on by fraud, and thereby prevented his discharge in bankruptcy from releasing him from liability on the note. While for the reasons hereinbefore indicated the statute of limitation can not be relied on as a defense to the note, or in avoidance of the alleged fraud whereby the money was obtained thereon by Buchanan, the question is, in our opinion, unaffected by the decision of this court on the former appeal.

The judgment is reversed and cause remanded for further proceedings consistent with the opinion herein.

CITY OF LOUISVILLE v. CORLEY, &c.

(Filed April 20, 1901—Not to be reported.)

1. Suspension by city of police force—The act of the board of safety in attempting to suspend or lay off the detective and police force of a city for four days in each month, was an illegal and void act.

2. Same—Where there is nothing in the pay rolls showing that the officers of a city accepted suspension for a certain time, the signing of the pay rolls should not be deemed as consenting to the suspension, and they are not estopped by reason of having signed the pay rolls for the months in which they suffered the diminution of their pay.

H. L. Stone for appellant.

Barker & Woods for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

This is the second appeal in this case. The opinion on the former appeal is reported in 23 Ky. Law Rep., 1782. That opinion settled all the legal questions involved. The act of the board of safety, in attempting to suspend or lay off the detective and police force of the city for four days in each month, was an illegal and void act. Under the charter of cities of the first class, this power is alone given to the general council. On the return of the case the city made two defenses: first, the suspension of the appellees was a necessity forced on the board of safety under sections 2820 and 2821, Kentucky Statutes, because of an insufficient appropriation of the general council; second, the appellees are estopped from recovering anything by reason of their having signed the pay rolls for the months in which they suffered the diminution of their pay.

As to the first proposition, even admitting that there was a necessity in suspending the policemen for a few days in each month or discharging a portion of them to keep within the appropriation for the payment of their salaries, the board of safety was without power to remedy this matter. This power existed alone in the council. Sections 2820 and 2821 have no application to the question involved in this action. These provisions of the stat-

being to prevent extravagance on the part of public officers. The appellees derived their pay by reason of law and not by contract.

The case of Hopkins County v. The St. Bernard Coal Co., 24 Ky. Law Rep., 944, settles this question. In that case the county had become involved in something over \$10,000 for the payment of guards authorized and appointed under section 1241a, Kentucky Statutes. The county defended and one of its defenses was, this liability was imposed on the county in violation of section 157 of the Constitution. We quote that part of the section applicable: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two thirds of the voters thereof voting at an election to be held for that purpose and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same." The court in that case in commenting upon this section of the Constitution, said: "The prohibition is against becoming indebted or voluntarily incurring a legal liability. The words 'no county * * * shall be authorized or permitted to become indebted,' can not reasonably refer to the necessary expenses of the governmental functions of the county which are compulsory obligations cast on it by law, but only to that class of debts which it is optional with the county to incur. Any other construction, as has been well said, would destroy the fundamental safeguards and bulwarks of organized society. * * * The duty of preserving public peace and protecting life and property can not be avoided because the income provided for the year by the fiscal court will be insufficient to pay the guards provided by the statutes. It is the duty of the fiscal court to provide a sufficient fund for this purpose when the necessity arises, if it has not been provided before. It was not the purpose of the Constitution to disable the municipalities of the State from maintaining the public peace or protecting the good name of the State."

As to the second proposition, appellant pleaded in its answer that appellees are estopped from recovering in this action for the reason that they signed the pay rolls for the months during the time this order was enforced and by reason of signing same accepted the reduction or suspension. There is nothing in the pay rolls showing that they accepted the suspension. They were made out in the usual form except four days were left blank. It was not proven that they in terms accepted or consented to this suspension.

The only two persons who spoke on this subject were Tilford, chairman of the board of safety, and Major Gunther, who stated in substance that the proposition of this suspension was reported to them by the captains of police as having been submitted to and accepted by the appellees. This was only hearsay. Not a witness testified that the appellees or any one of them ever accounted or consented to this suspension. By the order of the board of safety to the chief of police the appellees were made to understand that it was one alternative or the other; compliance with this order or discharge the force. Under such circumstances the signing of the pay rolls did not be deemed as consenting and acquiescing in the suspension, on part of appellees, and they are not estopped.

Therefore, the judgment of the lower court is affirmed, with damages.

1. Lands—Patents—Pleading—In an action by appellants against appellees, under section 11 of the Kentucky Statutes, the petition was defective in that it failed to allege that appellants were in possession of the land in controversy, and the demurrer should have been sustained to the paragraph which set out ownership of the land, but which failed to aver possession.

2. Same—It was error to sustain a demurrer to a petition which alleged that defendants were cutting and removing timber, confusing boundary lines and destroying marked corners, because, for this trespass an action could be maintained under section 2361, Kentucky Statutes, without having the actual possession of the land.

James Goble, W. S. Harkins and R. T. Burns for appellants.

J. M. York and J. F. Butler for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

The appellants, descendants and heirs at law of John B. Goff, deceased, brought this action against appellees, alleging in substance that their ancestor, John B. Goff, obtained a patent from the Commonwealth of Kentucky, dated August 16, 1861, granting to him a certain tract or parcel of land containing 1,000 acres by survey, bearing date June 20, 1860, the patent giving the metes and bounds, courses and distances, closing with these words: "Including in said bounds 2,700 acres of former patented land, which is excluded in the calculation of the preceding plat." Appellants in their petition, then gave the metes and bounds of twenty-three parcels of land which they say were excluded by the patent, and then alleged that the appellees, since the date of the John B. Goff patent, and within its bounds without right, surveyed and patented six parcels of land, five of 200 acres each, and the other of 150 acres. They then averred, "that having procured these patents as on vacant and unappropriated land and have thus cast a cloud upon the title to the land of these plaintiffs, and are now giving it out in speech that they are the owners of this land, and thus impairing the value thereof and otherwise harassing and annoying plaintiffs in the use and occupation of the same. Plaintiffs further say that the defendants, O. B. M. Lowe, Orrison R. Lowe, Jr., O. R. Lowe, Sr., Lawyer Lowe, Henderson Scott and Thomas Runyon are threatening to enter upon the lands owned by these plaintiffs inside of the grant of their ancestor and outside of the exclusions in the patent and to cut, remove and to carry away the timber growing upon this land; that the same is its chief value and is of the substance of the inheritance, and by doing so great and irreparable injury will be done them, which could not be compensated for in damages; that in removing the timber from plaintiffs' land they will commit numerous and repeated trespasses, and will involve the plaintiffs in numerous and vexatious suits of law, and by cutting and removing the timber and entering and surveying this land they are confusing the boundary lines of plaintiffs' land and are destroying the marked corners, line trees and other monuments of title."

The appellees filed their answer in two paragraphs. In the first they

purchase and described in the following described lands, patented November 18, 1881, and giving the boundary of each of the six patents; five for two hundred each, and the other for one hundred and 50 acres, being the same six boundaries of land named and described in the petition. They then denied that they had entered upon any of the land bounded and described in the appellants' petition, and then in the usual terms stated that they and those under whom they claimed, have had the peaceable, uninterrupted and adverse possession of the last named six surveys of land for more than fifteen years prior to the bringing of this action, and pleaded the fifteen years' statute in bar of appellants' right of recovery.

The second paragraph of the answer is as follows: "The Commonwealth of Kentucky for the use and benefit of the defendants, O. B. M. Lowe, says for further answer and counterclaim herein, that the ancestor of plaintiffs, John B. Goff, on the 20th day of June, 1860, only entered and paid for warrants authorizing the entering of 1,000 acres of vacant and unappropriated land and the patent issued to the said John B. Goff only called for and conveys to him 1,000 acres of land, but through fraud or mistake (an allegation, one of which is true, but defendant does not know which) when the survey was caused to be made and when the patent from the Commonwealth of Kentucky to John B. Goff was caused to be issued, it contained by metes and bounds 2,700 acres outside of and beyond the exclusions called for in the patent, and that plaintiffs' ancestor only paid for a sufficient amount of treasury warrants, claims, to appropriate 1,000 acres of land and beyond the said 1,000 acres the patent is void in so far as it conflicts with defendants' land as described in the first paragraph of his answer and counterclaim. Defendants say that if plaintiffs should be required to begin at the beginning corner of their survey that they could and would have their full 1,000 acres outside of the exclusions called for in the patent before they reach or come in conflict with the land described in the first paragraph of their answer."

Appellants then filed a demurrer to each of the paragraphs of appellees' answer, and the court made the following order with reference thereto: "The plaintiffs produced and filed demurrer to answer of defendants; O. B. M. Lowe, the defendant, then insisted on demurrer relating back to the petition, and the court being sufficiently advised, adjudges that the demurrer be and is sustained to the petition of the plaintiffs, and the patent sued on and made a part of the petition is void upon its face for indefiniteness, and the court adjudges that the petition be dismissed."

The court was correct in sustaining the demurrer to the first paragraph of appellants' petition. This paragraph was instituted by authority of section 11 of the Kentucky Statutes, which in part reads as follows: "It shall and may be lawful for any person having both the legal title and possession of lands to institute and prosecute suit, by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other person setting up claims thereto." * * *

It was not only necessary for appellants to allege that they were the owners of the land, but also that they were in the possession of the land. Appellants failed to allege that they were in session thereof. The court

given them leave to amend if they desired.

The court erred in sustaining the demurrer to the second paragraph of the petition. By it appellants alleged that appellees were cutting and removing the timber and were confusing the boundary lines of their land and destroying the marked corners, line trees and other monuments of title. For this trespass, they, as the owners of the land, could maintain the action without having the actual possession of the land at the time it was committed. Section 2861 of the Kentucky Statutes reads as follows: "The owner of land may maintain appropriate action to recover damages for any trespass for injury committed thereon, or to prevent or restrain any trespasses or other injury thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass."

The court erred in adjudging the patent void upon its face for indefiniteness. The patent gave the metes and bounds, courses and distances. The exterior of the patent boundary was definite and made certain. The prior patents excluded, amounting to 2,700 acres, were not described or defined in any way, and we suppose for this reason the lower court declared the patent void upon its face, but this court, in the case of *Hall v. Martin*, 89 Ky., 11, declared a patent valid which was similar in all respects to the one at bar. In that case the court said: "If in every patent that contains exclusions it is necessary to describe the grant excluded, or to so identify it, either as to the number of acres, the boundary, or by giving the name of the grantee or the patentee of the elder grant, then the patent to McNew is void, as it is silent as to the boundary, the number of acres or the owners of the excluded land. We perceive no reason why such a grant should be held void, or the party under such a patent denied the right of showing title in himself to all but the exclusions contained in the grant. The burden is on the plaintiff in such a case to show that he is outside of the excluded territory and encroaching on the elder grant that he concedes, by the patent under which he claims, to be superior to his." (*Frazier v. Frazier*, 81 Ky., 187.)

The only other question to be determined is the sufficiency of the second paragraph of appellees' answer. As we understand it, there is not any fact alleged in it that would render the patent void as declared by any statute or any circumstances that the statute declares to be fraudulent.

In the case of *Frazier v. Frazier*, supra, a patent was issued for 900 acres, when within the bounds there were 800 acres. In that case the court said: "It is not necessary to decide what the law is in a direct proceeding in the name of or by the Commonwealth to repeal or vacate the Field's patent for the excess of 100 acres; it is enough for us to say in this case, as between the parties, the patent is conclusive, it not being void upon its face or shown to be fraudulent or void because in contravention of any statutory law specifying the state of case which would render it void or fraudulent. The metes and bounds, courses and distances from which the true quantity of the boundary can be ascertained, and by which it is to be governed in construing the extent of the conveyance by the patent from the Commonwealth, are the highest and best evidence of the number of acres the Commonwealth intended to convey, and they must control a general statement in the patent that the boundary contained 200 acres. The State, therefore, having parted

with the title to the 800 acres as vacant land, can not again issue a patent for any part thereof."

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

TOWN OF CENTRAL COVINGTON v. BUSSE & DRESSMAN.

DRESSMAN v. BUSSE.

(Filed April 21, 1904—Not to be reported.)

Towns and cities—Street improvement—Where, pursuant to an ordinance requiring the south half of Willow street to be improved at the exclusive cost of the property owners, an owner of lots refusing to pay the warrant, in an action by the contractor against both the owner of the lots and the city, it appearing that only one-half of the street was within the corporate limits of the city, it had no authority to require the improvement of a part not in the city, or to levy a special tax upon the abutting lot owners.

O. P. Schmidt and T. B. Wise for appellants.

S. D. Rouse for appellee Henry Busse.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The board of trustees of the town of Central Covington on the 17th day of August, 1901, passed an ordinance requiring the south half of Willow street to be graded, macadamized and curbed as specified in the ordinance, at the exclusive cost of the property abutting the south side as required by section 8706 of the Kentucky Statutes. This work was performed by the appellant, Ben Dressman, under contract with the city, in accordance with the plans and specifications, the work accepted and warrants issued apportioning the cost of the improvement among the abutting property holders, as required by the charter. The appellee, Henry Busse, owned two lots fronting the south side of the street, one forty and the other seventy feet, which were charged with \$258 as their part of the cost of the improvement. Having refused to pay, Dressman instituted this suit against both Busse and the town of Central Covington, asking judgment therefor primarily against Busse, but in the event it should be adjudged that he was not entitled to a judgment against him, then against the town of Central Covington for the amount due him. Busse resisted a judgment, first, on the ground that the assessment was exorbitant and the result of fraud and collusion between the authorities of the town and the plaintiff; and, second, because, as he alleges, the northern boundary of the town of Central Covington runs with the center of Willow street from east to west in the square improved; and that the city had, under section 8706 of the Kentucky Statutes, no power to assess more than one-half of the cost of improving the street upon an abutting property holder. The city also answered, denying any liability and claiming that the property of the defendant, Busse, was liable for the cost of the improvement.

The trial judge found the charge of fraud was not sustained by the proof, but that only the south half of Willow street was located in the town of

the town and within the limits of the city of Covington; that the board of trustees could only assess one-half the cost of the improvement of the street upon the abutting property holders on the south side thereof; that as the assessment of the cost against them was for the entire cost thereof, and the statute did not authorize an apportionment thereof by the court; that plaintiff's petition as against Busse should be dismissed, but he gave a judgment against the town of Central Covington for the amount claimed. From this judgment both the town and Dressman have appealed.

The record discloses that the boundary line between the city of Covington and the town of Central Covington is the center line of Willow street; and that consequently only the south half of willow street is within the corporate limits of the town. On this account the board of trustees of Central Covington had no authority to require the improvement of the north half of Willow street, or to levy a special tax upon the abutting property holders on that side for the purpose; but as only the south side of this street was required to be improved by the ordinance and only the cost of improving this half was actually assessed against the abutting property, we are unable to perceive any legal ground for releasing the abutting property holders from the payment of the cost thereof. When the other part of the street is improved it will have to be paid for by the abutting property holders on the north side. Section 3706 of the Kentucky Statutes, which is a section in the charters of towns of the sixth class, authorizes the board of trustees to improve the street, as required by the ordinance in this case at the exclusive cost of the owners of lots abutting upon the proposed improvement, to be equally apportioned among them.

For reasons indicated so much of the judgment as denied to the appellant, Dressman, a lien upon the abutting lots of Henry Busse is reversed and cause remanded, with instructions to enter a judgment subjecting the lots owned by him to the payment of the sums assessed against them, and the judgment against the town of Central Covington is also reversed and cause remanded, with instructions to set this judgment aside, and for other proceedings not inconsistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. BOARD.

(Filed April 21, 1904—Not to be reported.)

1. Passenger on freight train attending on stock—Thrown from car by trainman—Somnambulism—The injury to plaintiff having been received between Colesburg and the tunnel, and as there is no testimony that the train stopped between these points, there can be no escape from the conclusion that the plaintiff was thrown from the car in which he was riding, by some of the trainmen, or that while in a state of somnambulism or noctambulism he himself untied the car door and fell out of the car.

2. Instructions—There is no proof upon which to hypothecate an instruction given to the jury authorizing a recovery in the event they believed the plaintiff was injured by being thrown from the train by other person than defendants' agents or servants in charge of the train, or that they negligently permitted any other person to do so, and this instruction was prejudicial to appellant. The instruction should have been, that unless they

believed from the evidence that the defendant's employes, or some of them in charge of the freight train, threw the plaintiff off that they should find for the defendant.

J. A. Mitchell and Ben D. Warfield for appellant.

B. F. Proctor and R. L. Greens for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

The Louisville & Nashville R. R. Co. appeals from a judgment in favor of the appellee, Lem Board, for personal injuries alleged to have been received by him at the hands of their servants, whilst a passenger on one of their freight trains on the 29th of September, 1901. He alleges in his petition, that whilst such passenger "the defendant, its agents and servants in charge of said train did, with gross negligence, throw him from its car whilst the train was in motion, or did permit other person, to him unknown, to do so;" that one of these statements of fact is true, but that he did not know which. The defendant, in their answer, admit that the plaintiff was riding in one of their freight cars as an attendant in charge of live stock belonging to E. R. Bagby, which were being shipped from Louisville to Bowling Green about the time charged, but deny that he was, with gross negligence, or at all, throw from such car, while the train was in motion, or at all, by its agent or servants; or that they permitted him to be so thrown.

In a second paragraph they plead contributory negligence. The plaintiff testified that on the 29th of September, 1901, he left the city of Louisville on one of appellant's freight trains as an attendant in charge of seven head of cattle and a horse belonging to E. R. Bagby, of Bowling Green, after 1 o'clock at night; that he was awake until he arrived at Colesburg, the last station before the big tunnel; that after leaving this station he and another man named Taylor took off their coats and shoes, made down their pallet, pulled the door to and tied it with a rope on the inside; that he laid down and went to sleep, leaving a lantern burning in the car; that shortly after the train had gotten through the tunnel and into the cut on the south side, he was awakened by two men dragging him from the car by his legs; that he did not see either of them after he fell off, and could not tell whether they were white or black or whether they were railroad men or not; that he walked to the tunnel hill station, and informed the telegraph operator what had occurred, who telegraphed to the operator at Elizabethtown, and requested him to get his coat, hat and boots off the train, and send them to him, which he did, and that he went on to Bowling Green in a passenger train the next day. The statements of the witness as to tying the car door and going to sleep are corroborated by the witness, Taylor. The railroad company introduced as witnesses the conductor and three brakemen in charge of this freight train, each of whom testified to the presence of the plaintiff on the train, and that they did not know that he had gotten off until the receipt by the conductor of the telegram from the operator at the tunnel hill station. They all emphatically deny having thrown him off or that there was any other persons on the train than the regular crew thereof, who could have done so.

One of them testifies that it was impossible for the plaintiff to have been

on the train. As there is no testimony that the train stopped between Colesburg and the point where the accident occurred, we think there can be no escape from the conclusion that the plaintiff was thrown from the car by some of the agents or servants of the railroad company in charge thereof, or that while in a condition of somnambulism or noctambulism he himself untied the car door and walked or fell out of the car.

There is no proof on which to hypothecate the second instruction given to the jury authorizing a recovery, in the event that they believed that the plaintiff was injured by being thrown from the train by other person than defendant's agents or servants in charge thereof, or that they negligently permitted any other person to do so. We think this instruction was erroneous and prejudicial to the substantial rights of the defendant and the jury should have been instructed on this point that unless they believed from the evidence that the defendant's employes or some of them in charge of the freight train threw the plaintiff off that they should find for the defendant.

For these reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CHAPMAN, &c. v. HALEY.

(Filed April 21, 1904.)

1. **Illegal contract**—Money furnished to buy counterfeit money—Appellee gave George Chapman \$300 in money upon a promise by C. to sell him \$3,000 in "good" money which he was to bring to him in a few minutes, but did not deliver, the appellee evidently understanding he was purchasing counterfeit money. Held—The contract was void and appellee can not recover the money paid by him in pursuance of this criminal conspiracy.

2. **Appeals**—Jurisdiction of Court of Appeals—Upon a trial in the lower court to set aside a deed made to the wife of C. on the ground that the land was paid for by the money of appellee which was fraudulently obtained by C., the lower court adjudged the deed void and gave a personal judgment against C. for \$175. Held—That the judgment setting aside the deed be reversed and the court would reverse the personal judgment against C., but under the authority of the case of Rhodes v. Frankfort Chair Co., decided March 19, 1904, the appeal being for \$175, must be dismissed for want of jurisdiction.

W. R. Ramsey and E. H. Johnson for appellants.

T. J. Coyle for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee to recover of appellant, George Chapman, the sum of \$300, alleged to have been given him by appellee to be invested in some manner, not stated in the petition, and which he had fraudulently converted to his own use, and failed and refused to pay over or return to appellee. As an ancillary remedy, an attachment was sued out and levied upon a small tract of land situated in Laurel county, Kentucky, the title of which was in Gertie Chapman, the wife of George Chapman.

The wife was made a defendant, and the allegation made against her that the land was purchased with the money of which appellee had been defrauded, and the prayer was made that the conveyance to the wife should be cancelled the land sold, and the proceeds applied to the repayment of appellee's debt.

Separate answers were filed by the husband and wife, placing in issue all of the material allegations of the petition. A judgment was rendered by the chancellor awarding a personal judgment against George Chapman for \$175, sustaining the attachment levied upon the land, cancelling the conveyance to the wife, and subjecting it to the payment of appellees' debt. From this judgment both husband and wife have appealed.

Appellee's evidence revealed the following state of facts upon which he predicated his right to the judgment he obtained. About five years before the institution of this action, appellant, who lived in Laurel county, came to the home of appellee, in Madison county, and there proposed to him that if he would meet him in Cincinnati, O., he would sell to him \$3,000 of "good" money for the sum of \$300. This proposition was accepted by appellee, who, not having the \$300, took two of his neighbors into his golden venture, each of whom contributed \$89.50. In pursuance of this arrangement, appellee met appellant in Cincinnati, in a small room, at night, and there turned over to him the sum of \$300, relying upon the word of the latter to return in fifteen or twenty minutes with the promised \$3,000 of "good" money in exchange for his \$300. To his great surprise, appellant failed to return, and appellee neither saw nor heard of him again, until just prior to the institution of this action; that appellee fully understood that, under the contract, he was to purchase counterfeit money from appellant can not be doubted. The following excerpts from his evidence, as shown by the bill of exceptions, will fully illustrate what he knew of the moral quality of the transaction: "He (Chapman) told me he would give me \$3,000 for \$300, and showed me the kind of money. He told me there was a firm in Cincinnati that had this money, and he was one of the members. He was to get me \$3,000 for \$300. I gave him the \$300. He showed me new bills, one \$2 and a \$20, and I think a \$5 and a \$10, and he had plenty of it, apparently. The money I was to get was to be just like those he showed me. Silver certificates and not counterfeit. I gave him the \$300 in Cincinnati, I gave it to him in the night. No one was present at the time I gave it (the money) to him. We were in a little room where there was a light, and I counted the money out to Mr. Jones, as I thought then."

"Q. Was there any agreed time as to when he was to return with your \$3,000?"

"A. He told me to sit down here on the walls of the waterworks, and he would step right across the street here, and would get it and be back in twenty minutes, and he never returned."

In answer to a question regarding the character of the money, appellee stated that "he (Chapman) told me it was good money, and said there was only one trouble about this money, and that was, when deposited in bank, two numbers running of the same date might be detected in that way. He said that was the only trouble."

"Q. What did you understand there was wrong with that money that bankers might detect?"

"A. Just only what he said about the numbers. I did not doubt the money at all."

"Q. Did you really believe that you were going to get \$3,000 good and lawful money for \$300?"

"A. Yes, sir."

It is unnecessary to say that this conspiracy between these two men to purchase counterfeit money constituted an illegal contract, and was void.

The possession of counterfeit money for the purpose of circulation constitutes a crime both under the Federal and State Statutes. The question, as to whether or not appellee, who was equally guilty with appellant, can recover the money paid by him in pursuance of this criminal conspiracy is the first question for adjudication.

In the case of *Kimbrough v. Lane*, 11 Bush, 556, the contract was for the payment of \$3,000 to secure the dismissal of an indictment against Lane for a felony. In affirming a judgment dismissing the petition in the action wherein it was sought to recover the \$3,000, this court said: "It is sufficient to say on this point that the rule of law inhibiting such contracts was not made for the benefit of the obligors. The courts will not enforce such contracts, because they are leveled at the safety and repose of society, and are calculated to shield the guilty from punishment and leave them free to prey upon the public. If money is paid upon such a contract, the courts will not aid in recovering it back; they will leave both parties in the exact position in which they have placed themselves."

In the case of *Gray v. Roberts*, 2 A. K. Marsh, 209, it is said: "If both parties are equally guilty of a breach of the law, a court of justice cannot interpose to aid in behalf of either; for it is a settled rule that in *pari delicto potior est conditio defendantis*." * * *

In the case of *Davezac v. Sellar*, 12 Ky. Law Rep., 599, the Superior Court, through Judge Barbour, said: "But aside from the question of mistake, we are of the opinion that where property is sold at a judicial sale, and agreement by the purchaser to give one an interest in it, or some benefit if he will not object to the confirmation of the sale, is void as against public policy. The effect of it is to prevent fair competition and to sacrifice the property of the debtor. As the money sought to be recovered in this case was voluntarily paid, under such an agreement, it can not be recovered back."

In the case of *Smith v. Richmond*, 24 Ky. Law Rep., 1117, it appeared that the plaintiff was running a lottery office in Cincinnati, O., and that to unlawfully obtain immunity at the hands of the officers of the law, he paid Richmond, from time to time during a period of seven years, various sums aggregating \$16,075. These sums were pocketed by Richmond, and not paid over to the police authorities, as agreed. In affirming a judgment dismissing the petition seeking a recovery of the money so paid, this court said: "To allow the appellant to recover in this case would be in effect saying to all parties that you can go on with reasonable safety, furnish money to a person for illegal and criminal purposes, and after you have derived the benefit therefrom, sue the so-called agent and recover back the money, unless he, perchance, was able to prove to the satisfaction of the court that he, in like manner, had paid over the money for the said unlawful purpose. As

before stated, we do not think that Richmond was the agent of plaintiff in the legal sense of agency, but was simply one of the partners in crime; and we know of no court that has ever sustained a suit of one partner for an accounting of the money invested in an unlawful purpose, especially if such purpose was to violate the criminal laws of a State and shield offenders from punishment or corrupt public officers."

In the case of *Central Trust and Safe Deposit Co. v. Respass*, 23 Ky. Law Rep., 1901, Respass and Sharp were partners in "book making," which was an arrangement by which the partners carried on a betting business on horse races, and they also owned, in partnership, a racing stable. Sharp died suddenly, having in his possession at the time \$4,734 of the firm's money, which had not been divided at the time of his death. The trust company qualified as his executor, and Respass brought a suit against it for a division of the money constituting the "bank role." In reversing the judgment of the lower court, this court, through Judge DuRelle, delivered an opinion reviewing the authorities on the subject in hand, and fully sustaining the doctrine of the cases hereinbefore recited, and, among the cases reviewed, is one peculiarly analagous to that at bar, of which it was thus said: "One of the most interesting cases upon this subject is that of *Everett v. Williams*, the celebrated highwaymen's case, an account of which is given in 9 L. Q. R., 197. That was a bill for an accounting of a partnership business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. The bill set up the partnership between defendant and plaintiff, who was 'skilled in dealing in several sorts of commodities;' that they 'proceeded jointly in the said dealing with good success on Houndslow Heath, where they dealt with a gentleman for a gold watch;' that defendant informed plaintiff that Finchley 'was a good and convenient place to deal in,' such commodities being 'very plenty' there, and if they were to deal there 'it would be almost all gain to them;' that they accordingly 'dealt with several gentlemen for divers watches, rings, swords, canes, hats, clocks, horses, bridles, saddles and other things, to the value of 200£ and upwards;' that a gentleman at Black Heath had several articles which defendant thought 'might be had for little or no money in case they could prevail on the said gentleman to part with the said things;' and that 'after some small discourse with the said gentleman said things were dealt for at a very cheap rate.' The dealings were alleged to have amounted to 2,000£ and upwards. This case, while interesting from the views it gives of the audacity of the parties and their solicitors, sheds little light upon the legal question involved, for the bill was condemned for scandal and impertinence. The solicitors were taken into custody and 'fyned' 50£ each for 'reflecting upon the honor and dignity of this court;' the counsel whose name was signed to the bill was required to pay the cost, and both the litigants were subsequently hanged at Tyburn and Maldstone, respectively, while one of the solicitors was transported."

As appellant does not seem to require the supervising care of a committee to conduct his case, his naive declaration that he believed he was to get \$3,000 "in good money" for \$300 in old, worn government bills, may be regarded as apocryphal; although we can not but sympathize with the pleasing simplicity with which he ignores the patent fact that the goodness

of the "new silver certificates," barring the peccadillo as to the "numbers," constitute their chief bane, and affords a constant ground for the watchful anxiety on the part of the government detectives; and the same may be said of the untutored faith with which he watched in vain for the promised return of his cotenant in crime. Taken as a whole, we do not believe the books disclose a parallel in audacity to the case at bar, saving always the history of the dark lantern firm of Houndslow Heath detailed above; that a like judgment did not overtake parties litigant here as dissolved the ancient partnership, marks the lapse of our modern procedure from that vigorous integrity with which the ancient judges administered the common law in its primitive virtue.

In the Am. & Eng. Encycl. of Law, volume 15, page 1001, the rule is thus stated: "And so when money is paid on an illegal contract or personal property is transferred, the aid of the law can not, as a rule, be invoked for its recovery, although the other party refuses to perform his part of the contract."

Under the foregoing authority, we would reverse this judgment as a whole, but for the fact that the personal judgment against George Chapman is for only \$175, which is less than the jurisdictional sum provided by the statute regulating appeals to this court; under the authority of the case of Rhodes v. Frankfort Chair Co., decided March 17, 1904, ante —, his appeal must be dismissed for want of jurisdiction. The judgment as to Gertie Chapman is reversed, with directions to set aside the judgment, and dismiss the petition as to her.

REGISTER NEWSPAPER CO., &c. v. YEISER, MAYOR, &c.

(Filed April 21, 1904.)

Sale of city tax bills—Advertising sale—Mandamus—Official newspaper—Under sections 3186 and 3187, Kentucky Statutes, part of the charter of second class cities providing for the sale by the city treasurer of unpaid tax bills at public auction at the door of the courthouse or city building, notice of which sale shall be advertised by the city treasurer for at least two weeks in the city's official newspaper, the plaintiff, Register Newspaper Co., being admitted to be the city's official newspaper has the right by mandamus to require the city's officer to discharge the duties imposed upon him by the law.

Hendrick & Miller for appellants.

E. H. Puryear for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

Paducah is a city of the second class. Sections 3184, 3185, 3186 and 1887 of the Kentucky Statutes, are parts of the act for the government of cities of the second class.

Section 3184 fixes the dates when taxes are payable. Section 3185 directs that the assessment books shall be delivered by the auditor to the city clerk; that the city clerk shall make out the tax bills, deliver them to the auditor whose duty it is to deliver them to the city treasurer. Under the foregoing

sections the taxes are due, one-half the 1st of June and the other half the 1st of December in each year. Section 8186 provides that on the first Monday in the third calendar month after each half year's bill is due it shall be returned to the treasurer. Section 8187 provides that when such tax bills are returned to the treasurer it is his duty on the first Monday in the next month to sell at the courthouse door or the city building door by auction, to the highest and best bidder, for cash, each of the tax bills, unless they are in the meantime paid to the treasurer; that the list and notice shall be published for at least two weeks in the city's official paper. The owner of a lot has the right to redeem a tax bill within one year of the tax sale. The section then provides how the purchaser may enforce a tax bill.

It will be observed that it is the tax bill which is ordered sold, not the lot, except it may thereafter be sold for the tax bill, interest and penalty. It is expressly stated in the statute that after each one half year's tax bill is due and unpaid the treasurer shall return it to the auditor. It is equally clear from the language of the statute that "on the first Monday in the next month" the sale shall take place. The language employed shows that the general assembly intended that a one-half year tax bill should be sold. The evident intention was to enforce prompt payment of the taxes due the city.

The Register Newspaper Co., by the demurrer, is admitted to be the city's official paper. It being the duty of the city's officer to advertise the sale of property for taxes, the official paper has the right to require him by mandamus to discharge the duties imposed upon him by law.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. LAWSON.

(Filed April 21, 1904.)

Homocide—Dying declarations—Identity of accused—Controversy as to whether any declaration was made. question for the jury—On the trial of Nev. Lawson for the murder of Josh Faulkner, a witness was introduced for the Commonwealth who testified as follows: "John Faulkner was my nephew. He was shot about 2 o'clock at night and died the next night of the gunshot wound. About two hours after he was shot I went to his house where he was, and he said: 'I'm killed and can not recover;' I asked him who shot him and he said, 'Nev. Lawson shot me.'" The defense introduced two witnesses who testified that they were present; that deceased made no dying declaration, and was never able to speak after he was shot, whereupon the court excluded the testimony of the Commonwealth witness upon the idea that the preponderance of the evidence showed that no dying declaration was made. Held—It was error in the court to exclude the declaration of deceased, as testified to by the Commonwealth witness. The question as to whether or not deceased made the declaration as testified to, or whether it was true in whole or in part, or whether he made a declaration at all, were issues for the determination of the jury, and not for the court.

N. B. Hays, J. N. Sharp and Lorraine Mix for appellant.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Nev. Lawson, was indicted by the grand jury of Whitley county, charged with the willful murder of Josh Faulkner. The tragedy took place at a dance at the house of appellee. Upon the trial, appellee admitted that he had a difficulty with the deceased, but denied the shooting. The identity of the murderer was the real issue in the case. The Commonwealth introduced John W. Faulkner, an uncle of deceased, who testified as follows: "Josh Faulkner was my nephew; he was shot along about 2 o'clock at night and died the next night of the gunshot wound. About two hours after he was shot, I went to Nev. Lawson's house, where he was, and he said, 'I'm killed, and can not recover.' I asked him who shot him, and he said, 'Nev. Lawson shot me.'"

After the Commonwealth's evidence was in, the defense introduced two witnesses, who testified that they were present; that Josh Faulkner made no dying declaration, and was never able to speak after he was shot; whereupon the court, on motion of appellee, excluded the dying declaration as testified to by John W. Faulkner, on the ground that a preponderance of the evidence showed that the deceased had made no declaration. The trial resulted in a failure on the part of the jury to agree on a verdict; whereupon the case was re-assigned on the docket for trial, and the Commonwealth has appealed to this court under the provision of the Criminal Code, for an adjudication as to the validity of the order made by the trial judge, in excluding the evidence of the dying declaration of the decedent.

There can be no question that the testimony of John W. Faulkner fully established that condition of mind in the dying man which authorized the admission of his declaration as to the manner of his taking off. The rule is, that declarations must be made under the sanction of a full realization that the party stands in the presence of immediate dissolution. In the case of *Kehoe v. Commonwealth*, 85 Pa., 127, the testimony was as follows: "Bill, its all up with me; I will never get over it." The declarant died two days thereafter; the declaration was admitted.

We fully recognize that the question of the admission of such declarations is primarily for the determination of the court (*Greenleaf on Evidence*, section 160; *Roscoe's Criminal Evidence*, 8 edition, page 37; *Thompson v. State*, 31 Fla., 520, and *Mann v. People*, 9 Hun., 116); but this only relates to the question of the admissibility of the evidence; in other words, whether or not the condition of the decedent's mind, with reference to his death, is such as that the awfulness of his situation will supply the sanctity of an oath. After the testimony is in, the weight that is to be given to it, either in part or in whole, is for the determination of the jury. The defense may impeach the credibility of the declarant; may show that he made a different statement to that contained in the declaration, or that the declaration is untrue, in fact; but, after all, the question as to whether or not the declarant made the declaration as testified to, or whether it is true in whole or in part, or whether he made a declaration at all, are issues for the determination of the jury, and not for the court.

We are of opinion that the court erred in excluding the dying declaration of Josh Faulkner, as testified to by his uncle, John W. Faulkner, and we, therefore, certify our conclusion to the trial court for future guidance.

CITY OF LANCASTER v. WALTER.

(Filed April 21, 1904—Not to be reported.)

1. Damages—Contributory negligence—Pleading—In an action against a city for injuries resulting from falling over obstructions in a street, the fact that the petition did not state that plaintiff was unaware of the obstruction which caused the injury, did not render it defective. The absence of contributory negligence need not be stated in the petition, it being a plea that is due from the defendant.

2. Street improvement—Where an ordinance provides that certain improvement be made by abutting property owners, the performance of that work by the city upon the failure of the property owner to do it, does not render the city the agent of the property holder. The liability in a case of this kind for wrongful injury is as great as if the city had undertaken it in the first place without reference to any duty of the property holders.

G. B. Swinebroad, J. M. Rothwell and William Herndon for appellant.

R. H. Tomlinson and W. J. Williams for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Barker.

The appellee, M. C. Walter, and her husband, Dr. B. F. Walter, are owners of property in, and residents of Lancaster, Ky. Their home fronts on Hill street.

In March, 1903, the city was engaged in the construction of a sidewalk on the highway named, in front of appellee's home, and in order to place curbing along the proposed sidewalk, a ditch had been dug along its edge and the curb stones which were to be set therein, had been strung along in the street next to the pavement and in front of appellee's gate. These stones were four or five feet long, eighteen to twenty inches in width, and about six inches thick. In some instances, the end of one of the stones rested upon that of another.

On a night in March, 1903, between 10 and 11 o'clock, the husband of appellee was suddenly taken violently ill, and fell in a swoon; whereupon she, being much alarmed and excited, ran across the street to her nearest neighbor, William Ward, for help; having aroused Mr. Ward, he consented to go for a physician, and she then undertook to return across the street to her home. The night was dark, and it was raining hard at the time. Returning in haste, she tripped on and fell over one of the large curb stones lying in the street in front of her gate, and was thrown into the ditch, which had been excavated as before stated, receiving injuries of so serious and painful a nature as to confine her to her bed for three or four weeks, and which, she complains, has resulted in leaving her permanently lame; to recover indemnity for which, this action was instituted. The petition alleges, substantially, the foregoing facts, which were denied by the answer, which contains, also, a plea of contributory negligence, which, being controverted by reply, completed the issues.

The evidence shows, without contradiction, that the ditch, and large stones lying along the edge thereof, had remained in that condition for several weeks; that the work was being done under an ordinance of the city, and by its direction; that no safeguards or lights to warn persons using the

highway at night had ever been placed around these obstructions, and the condition of affairs complained of had not only remained for a sufficient length of time to put the city upon notice, but several members of the municipal government, who testified in the case, showed their possession of actual knowledge. The jury returned a verdict of \$1,000 in favor of appellee; of this, the municipality is now complaining.

It is urged that appellee's petition is fatally defective in failing to state that she was unaware of the obstruction in the highway, which caused her injury. This objection is not well taken. The absence of contributory negligence need not be alleged in the petition; it is a plea due from the defendant. (Sections 109 and 118, *Shearman and Redfield on the Law of Negligence*, 5 edition.)

It is also contended for appellant that by one of its ordinances, the improvement in question was ordered to be done by the abutting property holders, among whom was appellee, and that, upon their failure so to do, the city undertook to have the work done at their expense, and, therefore, the contractor was really the agent of the property holders. This position is unsound. While the local law required the property holders to make the improvement in question, the alternative was, upon default upon their part, the city would do the work at their expense. When the city, under this ordinance, undertook to have the improvement constructed, its liability for wrongful injury was just the same as if it had undertaken the work in the first place, without reference to any duty of the property holders.

The following language in the first instruction is complained of: "It was negligence on the part of the city of Lancaster to allow the curb stones to remain as they were, and as long as they did on Hill street, without any contrivance to serve as a notice and reminder to night pedestrians of the condition of the street."

There was no dispute as to the facts constituting the negligence of the municipality. Neither the existence of the obstruction by which appellee was injured, nor the fact that it had remained in the same condition several weeks without any sort of safeguard or light, was denied by appellant; and these facts were fully established by the evidence for appellee. Where the facts constituting negligence are undisputed, it becomes, then, a rule of law to be applied by the court. In the case of *Henderson Trust Co., Adm'r, &c. v. Stewart*, decided by this court, and reported in 48 L. R. A., 49, it is said: "The negligence or absence of care is always a question of fact for the jury when there is a reasonable doubt as to the facts or inferences to be drawn from them, but when the facts or evidence admitted are established by undisputed testimony, it is the duty of the court to declare the law applicable to them." (Citing *Field on Negligence*, section 519, and *Ashland Coal and Iron Co. v. Wallace*, 101 Ky., 687.)

While we do not think the evidence showed gross negligence on the part of the municipality in the matter complained of, the verdict of the jury, considering the extent of appellee's injury, is so clearly compensatory, that we are of opinion appellant was not injured by the erroneous instruction. The fact that appellee knew of the existence of the dangerous obstruction in the highway did not, under the circumstances of this case, show her guilty of contributory negligence in undertaking to pass over it in the manner in

which she did; the sudden, and apparently serious, illness of her husband, the immediate need for a physician, the great excitement and perturbation of mind incident to the calamity with which she was confronted, naturally rendered her forgetful of everything except the urgent mission upon which she was bent. It would have been strange, indeed, if this good wife had thought of herself for one moment in the presence of the urgent need of her husband for medical attention; that, under these distressing circumstances, she should have forgotten herself, should cause neither surprise nor condemnation. This court in the cases of *City of Louisville v. Brewer's Adm'r*, 24 Ky. Law Rep., 1671; *City of Maysville v. Guilfoyle*, 28 Ky. Law Rep., 48; *City of Madisonville v. Pemberton's Adm'r*, 24 Ky. Law Rep., 847, held that, although the injured parties knew of the existence of the obstructions in the highways by which they were injured, yet momentarily forgot them, they were not necessarily guilty of contributory negligence by reason of such mental aberration. The principles of law governing this branch of the case at bar are so fully illustrated in the cases cited as to make it unnecessary for us to further extend this opinion. The instructions of the court, except in the harmless instance mentioned, are unobjectionable.

The judgment is affirmed.

TANNER, &c. v. NICHOLS.

(Filed April 21, 1904—Not to be reported.)

Railroads—Subscription to capital stock—Action against subscribers to stock—In an action against subscribers to the capital stock of a railroad to recover a debt against the company after judgment against it and return of no property, the fact that appellants were elected directors of the company and acted as such, authorizing the survey of the right of way, they are estopped to raise the question that the road was not incorporated. By assuming to act they treated the company as incorporated, and the appellant having been employed by the surveyor who was employed by the directors to survey the right of way, may maintain an action for the recovery of the amount of the judgment which he recovered against the corporation.

R. E. Roberts and Fennell & Fennell for appellants.

Victor F. Bradley and James F. Askew for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this suit against appellants. He alleged in his petition that at the May term, 1900, of the Scott Circuit Court he recovered judgment against the Green River Valley R. R. Co. for \$233.33, with interest and costs, on which he had execution issued and returned no property found; that the capital stock of the railroad company is \$40,000, no part of which has been paid in; that the defendants, K. L. Tanner, subscribed and agreed to pay for ten shares of stock in the company of the value of \$100, E. J. Tanner for one share, Walter Dudderrar for one share, C. H. Williams for fifty shares; that none of them had paid any part of their subscription; that Williams is insolvent and was not to pay any money for his stock, but was to secure the right of way for the road, which he did; and that his judg-

ment was unpaid. He prayed judgment requiring the defendants to pay so much of their subscription as might be necessary to satisfy his debt. The defendants answered, alleging that C. H. Williams in the summer of 1899 was soliciting stock for a railroad company, the line of which was to run from McKinney, Ky., through Mount Salem to Nashville, Tenn., and to be known as the Green River Valley R. R. Co.; that Williams applied to them to take stock in the company, fraudulently representing to them that he had the money up to build the road, and that work would begin on it as soon as the right of way could be secured; that he represented to them that they would not have to pay any money on the shares subscribed by them until the road was completed from McKinney to Mount Salem; that relying on these representations they subscribed for the stock, but that the road was not built and the company was never organized; that the plaintiff, Nichols, also subscribed for one share of stock, agreeing to pay therefor in surveying the proposed line; that the writing showing the terms and conditions upon which they subscribed the stock was in possession of the plaintiff; and that by reason of the misrepresentations made to them by Williams and the failure of the company to build the road from McKinney to Mount Salem, they were absolved from liability. The allegations of the answer were denied, and on final hearing the court entered judgment in favor of the plaintiff.

It is insisted for the defendants that the company was never incorporated; and, therefore, it could maintain no action against them on their subscriptions; and that the plaintiff has no better right than the company itself would have. It is also insisted that the plaintiffs' subscriptions were conditional on the road's being completed from McKinney to Mt. Salem, and that as the condition was not complied with they are not liable.

It is shown by the evidence that the defendants were elected directors in the company and acted as such, authorizing Williams to have the right of way surveyed. They are, therefore, estopped to raise the question as to whether the company was incorporated. By assuming to act they treated the company as incorporated, and the plaintiff having been employed by Williams, they can not, when sued for his services, defend upon the idea that the company had not been incorporated or had not complied with certain provisions of the laws of this State before doing business in it.

The answer does not make the defense that the defendants' subscription was upon the condition that they were to pay nothing unless the road was completed from McKinney to Mt. Salem. It is only alleged that Williams so represented to them. But the nature of their obligation would depend upon the paper which they signed, and not upon the representations which Williams made to induce them to make the subscription; for the previous negotiation was urged in the writing. There is no plea that Williams knew any statement he made to be untrue, and the facts alleged are not sufficient to invalidate the subscription on account of fraud in its obtaining. Besides, the evidence strongly tends to show that it was not originally contemplated that the line of road would run through Mt. Salem.

Judgment affirmed.

PARKER, JONES & STEELE v. PARKER.

(Filed April 21, 1904—Not to be reported.)

1. Husband and wife—Validity of note—Where the wife lent a firm money which was used by it in the conduct of its business, he never having reduced it to possession, her right to assert a claim to it was not merged into that of the husband, and she may maintain an action for its recovery.

2. Same—A debt due the wife being in existence when the present married woman's act was passed, she is entitled to all the remedies for its enforcement she would have had if the debt had been contracted under the present law.

Sam C. Hardin for appellant.

E. H. Johnson for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

This action is based on a note for \$400, payable to the order of the appellee, Matilda Parker, which purports to have been signed by Parker, Jones & Steele, with J. T. Williams as surety. The firm was composed of Ed. Parker Evan Jones and S. G. Steele, who conducted a "Star Route" business as partners under the firm name above mentioned. Williams prevented a recovery against him by pleading the seven year statute of limitation, as he was only surety. The principal grounds relied upon by Parker, Jones & Steele are, first, a plea of non est factum; second, that Matilda Parker is the wife of Ed Parker, a member of the firm, and could not maintain the action; third, want of consideration.

The evidence tends to show that Miss Dora Farris conducted the business of the firm at their office in London, Ky. She made the deposits in the bank and drew the firm's checks thereon. The firm's name was signed to the note by Miss Farris. She was requested by Ed. Parker to borrow the money from his wife for the firm, which she did, and signed the firm's name to the note. The money was used in the business and for its benefit. As a member of the firm, Ed. Parker had the right to borrow money to be used for the benefit of the firm. Consequently he had the right to direct an agent of the firm to do so for it. The plea of non est factum was not sustained.

Ed. Parker did not reduce his wife's money to his possession. He did not borrow the money individually. It was borrowed for the firm and used for its benefit. He not having reduced his wife's money to his possession, her right to assert claim to it was not merged into that of her husband, although the money was loaned to the firm before the passage of the present "married woman's act."

It is suggested that she can not maintain this action, because her husband is a party to it. Under the present law a wife may sue a husband. While this law does not give a wife new rights, so as to render valid a contract which was invalid under the former law, still it would afford her a new remedy for the enforcement of a right which previously existed. This debt being in existence when the present "married woman's act" was passed, she is entitled to all the remedies for its enforcement she would have had if the debt had been contracted under the present law. There was a consideration

to uphold the note, because the firm received and used the money for which it was executed.

The judgment is affirmed.

ZOOK, &c. v. ILLINOIS CENTRAL R. R. CO.

(Filed April 21, 1904—Not to be reported.)

Pleading—In an action against a railroad for the destruction of a crossing and its refusal to restore it, it was not necessary to aver that plaintiffs were in possession of the land, because they averred that they owned it, and the action may be maintained for injury to it without being in possession of it.

Wickliffe & Wiley for appellants.

J. M. Dickinson, Pirtle & Trabue, Robbins, Thomas & Bridgewater for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Paynter.

This case went off on demurrer. The petition as amended is very inartificially drawn, but the substance of the averments which it contains is to the following effect; that the plaintiffs owned a farm through which appellee's road was constructed; that when the road was constructed a crossing was made at a point on their farm by the appellee's lessor; that it was maintained and used by the plaintiffs and their vendors continuously and adversely and under a claim of right for more than fifteen years before the destruction of it by the appellee; that it was an easement which they had acquired by contract and the adverse use mentioned; that the defendant had destroyed the crossing, refused to restore it, thus forcing the plaintiffs to travel two miles to reach that part of the farm on the opposite side of the railroad. The criticisms of the petition are hypercritical. It is urged that the averments of the petition did not show that the plaintiffs have a personal interest in the land. They aver that it is their farm which is equivalent to saying they own the land.

They showed that they had an interest in the crossing because it was an easement, appurtenant to their freehold and an invasion or destruction of their right therein could be the foundation of an action, as could be an injury to any part of their freehold. It is urged that appellant's claim of right to the crossing by the continued use for more than fifteen years is inconsistent with their claims for damages as a result of their being kept out of possession; and that it is not a good plea as a claim of prescriptive right, because it is a statement of evidence, not a statement of substantive right. The plaintiffs recognized that the appellee had a perpetual right of way, and that it was necessary to show that they had acquired a right to a passway over its right of way. They, therefore, averred that they had continuously used the crossing or passway under a claim of right for more than fifteen years. This is a statement of fact, just like it would have been to have averred that the defendant, by deed, had granted to them the right to use the passway, or that under the statute it was the duty of the defendant to maintain the crossing for this use. An easement can be acquired by the continued adverse use under a claim of right for fifteen years, as the right of entry

may be tolled by the continued actual adverse possession of land. While plaintiffs averred that originally there was a contract under which the crossing was constructed, still it was not necessary in order to state a cause of action, that its terms should have been stated, because their right to the easement was sufficiently stated by the averments that they owned the land and in connection therewith had used the crossing under a claim of right. The averments summarized are to the effect that they owned the land and had acquired the right to enjoy the crossing in question. It was not necessary to aver a contract and its breach, because the action is not founded upon contract.

They averred that they had rights in real estate which had been invaded and sought to recover damages for the injuries which had been inflicted thereby. It was not necessary to aver that they were in the possession of the land, because they had averred that they owned it and they could maintain an action for injury thereto without being in possession of it. We are of the opinion that the petition stated a cause of action.

The judgment is reversed for proceedings consistent with this opinion.

McMAKIN v. COMMONWEALTH.

(Filed April 22, 1904—Not to be reported.)

Taxation—Place of residence—In an action by an auditor's agent for the recovery of taxes, where the only issue was as to the place of residence of the owner of property sought to be assessed for taxation, where it appeared that the person was a nonresident of this State during the period for which the tax was sought to be collected, it was error for the trial court to adjudge that such person was a resident of this State and render judgment for the recovery of the taxes.

Morgan Yewell for appellant.

J. Smith Barlow for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by the auditors' agent for Nelson county against appellant, Mollie V. McMakin, by which he sought to recover a judgment against her for taxes upon about \$8,000 worth of personal property. It was alleged that she omitted to list with the assessor for the years beginning with 1898 up to and including 1901, and this property was not assessed in any of these years and that she failed to pay any taxes thereon. By her answer she in effect admits the ownership of this property for the years 1898, 1894 and 1895, but alleged that for the other years named she was not the owner thereof; that her former husband, one Hardesty, devised this property to her with the provisions that if she remarried the property was to go to her children by him, and that she did marry McMakin in the year 1896, and that after that date the property belonged to her Hardesty children. She denied that she was a resident of Nelson county, and alleged that she was a resident of Colorado during the years 1893, 1894 and 1895.

A copy of the will of Hardesty was filed as evidence, and it appears from

that and other evidence that she was not the owner of this property after her marriage with McMakin. The only issue involved is as to whether or not appellant was a resident and domiciled in Nelson county, Ky., on the 15th of September of each of the years 1893, 1894 and 1895. The lower court on the trial determined that she was, and from this judgment she has appealed. Appellant and four or five witnesses testify that during these years she was a resident and domiciled in the State of Colorado, where her sons were engaged in business; that she was temporarily in Nelson county during portions of these years nursing and giving attention to her sick mother. We have carefully examined the record and have been unable to find any evidence contradicting appellant's version of this matter. There was no competent proof that she ever at any time resided in Nelson county before her marriage with McMakin in the year 1896.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

CITY OF LOUISVILLE v. WERNE, &c.

(Filed April 21, 1904—Not to be reported.)

1. Taxation—House of worship—Lot adjoining and used in connection therewith—Under constitution, section 170, exempting from taxation "places actually used for religious worship with the grounds attached thereto, and used and appurtenant to the house of worship not exceeding one-half acre in cities, and two acres in the country," a lot 100 feet wide by 200 feet deep on which a house of worship was erected in March, 1891, is exempt from taxation.

2. Taxes prior to the adoption of the Constitution of 1891—Hewitt Act of 1886—Under the Hewitt Act of 1886, exempting from taxation "churches and all property devoted to charitable purposes," a lot in a city leased to a church in 1890 for the purposes of a mission church, is exempt from taxation for the year 1890, although the church thereon was not erected until 1891.

3. Title to the lot—The fact that the church has possession and use of the church building and lot, exempts it from taxation, although the legal title is in the lessor.

Henry L. Stone for appellant.

Isaac T. Woodson for appellee.

Appeal from Jefferson Chancery Court, First Division.

Opinion of the court by Judge Hobson.

The city of Louisville filed these actions to enforce its tax lien on a lot of ground on Third street for the years 1891 to 1898, inclusive, which it is claimed by defendants, was exempt from taxation. The facts as to the matter are as follows: In the year 1890 the Walnut Street Baptist Church desired to establish a mission out on Third street, and with a view to further the cause Joseph Werne, who was a Baptist, and owned the lot in controversy, at the request of one of those interested in the movement on March 31, 1890, leased the lot to the trustees of the Walnut Street Baptist Church for a term of twenty years, without rent, for the purpose of a mission church, it being stipulated in the lease that the lessees would pay any taxes

chargeable to the property. The trustees took possession of the lot, which had no buildings on it, and in May or June, 1891, moved a house upon it and began holding services in it. They began the construction of a church building, which was completed in August, 1891, and after that the regular services were held in it, including a Sunday-school and the usual services on Sunday and prayer meetings on Wednesday evenings. From that time to this these have been continual. In about three years the congregation had become sufficiently strong to form a separate organization; the Third Avenue Baptist Church was then formed out of it, and the lease was assigned to it by the trustees of the Walnut Street Church. The present Constitution of Kentucky took effect on September 21, 1891. The question of exemption since then depends upon its provisions. By section 170, among other things, the following property is exempted from taxation: "Places actually used for religious worship with the grounds attached thereto and used and appurtenant to the house of worship not exceeding one-half acre in cities or towns and not exceeding two acres in the country."

The lot is 100 feet wide and 200 feet deep. It is all used and appurtenant to the house of worship. The makers of the Constitution, when they limited the exemption to one-half acre in cities or towns, had in view that light and air are necessary as well as room for out-buildings, and that the exemption should not be restricted simply to the ground the church stands on. It is insisted for the city that as there is forty-three feet of the lot on the south side unoccupied except by two coal sheds, this much at least should be taxed, but the whole lot is appurtenant to the house of worship and used with it by the congregation. It no doubt contributes much to their comfortable enjoyment of the premises, and we see no reason for distinguishing this forty-three feet from the remainder of the lot.

It is also earnestly insisted for the city that as the congregation does not own the lot, but simply leases it for twenty years, it may be taxed. But the Constitution does not make the exemption depend upon the title. Its language is, "Places actually used for religious worship with the grounds attached thereto and used and appurtenant to the house of worship." It is the use of the property and not the ownership which determines the question of exemption. (*Broadway Christian Church v. Commonwealth*, 28 Ky. Law Rep., 1895.) To hold that the congregation must be the absolute owner of the property used exclusively for religious worship in order to create the exemption would be to inject words into the Constitution and to narrow the exemption which it expressly makes. (*Scott v. Society of Russian Israelites*, 81 N. W., 624; *Gerke v. Purcell*, 25 Ohio St., 242, and cases cited.) The cases relied on for the city as sustaining the contrary rule seem to be based on provisions materially different from that quoted. It is shown that *Werne* gets no rent from the property, and it, therefore, is not held for corporate or private profit nor used nor employed for gain by any person or corporation. We see no reason, therefore, under the letter or the spirit or the purpose of the constitutional provision for denying the exemption claimed, and conclude that the circuit court properly held the lot exempt since the adoption of the present Constitution.

It remains to consider whether it was exempt under the previous statute. By the act of 1886, known as the Hewitt Act, the following property was

exempt: "Public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries and colleges and all other funds devoted to charitable purposes and church parsonages, public cemeteries, except those owned by joint stock companies or associations which declare a dividend, provided that nothing herein shall be construed as exempting any property which is used or employed for gain of any person." * * *

The property was not used for gain of any person, after the lease was made in March, 1890. The taxes for the year 1892 were assessed as of September 1, 1891, which was before the present Constitution took effect. The taxes for the year 1892 are, therefore, governed by the statute quoted. The new church was begun in March, 1891, and the services were begun in it in August. On September 1, it was, therefore, church property, and exempt as a church. The circuit court properly so held.

As to the preceding year a more difficult question is presented, as the taxes for the year 1891 were assessed as of September 1, 1890, and at that time there was no building on the lot; but the church trustees took charge of it when the lease was made and held it from that time forward for the purposes for which it was granted. They had no right to use it for any other purpose than a mission church. If they had erected a house on it for other purposes and rented it out for gain, it would have been a palpable violation of the trust confided in them, for which Werne might have had remedy by action. The establishment of a mission for the preaching of the gospel was a charitable purpose within the meaning of the statute. The word "funds" is used in the statute in the sense of capital. It will be observed that the language is churches and all property of seminaries, asylums, hospitals, infirmaries and colleges, and all other funds devoted to charitable purposes. Under the previous statute which had for many years existed the lot would undoubtedly have been exempt, and we do not think there is enough in this act to change the rule as to a lot like this which was clearly devoted to charitable purposes. In construing the statute all its terms must be read together, and some regard must be had to the settled legislative policy of the State, which had then so long been followed. When the statute is thus read, taking it all together, we conclude that its terms sufficiently evidence a purpose to exempt from taxation, property which, like this, was devoted to religious uses, although the trustees had been unable to begin the erection of a church building before September 1.

On the original appeal the judgment is affirmed. On the cross appeal the judgment adjudging a lien upon the property for the year 1891 is reversed and the cause is remanded for a judgment dismissing the petition.

TURNER'S TRUSTEE, &c. v. WASHBURN, &c.

(Filed April 22, 1904—Not to be reported.)

1. Vendor and purchaser—Fraud in procuring deed—Ignorance of vendor—Superior knowledge of vendee—Inadequacy of consideration—Legal fraud—Three tracts of land were devised by Oscar Turner, Sr., to his son, Henry, for life, with remainder in two of the tracts to all of Henry's children, and remainder in one tract to Henry's son, Oscar. Henry died in February, 1896, leaving four children. Oscar died in August, 1896, at the age of five.

years. In August, 1901, Henry's widow, who was then the wife of Thomas Williams, sold and conveyed to Henry's brother, Oscar Turner, who was the executor of the will of Oscar Turner, Sr., all her present and future interest in all of said land, at the price of \$3,000, in which conveyance her husband joined. Her interest was then worth from \$10,000 to \$15,000. This conveyance was made by her under the belief that she was selling her life interest in two of the tracts and not the interest she had inherited from her son, Oscar. Held—That while there may have been no actual fraud in the purchase, yet she having sold under a misapprehension of her interest, and the purchaser being a lawyer and fully advised thereof, the sale was inequitable and unjust and amounts to a fraud in law.

2. Evidence—Competency of divorced husband to testify for wife—After said conveyance, the appellee obtained a divorce from her second husband, Williams, and married her present husband, D. A. Washburn. On the trial of this case her second husband, Williams, from whom she had been divorced, testified as a witness for her as to conversations he had with her vendee, Oscar Turner, concerning this transaction, the said Oscar having died after obtaining said deed. Held—That appellee not being his wife at the time he testified, he was a competent witness for her as to conversations and statements made to the witness by vendee, not in her presence.

3. Decree of rescission—Purchase money restored with interest and lien on the land—A judgment setting aside said deed and giving Oscar Turner's representative a lien on the land for the repayment of the purchase money, with interest, is affirmed.

Quigley & Mocquot for appellants.

J. B. Wickliffe for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn.

Oscar Turner, Sr., departed this life about the year 1895, a resident of Jefferson county, Kentucky. He left a will which was duly probated in that county, by which he devised all of his property to his wife and three children. We refer only to the devises to his son, Henry, as a portion of these devises is the subject of this litigation. He devised 548 acres of land on Clark's river in McCracken county, Kentucky, to his son, Henry, for life, with remainder to Henry's son, Oscar. And 592 $\frac{3}{4}$ acres, that being one-third of testators' home farm in Ballard county, Kentucky, which was also devised to him for life, with remainder to all the children of Henry Turner. Testator also devised to his son, Henry, for life one-half of a tract of land, situated in Ballard county, on the Ohio river, and near the mouth of Garr's creek, and at his death to go to all the children of Henry Turner. Henry Turner died in February, 1896, and left Rebecca F. Turner, now Washburn, appellee, and four and only four children, Oscar being one of them, and he died in August, 1896, at the age of five years.

On August 21, 1901, Oscar Turner, her brother-in-law, who was the executor of the will of Oscar Turner, Sr., obtained a conveyance from her and her then husband, Thomas Williams, which conveyance is as follows: "This deed between Rebecca F. Williams and Thomas Williams of the first part and Oscar Turner, of Jefferson county, of the second part, Witnesseth: That in consideration of \$3,000 cash in hand paid and other good and valuable considerations, the receipt of all of which are hereby acknowledged, the

parties of the first part do hereby convey to the parties of the second part in fee simple the following described property, namely: All the right, title or interest which they or either of them now have or may hereafter in any way acquired or become entitled to in the estate of any kind left by Oscar Turner, Sr., H. L. Turner or Oscar Turner, all deceased, to have and to hold the same with covenant of general warranty, and said parties of the first part further covenant and warrant that they are seized of an indefeasible estate of fee simple in the property hereby conveyed, that they have good right and full power to convey the same, and that it is free from any incumbrance."

Appellee instituted this action to have this conveyance set aside, alleging that it was obtained by fraud; that she did not understand the effect of the conveyance at the time she executed it; that she had full and complete confidence in the vendee, her brother-in-law, who led her to believe that the conveyance only included her interests in these estates and property until her youngest child by Turner should arrive at the age of twenty-one years; that she signed this writing under the belief that this was the extent of the conveyance, and that the only consideration received was the \$3,000 in cash, and the property conveyed therein at the date of the conveyance was reasonably worth \$15,000 or more. Her brother-in-law, Oscar Turner, died the year following the date of the deed. His representatives answered appellee's petition, traversing the allegations thereof. The proof was heard and the lower court adjudged that the deed was obtained by fraud and set it aside and gave Oscar Turner's representatives a lien upon this real estate for the repayment of the \$3,000, with its interest. From that judgment appellants have appealed.

The lower court properly refused to allow the deposition of appellee to be read as evidence, for the reason that under the Code she could not testify in her own interest concerning a transaction had with a person who was dead at the time she gave her deposition. The appellant claims that the lower court erred in allowing the deposition of Thomas Williams to be read as evidence on the trial of this action. Williams was the husband of appellee at the time this conveyance was made, but afterwards she obtained a divorce from him. At the time he gave his deposition she was not his wife, but the wife of appellee D. A. Washburn. The witness did not undertake, in his deposition, to testify concerning any communications between himself and appellee during their marriage relations. At the time he testified, and at all times since the divorce was granted, he had no interest whatever in the result of the matter in litigation. His whole testimony related to conversations and communications between himself and Oscar Turner, the vendee in the conveyance. (Section 606 of the Code of Practice.) In our opinion, the court did not err in permitting this deposition to be read as evidence. The testimony, as produced by appellees, showed that the land that descended to appellee upon the death of her infant son, Oscar, at the time of this conveyance was reasonably worth more than \$12,000. The proof introduced by appellants showed that it was worth something over \$6,000 at that time. The appellants refer to the case of *Banta's Exors v. Terry, &c.* 2 Ky. Law Rep., 202, and claim under that decision, there being a doubt concerning the title to the land, the inadequacy of price should not be sufficient to au-

authorize the court to set aside the conveyance. The case before us is unlike that. In that case there was a doubt as to the title, and in fact Bell actually owned the life estate by the curtesy in the land. In the case at bar the appellee owned the fee-simple title unincumbered in any way to the 548 acres of land in McCracken county, and a like title to one undivided fourth in the two surveys of land devised by Oscar Turner, Sr., to his son, Henry, situated in Ballard county.

The child, Oscar, the son of appellee, and Henry Turner, derived this land not from either of his parents, but from his grandparent, Oscar Turner, Sr. In such a case, when an infant dies without issue, leaving lands, they descend as if he were an adult. Section 1401 of the Kentucky Statutes, which provides that if an infant dies without issue having title to land derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred, etc., does not apply to land derived from a grandparent. (*Cooksey v. Hill*, 20 Ky. Law Rep., 1878.) This opinion was rendered about two years before this conveyance was made, and the proof shows that Oscar Turner, vendee, was a lawyer, and it is reasonable to suppose that he had no doubt as to appellee's title to these lands at the time he made the trade for them.

Thomas Williams testified that Oscar Turner wrote him a letter to meet him upon the old Oscar Turner farm in Ballard county, in the letter fixing the day. They met at the appointed time, and at that meeting Turner said to him that lawyers told him that appellee had an interest in this land, but that he did not believe she had any, but to avoid any trouble he was willing to pay her \$2,500 for her interest, which would be more than the rent would amount to by the time her youngest child arrived at the age of twenty-one years, and asked the witness to explain the matter to his wife, and if they would sign the deed he would give the witness \$1,000 in money. Turner charged Williams to keep this matter a secret from his wife, the appellee. Afterwards the deed was executed.

F. L. Turner, a lawyer of Wickliffe, Ky., and a first cousin of Oscar Turner, testified that in a conversation with Oscar Turner at witness' house in Wickliffe in April or May, 1902, just prior to the time that Oscar Turner took a trip to Dallas, Tex., where he was stricken with a fatal illness, the following passed between them: "I told him that I had read the deed he had from Rebecca and was very much astonished as on its face it purported to convey both her present interest or any future interest she might inherit in any of the Turner lands, and for a consideration of only \$3,000; that she certainly did not understand what she was selling, that her property rights at the time of the deed was worth at least \$15,000, and that her inheritance might amount to many thousands; that after seeing the deed, I had asked her about the matter, and she said she had only sold her interest in the Ballard county land until her youngest Turner child became of age; that I told her that it included her fee-simple title to the Ballard county land, and also to the McCracken county land; that she then said she did not own the McCracken county land, that the McCracken county land was never mentioned, and that she was only selling her dower interest, as she called it, in the Ballard land until her son, Gardner, was twenty-one years old; that I told her she had misunderstood the terms of the deed on its face; that she asked me

what to do about the matter and I told her I would see Oscar and advise her later, which I did; to this statement made by me to Oscar he said, 'well, I intended to buy everything she had, and that is what I bought; that she would sell her property and spend the proceeds, and I knew that I would have to take care of her and the children, and I wanted to save the property to help support them. I did not tell her that she owned any land in McCracken county, nor how much nor what interest she owned in Ballard, he said as soon as she spent the money he paid her he would try and get her to go to Louisville where he could look after her and the children.' I then told him that I thought probably that that was the best, and I would assist him in getting her to go to Louisville by telling her to let the matter drop and go with him; I then advised her to do as Oscar wanted her to do; for he seemed willing and was amply able to take care of her and the children, and if this was his purpose, I believed he would carry it out, and that she could not afford to have a misunderstanding or falling out with the Turners in Louisville, for they were the only ones to help her. She promised me to accept his offer to go to Louisville, but married Washburn, and did not go."

Under the evidence in this case we are impressed with the belief that it was the intention of Oscar Turner to carry out his purpose as expressed by the witness, F. L. Turner, and that it was his purpose to save the estate for the benefit of appellee and her children, and to prevent its being wasted by her then husband, but unfortunately he died soon thereafter without effectuating his intent, and failed to express his purpose and intent with reference to this property in his will or by any writing. This theory, however, is not presented as a defense, the only defense being a denial of any wrong perpetrated upon the appellee. To uphold appellants' contention would result in allowing the heirs of Oscar Turner to retain property of the value of at least \$10,000 for the price of \$3,000, and which was obtained in the manner stated by the witness. This would be inequitable and unjust, and while it may not be actual fraud, it amounts to fraud in law. (14 Am. & Eng. Enc. of Law, 2 edition, 20, and Cabell, &c. v. Cabell's Adm'r, &c., 1 Met., 385.)

For these reasons the judgment of the lower court is affirmed.

IPSER v. ROSENBAUM.

(Filed April 22, 1904—Not to be reported.)

Adverse possession—This case was affirmed upon the evidence showing sixty or seventy years adverse possession of a strip of ground less than three inches in width.

W. T. Burch for appellant.

Kohn, Baird & Spindle and R. L. Greene for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First division.

Opinion of the court by Judge Nunn.

It appears from the record that appellant and appellee own adjoining lots in the city of Louisville, Ky., fronting on Market street. Upon these lots brick houses were erected sixty or seventy years ago. They were not erected

at the same time and did not have a common or partition wall, but the walls were nine inches thick and built so close that they appeared to an ordinary observer as one wall. A few years since, appellee had his old house torn down and a large brick building erected in its stead. Appellant brought this action, alleging that appellee erected his new building three inches over the line on her property, and asks that appellee be required to remove it and surrender to her this three inches of ground and \$300 in damages for its detention. Appellee denied the allegations of the petition and alleged that his new house occupied the ground that the old one occupied and no more, except it extended further back from the street, and that he and those under whom he claimed had owned and occupied this lot and house for seventy-five years or more with the usual and proper averments of the plea of the statutes of limitations.

The issues were completed, proof was heard and the court adjudged that appellant was not entitled to recover, and dismissed her petition, of which she complains. The only question involved was one of fact. Appellant introduced testimony tending to sustain her petition and to the effect that from the appearance of the walls, looking at them from the front and by measuring through a crack or hole from the inside of appellant's building, that appellee, to obtain the land of appellant, had cut or hewn off the side of her three-story brick building. Appellant, with her husband and several tenants, occupied her building during the time appellee's building was being erected, and it is strange that no one professed to see the cutting or chipping off of this brick wall, which must have necessarily been tedious. Her surveyors testified that, by actual measurements, appellee's house was erected over the line and upon appellant's lot to the extent of six-eighths of an inch. Appellee's old building was torn down and the new one erected by contract. These contractors and persons who labored for them testified that the new building was erected on the ground that the old one occupied except the new one was deeper or longer, and also testified that appellant's wall was not cut, chipped or disturbed in any way, and his surveyors testified that by actual measurements, appellant's wall was on the line and did not extend across it.

Wherefore, the judgment of the lower court is affirmed.

SEABORN v. COMMONWEALTH.

(Filed April 22, 1904—Not to be reported.)

1. Evidence—Character of deceased as a drinking man—On the trial of one indicted for murder, evidence that the deceased was a drinking man was incompetent.

2. Clothing of deceased—It was competent to introduce the clothing of the deceased, worn at the time he was shot, to show the location of the wounds on his body.

3. Conduct of brother of accused in keeping witnesses away from the trial—It was competent to ask the brother of the accused, who was a witness for him, whether he had contributed to the absence of two witnesses, who had testified for the Commonwealth on the examining trial, in order to show his interest and affect his credibility.

4. Statement of accused on examining trial—It was proper for the Com-

monwealth to ask accused if he had not voluntarily testified at his examining trial that he had shot and killed deceased.

5. Proof of other public offenses—It was not competent to ask the accused if he had not been indicted in Taylor county for a public offense, but it was competent for accused to state that he had left Taylor county to avoid indicting others.

T. J. Coyle for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Jacob Seaborn, and Hiram Dees were jointly indicted by the grand jury of Jackson county for the murder of Henry Peters. A separate trial was awarded to the appellant, Seaborn, who being put upon his trial before a jury was convicted of voluntary manslaughter and sentenced to confinement in the penitentiary for twenty-one years. A reversal is asked on the ground that the trial court erred to his prejudice during the progress of the trial in a number of instances in the admission of testimony over the objection of the appellant and in the exclusion of testimony offered by him.

The first error complained of was the refusal of the trial court to permit the appellant to prove that the deceased, Henry Peters, was a drinking man, after having allowed the Commonwealth to prove that the defendant was drinking on the day of the commission of the homicide. Whilst voluntary drunkenness constitutes no excuse for the commission of crime, it is always admissible in evidence as one fact bearing upon the existence or nonexistence of malice, in the mind of the accused. (*Wilkerson v. Commonwealth*, 88 Ky., 83; *Buchanon v. Commonwealth*, 86 Ky., 110; *Shananhan v. Commonwealth*, 8 Bush, 463.) The defendant was permitted to prove that the deceased Peters was also drinking on the day of his death. The fact that he was a drinking man was immaterial and incompetent.

It is also complained that the Commonwealth was allowed to introduce as evidence the clothing worn by the deceased on the day when he was shot. We think this was competent evidence to show the location of the wounds on the body of the deceased. It is also complained that the court erred in permitting the Commonwealth's attorney to ask the brother of the accused, who testified as a witness in his behalf, whether he had contributed in any way to the absence of two witnesses who had testified in behalf of the Commonwealth before the examining court, and also in refusing to allow the defendant to prove that their absence was attributable to other causes.

We think it was competent to interrogate the witness for the defendant along the line indicated, with the view of showing the extent of his interest in the case and to affect his credibility. The record discloses, however, that the defendant was permitted to prove that one of these witnesses did not leave the county until he was indicted himself for a criminal offense. The cross-examination, however, wholly failed to elicit any fact damaging to the defendant, and was, we think, immaterial. It is further complained that the Commonwealth was permitted to prove in chief over the objection of the accused that he had voluntarily testified at his examining trial that he had shot and killed the deceased. It is always competent for the Commonwealth

to prove voluntary declarations and admissions of persons charged with crime with reference thereto against him. (3 Rice on Evidence, 72; Wharton's Criminal Evidence, section 628.)

The appellant also complains that the trial court refused to allow the appellant to introduce testimony for the purpose of showing his reputation was that of a peaceable citizen. Whilst it appears from the record that the trial court sustained exceptions to the form of a question seeking to elicit information on this point, it did not exclude any competent testimony as to the general reputation of the accused for peace and good order or the reverse. It is further complained that the Commonwealth was permitted to interrogate the accused upon cross-examination as to the motives which induced him to leave the county of Taylor, and if he did not leave that county because of charges against him. In response to which the accused answered: "They say that I am indicted down there. I left that county to keep from going before the court and indicting some other fellows." The trial judge immediately cautioned the jury that it was not competent for the Commonwealth to show that the accused had been indicted in Taylor county or charged with a public offense, but that so much of his answer as admitted that he had left the county to avoid indicting other persons, was competent.

It is never competent to impeach a witness by proof of particular acts which have no connection with the offense for which he was on trial. This question was fully considered in *Howard v. Commonwealth*, 22 Ky. Law Rep., 1551, where the Kentucky cases on this subject are collated. But where the answer which the accused may give will not directly and certainly show infamy or the commission of a public offense, he may be compelled to testify. (Greenleaf on Evidence, section 456.) We, therefore, think that the trial court's ruling on this point was not prejudicial error.

Appellant also complains that the verdict is not supported by the testimony. While there is evidence in the record conducing to show that defendant was acting in his necessary self-defense at the time he shot and killed the deceased, there was also testimony, circumstantial in character in the main, from which the jury might reasonably have concluded that this was not true, and to support their verdict finding the appellant guilty of voluntary manslaughter. Under this state of fact this court is prohibited by the Code of Practice from reversing the case for insufficient evidence to uphold the verdict; although we say frankly that we would have been better satisfied if the testimony on this point had been more conclusive.

But for reasons indicated the judgment is affirmed.

CRAVENS v. DESPAIN.

(Filed April 22, 1904—Not to be reported.)

C. S. Hill and G. C. Avritt for appellant.

L. S. Pence and Robert L. Greens for appellee.

Appeal from Marion Circuit Court.

Judge Nunn delivered the following response to petition for rehearing:

As stated in the opinion, the appeal was on a partial transcript and with

only a partial transcript it must be presumed that the lower court acted properly. The appellant, in his petition for rehearing, refers to his schedule filed in the record and claims that it calls for a complete record except the proof taken. The record shows that appellant filed his schedule and the appellee did not file one and there is nothing in the record showing that the appellee had any notice of the filing of appellant's schedule as required by section 787 of the Civil Code of Practice.

The petition for rehearing is overruled.

CARR, &c. v. FIELD, &c.

(Filed April 27, 1904—Not to be reported.)

Lands—Conveyances—In a conveyance from the husband to the wife of an estate for life, with remainder to him, but in the event he died first then she was to hold the lot with power to will or convey it, it is apparent that he intended in the event she should survive him, to vest in her the fee-simple title to the property conveyed.

F. M. Hutchinson for appellants.

E. L. McDonald for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burrum.

On the 4th day of December, 1898, George Brown duly executed the following conveyance to his wife, Mary E. Brown: "This deed between George Brown, grantor, and Mary E. Brown, grantee, witnesseth: That grantor in consideration of the love and affection he bears his wife, the grantee herein, and \$1 cash, in hand paid, the receipt of which is hereby acknowledged, does hereby sell, transfer and convey to the grantee for and during her natural life, with remainder to this grantor, the following property, to wit (here follows description of land,) to have and to hold the same with all the appurtenances thereon to the grantee for and during her natural life, with remainder to the grantor with covenant of general warranty. If the grantor should die before the grantee, then the grantee is to have and hold said lot as and for her separate estate, with full power to will and convey same. But should she die before grantor, then the title to said property is to vest in grantor as above."

The parties to this conveyance were childless, and grantor, George Brown, died before his wife. After his death the grantee, Mary E. Brown, sold and conveyed the property by general warranty deed to one Sarah Hester, who subsequently on the 23d of August, 1898, reconveyed the property by general warranty deed to Mary E. Brown, who thereafter died intestate and childless. This suit involves a controversy between the heirs at law of the husband, George Brown, and the heirs at law of the wife, Mary E. Brown, as to the ownership of the lot in controversy. The trial court held that the title to the property descended to the heirs at law of the wife, and the heirs at law of the husband have appealed, and contend in this court that there is a clear repugnance between the nature of the estate granted and that limited in the habendum clause of the deed, and invoke the rule that where such

irreconcilable conflict exists, the granting words of the deed must control, and to support this contention refer to the case of *Ratcliffe, &c. v. Mars, &c.*, 87 Ky., 36. The deed considered in that case is as follows: "The said Wm. Ratcliffe hath bargained and doth hereby convey unto Wm. Ratcliffe, Jr., two certain tracts of land (here follows description of land,) to have and hold said tracts of land with their emblements to said William aforesaid during his natural life, after that to his heirs, forever free from the claim of said William, Sr., or any person claiming under, by or through him with no other title or interest."

The court decided in that case that "if an estate be granted to A. in fee simple and in the habendum to him for life, and thereafter to his heirs generally, the restrictive clause was inoperative unless it could be gathered from the whole instrument that the grantor intended that the restrictive clause in the habendum should control the granting clause, and there being nothing in the deed indicating that the grantor intended that the habendum should limit the estate granted to a life estate, the grantee took the fee simple."

We deem it unnecessary to discuss the soundness of the conclusion reached in that case, as it is perfectly clear from the whole instrument that the grantor in this case intended to invest the fee simple title to the property conveyed in the wife, if he should die before her. And when the intention of a grantor in a deed can be clearly ascertained from the entire paper, it must always govern. The intent of the grantor must control. In *Jackson v. Meyers*, 8 Johns, 383, Judge Kent states the rule in these words: "The intent when apparent and not repugnant to any rule of law will control technical terms, for the intent and not the words is the essence of every agreement. In the exposition of deeds, the restriction must be upon and from a comparison of the whole instrument; and that with an endeavor to give every part of it its meaning and effect."

Mr. Blackstone says: "The construction must be made upon the entire deed, and not merely upon disjointed parts of it."

Applying this rule of construction to the deed in question we are of the opinion that Mary E. Brown having survived her husband became vested with the fee simple title to the property thereafter.

Judgment affirmed.

MISE v. COMMONWEALTH.

(Filed April 27, 1904—Not to be reported.)

Criminal law—It was not an abuse of discretion to refuse to allow the jury to view the place where the homicide occurred, where the term was near its close, the place fifteen miles distant, and besides a surveyor selected by the defendant had made a map showing the local situation and the distances between points referred to in the evidence.

James Sparks for appellant.

N. B. Hays and Loralne Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

This appeal is prosecuted from a judgment of conviction for the murder of Elisha Whitaker. It is urged that the court erred; first, in overruling the motion for a continuance; second, in refusing to take the jury to view the place where the homicide occurred.

The court overruled the motion for a continuance, but the affidavit therefor to be read as the evidence of the absent witness. There was nothing shown which made it peculiarly necessary that the absent witness should have been present and testified, that would not exist in any other prosecution for felony. If the courts did not proceed to the trial of criminal cases and allow defendants to read affidavits for continuances as the evidence of absent witnesses, such prosecutions would almost come to a stand still and the administration of justice would be seriously interrupted. There were some reasons in the case why it would have been well to have sent the jury to view the place where the homicide was committed. Whether this should have been done was in the sound discretion of the court. The term was near its close, the place was fifteen miles distant from the court house and to reach which it was necessary to travel over mountain roads. Besides a surveyor selected by the defendant had measured the distance between points referred to in the evidence and made a map showing the local situation. We do not think the court abused its discretion.

The judgment is affirmed.

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KENTUCKY COURT OF APPEALS.

SELBY v. COMMONWEALTH.

(Filed April 26, 1904—Not to be reported.)

Criminal law—Evidence—In a trial for murder where it was impossible for the witnesses to determine who fired the shot, or caused it to be fired, where one was a party to the occurrence, an exclamation made by him instantly was a part of the *res gestæ* and should have been admitted by the lower court.

James Sparks and D. K. Rawlings for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

Daniel Selby, who was indicted in the Laurel Circuit Court for the murder of Thomas Black, was tried and convicted of manslaughter and sentenced to seven years and eight months in the penitentiary.

The indictment charged that Selby killed Black by shooting him with a loaded pistol. The circumstances, as shown by the record, were about these: On the day the killing occurred about twelve or fifteen persons had been drinking beer from kegs which had been hauled out from a brewery situated in the town of Pittsburg, Ky., to a place in the woods. These parties had been at this place drinking from some time in the morning to about 4 o'clock in the afternoon. Most of them were considerably under the influence of liquor, the appellant probably being the drunkest; but all appeared to be in a good humor, no friction or ill feeling of any kind having arisen between them. Appellant had a pistol and on one or two occasions he had it exposed and spoke of its being a good one, he also boasted of his manhood and his ability as a wrestler. About this time he took his seat on the ground near where Thomas Black was drawing beer and handing it out to the crowd. Most of the witnesses say that he then had the pistol in his hand. The deceased, Black, remarked to him, "Dan, don't handle that pistol in that way, you might shoot me in the back." Just at this instant Andrew Patterson, who was about six or eight feet distant from appellant,

sprang to him and grabbed the pistol and instantly the pistol fired and killed Black, and at that moment Andrew arose with the pistol in his hand and remarked, "Boys, you see that it was an accident," and started after Dr. Givens. Not one of the witnesses present could tell who fired the shot, whether Patterson or the appellant. The trend of the testimony shows that it was the intention of Patterson to disarm the appellant so that he, in his drunken condition, might not injure any one, accidentally or otherwise.

The appellant also offered to prove by Dr. Givens that when Patterson arrived he told him that he had accidentally shot Black and he wanted him to go to see him. Patterson was not introduced as a witness in the case, it appearing that, at the time of the trial, he was in the State of Indiana. The court refused to allow this statement of Patterson, as related by Dr. Givens, and also the statement made immediately after the shot was fired, to go to the jury as evidence, and of this action of the court appellant complains. The court did not err in refusing to allow Dr. Givens to testify that Patterson stated to him that he shot deceased accidentally. This would be hearsay and could be proven only by Patterson himself.

In our opinion the court erred in refusing to allow the statement made by Patterson instantly after the shot was fired, "Boys, you see this was an accident." This was a part of the *res gestæ*. In the case of *Stroud v. Commonwealth*, 14 Ky. Law Rep., 179, the court said: "Whatever is said by a party to the occurrence or a co-adjutor in cases of homicide, it is competent to show the character or quality of the act; but the statement of a bystander, who is in no way acting in concert with the parties to the transaction, does not constitute a part of the *res gestæ*." In the case of *Bradshaw v. Commonwealth*, 10 Bush, 577, the court said: "The cries or exclamations allowed to be proved did not proceed from either one of the parties engaged in the transaction, nor from any one acting in concert with either of them. They do not constitute a part of the *res gestæ*. Contemporaneous expressions on exclamations of the assailant or of his coadjutors, or of the deceased in cases of homicide, may be proved for the purpose of illustrating the character or quality of the act. * * * We are aware of no case in which it was held that the cries or exclamations of persons in no way connected with the main fact were admissible as part of the *res gestæ*." In the case before us, Andrew Patterson was connected with the main facts. It was impossible for the witnesses to tell who fired the shot or caused the pistol to be fired. Patterson was a party to the occurrence, but apparently innocent of any wrongful purpose in his acts. Yet he was a party to it, and an exclamation instantly made by him should have been admitted as a part of the *res gestæ*.

The appellant complains that the court erred in failing to give an instruction on involuntary manslaughter. This offense is defined by Greenleaf, volume 3, section 123, where one doing an unlawful act, not felonious nor tending to great bodily harm, or doing a lawful act, without proper caution or requisite skill undesignedly kills another. We are of the opinion that under no phase of the proof was appellant guilty of involuntary manslaughter. He was handling a pistol, a deadly weapon, carelessly and recklessly which tended to great bodily harm and even if his act had been lawful, it

was without proper caution. The instructions of the court, as given, covered the whole law of the case.

For the refusal of the court to allow the statement of Patterson, which constituted a part of the res gestæ to be introduced as evidence, the case is reversed and the cause remanded for further proceedings consistent herewith.

KENTUCKY FREESTONE CO. v. MCGEE.

(Filed May 24, 1904.)

1. Master and servant—Negligence of master—Instructions—In an action by a servant for an injury caused by the alleged negligence of the master in failing to keep a pathway clear of loose stones over one of which appellant stumbled and fell while he was accompanying a car conveying stone from a rock quarry to a nearby railroad, an instruction to the jury that if defendant permitted the pathway to be obstructed by rocks, and that by reason thereof it was dangerous to its employes and that because thereof plaintiff was injured while in the discharge of his duty, that it was liable to the plaintiff for his injury, provided the plaintiff did not know of the obstruction, and that defendant did know it or could have known it by ordinary care, was erroneous for the reason that it imposes on the master the duty to furnish the servant a safe place in which to work.

2. Inherent danger—Duty of master—The inherent nature of certain kinds of employment is such that to engage in it at all is more or less dangerous, and the rule is that the master must furnish his servant a reasonably safe place in which to do his work viewed from the nature of the employment. The master is required to use ordinary care to acquaint himself with the condition of the premises on which he sets his servant to work.

3. Duty of servant—The servant's duty is to merely avoid those dangerous conditions of which he knows, or which are so patent and visible that he, in the course of his work and as a natural incident of it, can not fail to know it except by his own neglect.

4. Application of rule—Applying these principles the court should have submitted to the jury in addition to the question of appellee's knowledge of the usual obstruction, if it was an unusual one, the inquiry, whether it was such an obvious danger as that appellant in the discharge of his service with ordinary care must have seen it and known of it.

C. C. & R. G. Williams and C. D. Robertson for appellant.

W. A. Morrow and B. J. Berthurum for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, a laborer employed in taking out cars loaded with stone from appellant's quarry to a nearby railway siding, was injured by stumbling or slipping upon a stone in his pathway alongside of the track over which the car was being taken. The dimensions of the stone are not certainly proved, but it may be said to have been between the size of a man's fist and of his hat. It was one of a number of stones scattered along the pathway. Appellee's duty was to accompany the car, which was pulled out by a wire rope drawn by a stationary engine, and was moved at the rate of about fifty feet a minute. Appellee and the other workmen going along to chock the wheels

in case the rope should break, so as to prevent the car running back into the quarry. When appellee stumbled over the stone, or fell, he was thrown under the car, and before he could remove his foot from the rails it was crushed by one of the car wheels. He sues to recover for this injury because of the alleged negligence of his master in failing to provide him a safe place in which to do his work, it being alleged that the presence of the stones in his pathway was actionable negligence on the master's behalf.

The instructions submitting the issue of negligence to the jury told them in substance that if the defendant, appellant, permitted the pathway, where appellee's duty required him to be, to become obstructed by rocks, and that by reason thereof it was dangerous to its employees, and that because thereof plaintiff was injured while in the discharge of his duty, that it was liable to the plaintiff for his injury, provided the plaintiff himself did not know of the obstruction, and provided that defendant did know of such dangerous condition, or might have known of it by the exercise of ordinary care. The court also told the jury in the second instruction: "If you believe the track or premises of the defendant, where plaintiff's duty required him to be, were obstructed by rocks, and the plaintiff knew of such obstruction, if any there was, then you will find for the defendant."

The court is of opinion that these instructions fail to properly present the duty of the master in the premises, as well as to state the whole law of the servant's duty to himself.

In the first place, the instruction imposed upon the master the duty to furnish the servant a safe place in which to do his work. Such is not the law. The inherent nature of certain kinds of employment is such that to engage in it at all is more or less dangerous. This danger is one against which the master does not contract, and the possible consequences of which his servant impliedly assumes. It is altogether probable that loose stones of varying size would be scattered about a rock quarry. It is equally certain that their presence creates more or less danger to those walking among them. To the extent that their presence may be reasonably expected and can scarcely be guarded against, is one thing that must have been in contemplation in the contract of employment; but where their presence in unusual quantities or in unusual places increases the ordinary and inherent hazard and danger to laborers in and about the quarry, it is not a risk assumed by the employe. The rule, then, is, that the master must furnish his servant a reasonably safe place in which to do his work, viewed from the nature of the employment. As to the servant's duty to himself, he cannot purposely injure himself and charge the consequences to the master. Therefore, it is written, that if the servant knows of a danger not within the scope of his assumption, and notwithstanding risks its consequences, he alone must suffer. But just here there is a difference between the master's and the servant's duty, for the master must know that the place in which the servant must do his work is a reasonably safe one for that purpose, unless its unsafe condition has happened so recently, that he could not, by the exercise of ordinary care, have learned of it in time to have prevented the injury; while the servant's duty is to merely avoid those dangerous conditions of which he known, or which are so patent and visible, that he, in the course of his work, and as a natural incident of it, can not fail to know

It except by his own neglect. As stated in *Mellott v. L. & N. R. R. Co.*, 101 Ky., 214: "The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and can not blindly rely upon the skill and care of his master."

But this does not involve the question of "equal means of knowledge" invoked by appellant. This doctrine, though having had a place in the decisions of this State for a while, has been frequently ignored, and expressly denied, and in the late case of *Pfisterer v. Peter & Co.*, 25 Ky. Law Rep., 1605, is repudiated, while *Bogenschutz v. Smith*, 84 Ky., 380, upon which it seems to have been rested, is to that extent overruled in effect, if not in terms. The master is required to do all that ordinary prudence and care requires to acquaint himself with the condition of the premises on which he sets his employe to labor. The servant may rely upon the master's implied assurance of the premises being reasonably safe for the purposes for which they are used without inquiry or examination, unless the defect is one obvious and certain, and which must come to his notice in the regular discharge of his work without having to stop to suspect it or hunt for it.

Applying these principles, the court properly overruled the motion for a peremptory instruction, but it should have submitted to the jury in addition to the question of appellee's knowledge of the unusual obstruction, if it was an unusual one, the inquiry whether it was such an obvious danger as that appellant in the discharge of his service with ordinary care must have seen it and known of it.

For the reasons indicated the judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

HOWARD v. COMMONWEALTH.

(Filed April 22, 1904.)

1. Homicide—Selecting jury—Jury wheel—Summoning jury from county—The fact that the court did not require the jurors who tried the case to be drawn from the jury wheel, instead of being summoned from the county at large by the sheriff, if error, is one which this court has no power to revise, as section 281, Criminal Code, provides that "the decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial shall not be subject to exception."

2. Qualification of juror—Discretion of court—Private examination—Consent of defendant—Discharge of juror—The fact that upon information given to the court by the attorney for the Commonwealth based upon an affidavit filed that one of the eleven persons who had then been accepted by both the Commonwealth and the defendant, but had not been sworn, had formed and expressed an opinion in the case, and that the court with the consent of the attorneys for the Commonwealth and defendant, and without objection by defendant, privately examined said juror, not in the presence of defendant, as to whether he had formed or expressed an opinion, and upon said examination discharged him from the panel, was not an abuse of discretion in the court, although the defendant, at the time, excepted to his discharge.

8. Same—We are unwilling to say that one charged with a felony, as was appellant, with counsel at hand ready and competent to advise him of his

rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint has been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jury to try the case. Nor do we think it is affirmatively shown by the record, that any injury resulted to the substantial rights of the appellant by the dismissal of this juror, and we are expressly forbidden by section 281 of the Criminal Code, *supra*, to reverse for this error in the formation of the jury if it was an error.

4. Same—The fact that after the Commonwealth had accepted in open court the full panel of twelve jurors, and after they had been passed to the defendant for acceptance or peremptory challenge, and defendant and his counsel had retired from the court room to pass upon the panel, the court, over appellant's objection, permitted the Commonwealth to excuse one of the panel without cause, is not an error under section 281, Criminal Code, *supra*, for which this court is authorized to reverse as has been frequently and recently decided by this court in other cases.

5. Notes of evidence before grand jury—Refusal of Commonwealth's attorney to furnish notes—The Commonwealth's attorney having been furnished notes by the foreman of the grand jury of the statements of H. E. Youtsey before the grand jury, it was not error in the court in overruling defendant's motion to require him to furnish such notes to the inspection of the defendant.

6. Accomplice—Witness—Not required to criminate himself—It was not error in the court to refuse to require one who was jointly indicted with appellant for this offense, and had not been tried, to testify as a witness for defendant against his objection where he claimed he could not testify without giving evidence against himself.

7. Recalling witness—It was not error in the court in refusing to allow H. E. Youtsey to be recalled by the defendant after he had him on the witness stand and cross examined for two days, and again recalled and examined by defendant at great length and dismissed, especially as the matter about which he was to be interrogated was for the purpose of laying the foundation to contradict him by his wife, which, in the opinion of the court, if permitted, would have been incompetent.

8. Confidential communications between husband and wife—The court properly refused to allow Mrs. Youtsey to testify as to the contents of a confidential note or letter written to her by her husband in relation to the prosecution, said testimony being incompetent under section 606, Civil Code, which provides that "neither husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage."

9. Evidence—Accomplices—Corroboration—Range—It was not error in the court to allow the testimony of Youtsey, Cecil Jones and Day to go to the jury, relating to acts and declarations of appellant conducing to show his guilt in a conspiracy to take the life of William Goebel in which appellant was an alleged participant and principal, as the principal witness and the only ones who had personal knowledge of appellants' guilt, were his accomplices, whose testimony it was necessary to corroborate and in the nature of the case much of the corroborating testimony was circumstantial and should be allowed to take a wide range.

10. Instructions—The instructions given in the case confirm absolutely to the rule laid down by this court in the second appeal, and are free from error.

† W. M. Smith, J. A. Violet, J. A. Scott and Carlo Little for appellant.

B. G. Williams, R. B. Franklin, L. W. Arnett, W. O. Davis and Robt. L. Stout for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

The appellant, James B. Howard, was tried and convicted the third time in the Franklin Circuit Court under an indictment returned in that court against him and others, charging them with the murder of William Goebel, and his punishment fixed by the verdict of the jury and sentence of the court at imprisonment in the penitentiary for life.

His motion for a new trial was overruled by the lower court, and by this appeal he seeks a reversal of the judgment of conviction. There have been two former appeals herein. (Howard v. Commonwealth, 22 Ky. Law Rep., 1845; Howard v. Commonwealth, 24 Ky. Law Rep., 1225.)

As the principal facts connected with the crime for which appellant was convicted were stated and commented on in the opinions of this court on the former appeals, we deem it unnecessary to enter upon a recital of them in this opinion. Suffice it to say that the evidence shows that Hon. William Goebel, on January 30, 1900, in Frankfort, and on the Capitol square, while approaching the main entrance of the State House, was shot and wounded by some one in concealment, of which wound he, in a short time thereafter, died. It has been, and is, the theory of counsel for the Commonwealth that the bullet which deprived him of his life was fired by the appellant, though others are charged and jointly indicted with him as aiders and abettors in the crime.

There were twenty-one grounds for a new trial filed by appellant in the lower court, several of which were relied on by him on the former appeals, and were then held by this court insufficient to authorize a reversal. It will, therefore, be unnecessary for us to again consider such of them as were then determined. Indeed, we feel called upon to discuss and pass upon only such of the grounds for reversal as were urged by counsel for appellant in argument before us, and will consider them in the order in which they were presented.

1st. It is contended that the court erred in the formation of the jury, in that by its order for the summoning of 150 jurors from the county of Woodford, it was not required that they be drawn from the jury wheel or drum of that county, but only that they be summoned from the county at large by the sheriff of Franklin county. In *Curtis v. Commonwealth*, 23 Ky. Law Rep., 287, it was held that the manner of selecting the jury in that case was error, but as section 231 of the Criminal Code of Practice provides that "the decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception," this court is without power to revise such an error. In several cases subsequently decided, the most recent being that of *Turner v. Commonwealth*, ante, 2161, the rule announced in *Curtis v. Commonwealth*, supra, was adhered to and approved. We find it unnecessary, therefore, to decide whether or not there was error in the manner of summoning the jury, or in its formation; as a reversal by this court upon that ground, even if such error had been committed, would be unauthorized.

Another alleged error complained of by appellant was the discharge by the trial court of the juror, J. C. Alexander. It appears that he and ten others had been accepted by the parties as jurors, and that but one other was to be selected in order to complete the panel of twelve. The Commonwealth had then exhausted three of its peremptory challenges, and the appellant twelve of his, though neither party had been required to, or had, exercised the right of peremptory challenge, except as there were twelve men in the jury box, who had upon the voir dire been found qualified. At this point it was suggested to the court by the Commonwealth's attorney, out of the hearing of the jury, that had thus been partly made up, that he had just received information to the effect that J. C. Alexander had theretofore formed and expressed an opinion as to the merits of this case, and with respect to the crime charged in the indictment, and had after he was accepted on the jury improperly conversed with a person, not a member of the jury, on a subject connected with the case, notwithstanding the previous admonition of the court not to do so. This communication of the Commonwealth's attorney was immediately followed by a motion from him to discharge Alexander from the jury, in support of which was filed the affidavit of Ben Hackett, who had himself been excused as a juror in the case.

It was stated in the affidavit, in substance, that the affiant and Alexander, after the death of William Goebel, had many conversations and arguments about the killing, in which affiant contended that there had been a conspiracy to murder Goebel among those who were charged with his murder, and Alexander expressed and urged the opinion that there had not been such a conspiracy; that in these conversations both affiant and Alexander manifested much earnest interest and feeling. And further, that after Alexander and some other members of the jury had been accepted, put in charge of the sheriff and admonished by the court, he said to the affiant, after adjournment on the day before the filing of the affidavit, and as the jury were passing out through the courthouse yard, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Before passing upon the motion of the Commonwealth's attorney, the court privately examined Alexander, while the latter was in the custody of the sheriff, touching the truth of the charges contained in the affidavit of Hackett, and as the result of such examination discharged him from the jury.

It was stated by counsel for the Commonwealth in the oral argument and by brief in this court, and not denied in the oral argument or brief of counsel for appellant, that the examination of Alexander was conducted privately by the court at the request of counsel for appellant, made in the latter's presence and with his consent. Be that as it may, in ascertaining what transpired in the lower court in this case, we must look to and be governed by the record made therein, and it appears from the record that the privy examination of Alexander was made by consent of the parties, though it further appears that appellant at the time of the discharge of Alexander excepted to such discharge and moved the court to also discharge the ten persons remaining of the jury, which the court refused to do, but proceeded to complete the jury, subject to the right of challenge by either party to the extent of the challenges remaining to them, by selecting from the persons

summoned from Woodford county for that purpose the two necessary to complete the panel of twelve.

As to what occurred in the privy examination of Alexander, does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does appear in the bill of exceptions that he made the admission, presumably before the privy examination, that he said to Hackett after the latter had been excused from the jury, and he had been accepted as a member thereof, "Hello, Ben, I am glad that they cut you off of this jury, as I did not want to serve on this jury with you," but claimed that it was made in a jocular way. It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself involving the merits of this case, is true, otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury? In this view of the matter it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion.

Upon the other hand, it is insisted for appellant, that it was error for the court to examine Alexander in his absence, and that he could not legally waive his right to be present at such examination. In support of this contention, section 188, Criminal Code, is relied on, which provides: "If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial." * * *

While this court in construing the section, *supra*, has repeatedly held that one charged with the commission of a felony can not be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule. Thus in *Hite v. Commonwealth*, 14 Ky. Law Rep., 308, it was held that the occasional absence from the court room of the accused, on account of temporary illness for a few minutes at a time, the trial continuing in his absence, did not prejudice the substantial rights of the accused. In *Meece v. Commonwealth*, 78 Ky., 586, it appeared that after the submission of the case to the jury and their retirement to the jury room, they returned into court and asked for further instructions.

The court declined to give any, but in the presence of counsel for the prisoner inserted by interlineation certain words in one of the instructions. The accused was absent at the time, and it was urged in his behalf that for this reason the judgment should have been reversed. This court, however, held otherwise, in doing which it said: "While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist, except by the legislation of the State on the subject, and when permitting an appeal the law-making power has

the right to determine for what cause a reversal may be had." * * *

It has also been held by this court that a trial for felony begins when the jury is sworn. (*Willis v. Commonwealth*, 86 Ky., 68.) At the time the examination of Alexander took place and when he was discharged, the jury had not only not been sworn, but it had not been completed. There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive. Such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jury to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

It is, however, beyond our province to reverse this case for error, if there were any, in excluding Alexander from the jury. Our right to do so is expressly forbidden by section 281 of the Criminal Code, and we have already referred to *Curtis v. Commonwealth*, 23 Ky. Law Rep., 267, and *Turner v. Commonwealth* (ante, 2:61), to indicate this court's construction of that section. In addition to those cases, a further recent authoritative utterance of this court to the same effect will be found in *Alderson v. Commonwealth*, 25 Ky. Law Rep., 32, in which one of the grounds for reversal, as set forth in the record, was that the appellant over his objection at the time, was forced by the trial court to accept as jurymen persons alleged to have formed an opinion as to his guilt or innocence.

Another alleged error was that after the Commonwealth had accepted in open court the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the courthouse to pass upon the panel, the court over appellant's objection, permitted the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it. Whereupon appellant, as was done in the case at bar, moved the court to dismiss the entire jury, which motion was overruled.

In passing on the questions thus presented, this court, after quoting section 281 of the Criminal Code, *supra*, said: "In construing this section we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal."

Whatever may be the rule in other States, this question has been settled in Kentucky as herein indicated, and the authorities cited are the latest that have emanated from this court. Another complaint of the appellant is the refusal of the lower court to require the Commonwealth's attorney to permit him to examine an alleged original statement called the confession of H. E.

Youtsey, and the notes of the evidence given by him before the grand jury. The motion of appellant for those papers was based upon his affidavit. A response to the motion was filed by the Commonwealth's attorney in which it was denied that he had, or knew anything of the alleged confession, but that he did have notes of Youtsey's testimony before the grand jury, which he refused to surrender.

The court ruled correctly in refusing to require the surrender by the Commonwealth's attorney of the notes of Youtsey's testimony given before the grand jury, as was decided by this court in *Franklin v. Commonwealth*, 20 Ky. Law Rep., 1137, in the opinion of which it is said: "It appears from the record that the grand jury reduced to writing the testimony of the witnesses before it and furnished to the Commonwealth's attorney the evidence so taken. * * * It was the duty of the foreman of the grand jury, also under the statute, to communicate to the attorney for the Commonwealth when requested, the substance of the testimony before them. But we do not think the court below should, in the exercise of sound discretion, have required the Commonwealth's attorney to communicate to the defendant the evidence so reported to him by the foreman of the grand jury."

Appellant also complains that the court refused to compel Green Golden to give certain testimony demanded of him. It appears from the record that Golden was jointly indicted with appellant and others for the murder of William Goebel, and that the prosecution therefor is still pending against them. Golden was introduced by appellant, and after certain preliminary questions, without objection from the Commonwealth, or suggestion from the court, he announced that he had been indicted in this case, but had not been tried, and claimed his privilege, and he was not required to testify, upon the ground that he could not do so without giving evidence against himself.

In Roberson's Criminal Law, volume 2, section 980, it is said: "It is a rule that no person is bound to answer any question, if the answer thereto would in the opinion of the trial judge, have a tendency to subject the witness, or the wife or husband of the witness, to any punishment, penalty or forfeiture. And the witness may claim the protection at any stage of the inquiry, whether he has already answered the question in part or not at all. If the fact to which he is interrogated forms but one link in the chain of evidence which is to connect him, he is still protected. The privilege is one personal to the witness and to be exercised by him alone, and counsel will not be allowed to make the objection. Nor can the witness be made to explain how he might be criminated by the answer, as this would strip him of the privilege which the laws allows him. But it is not enough for the witness to say that the answer will criminate him. He is not the sole judge of the fact. It is for the court to determine from all the circumstances whether there is really reasonable ground to apprehend danger to him from his being compelled to answer." (*Burdett v. Commonwealth*, 98 Ky., 79; 1 Greenleaf, section 451.)

Chief Justice Marshall, in the trial of Aaron Burr, said: "If the question be of such description that an answer to it may not incriminate a witness, according to the purport of the answer, it must rest with himself, who alone can tell what it would be to answer the question or not." (*Burr's Trial*, 224.)

From these authorities, the statements of Golden, and his reasons for not testifying, it is manifest that he was entitled to avail himself of the privilege allowed by law, and the court properly excused him from testifying.

It is insisted for appellant, that it was error for the trial court to refuse him permission to recall and further cross-examine H. E. Youtsey. It will be found that the direct examination of Youtsey comprises ten pages of volume 8 of the bill of evidence, and the first cross-examination 180 pages of that volume. On the first cross-examination he appears to have been on the stand about two days, at the end of which, viz., April 17, the cross examination was suspended, and appellant given until April 20 to prepare for his further cross examination. On April 21 he was again cross-examined at great length and finally dismissed. On April 28 appellant asked to be allowed to recall and still further cross examine Youtsey, for the purpose of laying the foundation to contradict him by his wife.

As will be presently shown, the expected contradiction would, if permitted, have been incompetent, but aside from this consideration after such a long and exhaustive cross-examination as was given the witness, covering, as it would seem, every possible aspect of the case and the witness' relation thereto, we are unwilling to say that it was an abuse of discretion for the court, under the circumstances, to refuse to permit him to be recalled the third time for still further cross-examination.

We are of opinion that the court properly excluded the testimony of Mrs. Youtsey, wife of H. E. Youtsey. Section 606, Civil Code of Practice, provides: "Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage, etc." * * *

In *Commonwealth v. Sapp*, 90 Ky., 585, it was said by this court: "If the proposed testimony violates married confidence in the slightest degree, or tends however slight to impair the rule for its protection, the highest considerations forbid its introduction."

It will be found that the authorities are uniform in holding that this rule applies, whether such proposed testimony is sought to be introduced in a case where the husband or wife is party, or only others are concerned.

In *Scott v. Commonwealth*, 94 Ky., 511, in an able discussion of this doctrine by Judge Lewis, it was held that a letter to the wife from the husband in relation to a crime with which he was charged, could not be used in evidence by the Commonwealth, and the case was reversed because of its introduction as evidence therein. Applying that rule in this case, the note or letter proposed to be identified by Mrs. Youtsey, as well as any other testimony that she might have given in regard thereto, was clearly incompetent, because the same came to her from the husband by reason of the privacy and confidence of the marital relation, and the use of it to contradict him would have been as fully within the reason, and as much against the policy of the law, as would any other confidential disclosure that he may have made to her. And the same rule that forbade her testifying in this case, would have excluded as incompetent, any statement from him made to her on the same subject.

Objection is made that the trial court refused to exclude certain testimony of H. E. Youtsey and Frank Cecil, and also the testimony of Jones and Day. We find that such of the testimony of Youtsey as appears to be incompetent was rejected and stricken out by the court. We think all the testimony of the four witnesses named, as it is shown by the bill of evidence to have been admitted by the court, was competent. It related to acts and declarations of the appellant, conducing to establish his guilt, as well as a conspiracy to take the life of William Goebel, in which he was an alleged participant and the principal. The testimony in question is of the nature, and similar in character, to much of the evidence held by this court on the former appeals in this case, and in the several appeals of Caleb Powers, to be competent.

It is to be borne in mind that the principal witnesses against appellant, and the only ones who claimed to have personal knowledge of his guilt, were his accomplices, whose testimony it was necessary to corroborate as required by section 241, Criminal Code. In the very nature of the case much of the corroborating testimony was necessarily circumstantial, and where, as in a case like this, such testimony must be relied upon, the evidence should be allowed to take as wide a range as would consist with justice, and the well recognized rules obtaining with reference to the admission of such evidence. We are of opinion, therefore, that while some of the evidence complained of, notably that of Jones and Day, is somewhat remote and even fragmentary, yet inasmuch as practically the same statements, which they claim to have overheard as coming from appellant, were testified to by the witness, Stubblefield, as having been made to him by appellant in a conversation about the same time in regard to the death of William Goebel, in which conversation, as stated by Stubblefield, appellant admitted that he had fired the shot which killed Goebel, we think the lower court did not err in permitting the testimony of Jones and Day to go to the jury.

Appellant also complains of the instructions. But we find that the instructions conform absolutely to the rule laid down by this court on the second appeal, and are, besides, free from error.

A careful examination of the record having failed to disclose any error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

Whole court sitting.

Chief Justice Burnam and Judge O'Rear dissent.

Judge O'Rear delivered the following dissenting opinion:

I am unable to agree with the four members of the court who hold that the presence of the accused in a felony trial can be dispensed with, even by his consent, during the empanelling of the jury, or at any other stage of the trial. (Bill of Rights, Constitution, section 11; Criminal Code, section 188; *Meece v. Commonwealth*, 78 Ky., 5-6; *Rutherford v. Commonwealth*, 78 Ky., 642; *Temple v. Commonwealth*, 14 Bush, 789; *Allen v. Commonwealth*, 88 Ky., 642; *Hopt v. People of Utah*, 10 U. S., 574.)

Nor can I agree that the evidence by Jones and Day of fragmentary conversation alleged to have occurred in Laurel county, between appellant and some other person, when it is conceded that the portions detailed are incomplete and disconnected from what went before or followed, is relevant as

admissions by the accused. (Berry v. Commonwealth, 10 Bush, 16; Terrell v. Commonwealth, 18 Bush, 246.)

I concur with the majority of the court that the rejection of the communication between Youtsey and his wife was proper.

PAYNTER v. MILLER.

(Filed April 26, 1904.)

Ferry right—Death of owner—Sale by administrator—Non-resident purchaser—Delay in transfer to resident—Upon the death of the owner of a ferry right for a term of years in this State, his administrator with the consent of the county court, sold the residue of his term to a resident of the State of Ohio, who subsequently transferred said right with the approval of said court, to a resident corporation of this State. Held—That the fact that said transfer was not made by the nonresident purchaser within a year from the date of his purchase, as required by section 1808, subsection 3, Kentucky Statutes, did not, per se, avoid the lease. And it is too late after the lease to the Kentucky corporation was made, with the approval of the county court, to raise this question.

H. D. Paynter for appellant.

B. F. Bennett and Harry Miller for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellants, George B. Paynter and James Fullerton, petitioned the Greenup County Court at its August term, 1903, to establish a ferry from Fullerton, Ky., across the Ohio River to Portsmouth, and to grant them the privilege of operating the ferry in accordance with the provisions of chapter 49 of the Kentucky Statutes. They allege in their petition in substance that they had complied with all the preliminary provisions required by the statute, that a steam ferry was being operated between these two points by one Isaac Miller, a nonresident of Kentucky, who had purchased the privilege of doing so from the administratrix of George Winn, to whom the privilege of operating a ferry between Fullerton, Ky., and Portsmouth, O., had been granted on the 5th of December, 1892, at a regular term of the Greenup county court; that on the 6th day of December, 1897, George D. Winn had renewed his covenant with the Commonwealth of Kentucky for the ferry privilege as required by law; that some time prior to March, 1903, George D. Winn died, and that his wife, as his administratrix, had sold the ferry privilege previously granted to her husband to Isaac Miller, of Portsmouth, O., who had also acquired the ferry landing on both the Kentucky and Ohio shores by purchase; that at a special term of the Greenup county court, held on the 15th of March, 1902, an order was entered by the court ratifying the previous sale and transfer of the ferry boat and ferry right, and at the same time a re-grant was made to Miller of the ferry privilege for a term of twenty years from that date; and that he executed a bond therefor, as required by law, and an order was entered fixing the tolls; that prior to the 21st day of July, 1903, Miller sold and transferred the privilege which had been granted to him to the Fullerton and Portsmouth Ferry Co., a cor-

poration organized under the laws of the State of Kentucky, with the consent of the administratrix of the estate of Geo. Winn and B. F. Bennett, who held purchase money liens on the ferry property; and that on that day the Greenup County Court ratified the sale of the ferry privilege and renewed the grant to the ferry company for a term of twenty years; and that the company had executed bond, as required by law, for the faithful performance of their duties thereunder. Petitioners allege that both the grants to Miller and the ferry company were void because made at a special term of the county court and without the notice required by section 1804 of the Kentucky Statutes. They also allege that Miller had forfeited all right to operate the ferry before his sale and transfer to the ferry company, for the reason that more than one year had elapsed after his purchase from the administratrix of Winn before his transfer to the ferry company, as required by subsection 3 of section 1801 of the Kentucky Statutes. The appellee, Isaac Miller, filed a demurrer to appellants application, which was sustained, and their application dismissed. They thereupon appealed to the Greenup Circuit Court, and appellee again demurred to their petition, which was sustained, and the petition dismissed. Plaintiffs in the application now appeal to this court.

Chapter 49 of the Kentucky Statutes provides that "the several county courts shall have jurisdiction to establish ferries and grant ferry privileges upon any river or stream in or adjoining their respective counties for not exceeding twenty years; that the ferry shall be established at the instance and for the benefit of the owner of the land on which it is located, or some one who has bought from the owner the privilege of using the same for that purpose; that no application to establish a ferry shall be heard unless notice of the application shall have been posted at the courthouse door of the county on the first day of the term of the court next preceding that at which the application is made."

Subsection 8 of section 1808 provides that: "When sale is made of a ferry right, or lease thereof, it must be with leave of the court, and the purchaser or lessee must execute covenant, with sufficient surety, in lieu of former covenant. * * * If the estate be for a term of years, the personal representative must, within one year after administration, sell the right with the assent of the court, and the purchaser give such new covenant. A nonresident owner of a ferry right shall sell the same to a resident citizen of this State, within a year after his removal or the accrual of his right, with leave of court, and the purchaser give such new covenant. Upon failure to comply with any requisition of this subsection, the court shall revoke the grant, the party having been first summoned, or, if a nonresident, warned by an order posted at the courthouse door, on a court day of a previous term, and by publication in some newspaper printed in the county, if any such there be."

Under these provisions of the statute, the administratrix of George D. Winn had the right with the consent of the Greenup County Court to sell the residue of his term as ferryman; and whilst it was incumbent upon her nonresident purchaser to transfer the right acquired by him to a resident of this State within a year after his acquisition thereof, the failure to do so did not, per se, avoid the lease, as it was voidable only at the instance of the

lessor, or the State or county authorities in a direct proceeding instituted for that purpose. And it was too late after the lease to a Kentucky corporation with the consent and approval of the county to raise this question (*Owens v. Roberts*, 69 Ky., 608.) Section 1058 of the Kentucky Statutes provides that: "Special terms of the county court may be held at any time for the transaction of any business except the probating of a will or granting a tavern, liquor or druggists license."

It is unnecessary in the determination of the rights of appellant in this case that we should decide whether the notice required by section 1804, as a condition precedent to the establishment of a ferry, also applies to an application for the renewal of a grant to operate a ferry, which has already been established. The court properly sustained a demurrer to appellant's original and amended petitions.

Judgment affirmed.

GRAHAM'S HEIRS, &c. v. KITCHEN, &c.

(Filed April 26, 1904.)

1. Lands—Special legislation—Jurisdiction—Judicial sales—On February 20, 1885, a special act of the Kentucky Legislature was passed conferring jurisdiction upon the Greenup Circuit Court, upon the filing of a bill in chancery therein by the heirs of John and George Graham, adult and infant, for the appointment of a commissioner to examine into the condition of the lands and the titles and their value, owned by said John and George Graham (consisting of many thousand acres in this State), and upon the report of said commissioner to decree a sale thereof, either public or private, and on such terms and credits as the court deemed best for the interest of the parties, and to authorize the commissioner to convey the title to the purchaser for and on behalf of such heirs. Held—That under said act jurisdiction was conferred on the Greenup Circuit Court to sell all the lands owned by John and George Graham in this State, and to convey to the purchaser such title as the heirs had.

2. Pending action—Amended petition—New parties—Adverse title—A suit was brought by said heirs in said Greenup Circuit Court in 1885, under the provisions of said act and kept on the docket continuously up to June 30, 1899, when an amended petition was filed, making appellees herein parties defendants, and alleging that since filing their original petition, appellees have entered upon certain portions of said lands wrongfully and without title, and had inclosed and were claiming same adversely to plaintiffs, which lands so in dispute were situated in Carter county, which was formed in 1835, and in which appellees reside and were summoned. Held—That the Greenup Circuit Court has no jurisdiction, by virtue of said special act, over lands lying in Carter county, or to try questions of title of persons holding and claiming lands adversely to plaintiffs.

3. Pendente lite—Strangers—The fact that appellees were charged with having entered upon these lands pendente lite, can have no application in this case, as such a plea applies where a stranger enters under some person who is a party to the suit, and not to one holding adversely to the plaintiffs.

4. Contempt of court—Nor can the jurisdiction of the Greenup Circuit Court be upheld on the ground that appellees are in contempt in interfering with the subject-matter of a suit pending in the court, said court not being in the possession of the land by its receiver or otherwise. If appellees owned or had bought the land from one claiming to be the owner, and not a

party or privy to that suit, they had the right to enter upon it, although it was in litigation between others, so long as there was not a breach of the court's possession.

Bennett & Bybee for appellants.

R. B. Davis for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge O'Rear.

Richard Graham was the patentee under the Commonwealth of Virginia of several large tracts of land located now in Carter, Greenup and other counties in this State. Richard Graham died prior to 1835. His heirs are alleged to have been John and George Graham, who also were dead prior to February 20, 1885, on which date there was approved by the governor of this Commonwealth a special act of the general assembly of the Commonwealth of Kentucky, for the benefit of the heirs of John and George Graham, procured to be passed at the instance of certain petitioners claiming to be such heirs. As the act mentioned is the basis of this suit, it is copied in full herein, and is as follows:

"An Act for the Benefit of George and John Graham.

"Section 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, that it shall be lawful for the adult heirs of George and John Graham, in person, or by attorney, and for the infant heirs of the said George and John Graham, by their guardian or their next friend, to file a petition in the court of a bill of chancery in the Greenup Circuit Court setting out what lands they hold from their ancestors in the State of Kentucky, and the situation of the land, and the condition of the title, and it shall be the duty of the court to appoint a commissioner to examine into the condition of the lands, and the titles and their value, and it shall be lawful for the Greenup Circuit Court, if it shall appear to be to the interest of the said heirs, to have said land sold, to decree a sale and appoint a commissioner to make either a public or private sale, on such terms and credits as said court may think most to the interest of the parties, and said court shall distribute the proceeds among said heirs on equitable principles from time to time, and cause the shares of the infants to be placed at interest or paid to their guardian on satisfactory security being given, and the court shall, after confirming any sale or sales, made by the commissioner, cause the land so sold, to be conveyed on the payment of the purchase money, or a lien to be retained in the conveyance for the purchase money. Any conveyance made by the commissioner of the land under its order shall be effectual to pass the estate of said heirs."

The purpose and scope of the words of this act are now in dispute.

Without setting forth the respective contentions of the parties, we hold that the purpose of the act, as gathered from its context, was to confer a jurisdiction upon the circuit court of Greenup county that it did not then have, to wit, to enable that court to sell all the lands owned in this State by the heirs of John and George Graham, and to convey to the purchasers such title as the heirs had. This was to be done by means of a commissioner to be appointed by that court, who was by the terms of the act, "to.

examine into the condition of the lands and the titles and their value," and to make sale thereof either publicly or privately as that court might decree. It was not claimed that the lands could not have been divided without disadvantage to their value among the heirs. The contrary would appear to be true, each tract comprising several thousand, and in one instance, more than one hundred thousand acres. Courts of chancery then had not the inherent jurisdiction to sell infants' real estate merely because it may have been advantageous to the infant to do so (*Vowles' Heirs v. Buckman*, 6 Dana, 466; *Henning v. Harrison*, 13 Bush, 720; *Walker v. Smyser*, 80 Ky., 620; *Meddis v. Bull*, 13 Ky. Law Rep., 767; *Elliott v. Fowler*, *Guardian*, 23 Ky. Law Rep., 1676), nor of adults, for that matter. Their jurisdiction was statutory, and different in material particulars from that conferred by the act. It was to enable a speedy, inexpensive, transfer of these titles in bulk that the heirs desired, converting them into money for distribution among the parties in interest, and it was to effect that that the act was passed. It was nowhere intimated in the act that the question of title or right of possession as between the heirs of the Grahams and any adverse claimants were to be, or could be, adjudicated in the proceeding authorized by the act. Some of the lands were described as lying on Red river, then in Fayette county; others on the Big Sandy, then probably in Lawrence. The court judicially knows the great distance and the hardships and delays in travel between these respective counties at that time. We can not indulge the presumption that the legislature intended conferring jurisdiction upon the Greenup Court to try titles to land lying in other remote counties, when the claimants or possessors were entitled to trials by a jury of the county where the land lay, if the action was in the nature of ejectment or trespass. The state of the general law, and the conditions then existing and above referred to, repel such presumption. Nor does the language of the act admit of it.

But if we were in doubt on the last point, the matter is made perfectly plain by the interpretation put upon the act by its beneficiaries who had procured its passage. As early as the 7th day of April, 1835, they filed a petition in chancery in the Greenup Circuit Court, setting forth their names and relation to John and George Graham, deceased, and setting out in general terms that they jointly and in coparcenary owned the title to certain tracts of land in the counties mentioned above as heirs at law of said Grahams, and reciting that: "During the late session of the legislature of Kentucky they laid before that honorable body a petition praying for the passage of a special act empowering a commissioner to sell all the lands lying in the State of Kentucky to which they had a joint title; that body not deeming it consistent with their legislative duties to pass the act as desired by your petitioners, yet deeming their case worthy of further consideration, did pass an act for their benefit, authorizing certain proceedings in your honorable court to effect the desired sale. * * * In pursuance of the provisions of said act, your petitioners will proceed to set forth their title to a part of the lands they own in the State of Kentucky. Their limited information will not permit them at this time to set forth their title to all the lands to which they believe themselves entitled. They, therefore, hope that if further investigation shall discover to them other lands to which they may have a valid claim, that they may be permitted to amend this their petition, and

that such lands, as well as those hereinafter named, may, under the orders of this honorable court, be subjected to sale."

The prayer of the petition was as follows: "Your petitioners, therefore, pray that their title to all of the lands above mentioned may be inquired into by a commissioner appointed in pursuance of the act of assembly aforesaid, and that their title thereto may be sold by a commissioner appointed by the further order of this court. They pray for such other and further relief as the nature of the case requires, and equity and the special act under which this proceeding is had will justify, and as in duty bound they will ever pray, etc."

The petitioners were nonresidents of this State, and some of them were infants who appeared by their guardians and next friends. The action was styled and has continued upon the docket as "John and George Graham's Heirs on Petition." There were no defendants or adverse parties. The Greenup Circuit Court then also took the same view of the powers conferred upon it by the act, and of the nature of the proceeding, as indicated above. The first decree entered in the action was on the 8th day of July, 1835. It was as follows: "The commissioner appointed herein at the last term of this court having reported and the court having considered thereof, is of opinion that the interest of the petitioners would be advanced by a decree empowering them to sell their lands, in the report aforesaid mentioned. It is now, therefore, by virtue of the special act of assembly in the petition referred to, decreed and ordered that William R. Beatty be appointed a commissioner, and he is hereby fully authorized and empowered to sell all the right, title and interest of the petitioners, the heirs of John and George Graham, deceased, of, in and to the 138,320 acres, the 80,406 $\frac{1}{4}$ acres and the 18,447 acres in the report aforesaid mentioned. Said commissioner is authorized to sell said lands at private sale in such lots or parcels as to him shall seem most advantageous to the petitioners, and upon such terms and credits as he shall deem prudent, making report of all such sales to this court; it being the true intents hereof that no sale shall be obligatory upon the petitioners till approved by this court and the petition is continued till next term."

The lands were not in the actual possession of the petitioners. The original petition on this point says: "Your petitioners would further represent that all the lands above described are very hilly and broken and of but little value; that it is only occasionally you meet with a small spot fit for cultivation; that they are now wholly unproductive; that they can never derive any profit from them except by selling them."

There is no order directing the court's commissioner to take possession of the lands. Nor does it appear that such an order would have been necessary or proper in such proceeding. In 1859 the court directed the commissioner to "ascertain and report the quantity of land unsold, its situation and probable value, and whether the same or any part thereof is adversely held by others."

The last commissioner's report filed in the case shows not only that none of the unsold land was in the possession of the commissioner, or any party to the suit, but expressly stated that part of it was in the actual adverse possession of appellees, and part of it was "wild, unenclosed land."

The case has been upon the docket of the Greenup Circuit Court almost

continuously since 1885, except that for a period prior to November, 1895, it was not on the docket, but was then by order of court redocketed, not on motion of any of the parties to it, it is true, but upon the motion of the executor of a former commissioner in the case. Whether the case had been stricken from the docket by a judgment of the court does not appear, and if it had, whether its being redocketed in the manner stated could give the court jurisdiction of it again, we refrain from deciding, in view of our conclusion upon more material points. On June 30, 1899, an amended petition was filed setting out that appellees had, since the filing of the original petition in 1835, entered upon certain of the lands, and had enclosed and were claiming same adversely to the petitioners. It was sought thereby to have their right of possession tried in that action, and as a final relief to have a writ of possession award the petitioners against appellees. It was alleged that appellees had entered wrongfully and without title.

In 1888 Carter county was formed in part from the territory of Greenup, and embraced in its boundary the particular land now in dispute.

Appellants urge that the Greenup Circuit Court having obtained jurisdiction to sell and convey the land under the act of 1835, and by virtue of the filing of the petition thereunder, it continued to hold that jurisdiction for every purpose necessary to carry the case to final judgment, notwithstanding the act creating Carter county had cut off this land into the latter county. This we grant. But we do not agree with appellants as to the purpose of the original suit, nor as to the scope of the act of 1835.

It is not doubted that the legislature might have conferred upon the Greenup court the jurisdiction to try the title to lands situated anywhere in the Commonwealth. But it has not done it. A jurisdiction to sell property, and a jurisdiction to try and adjudge the title to the same property are distinct matters. Under the present laws, the circuit court of the county where a decedent's personal representative qualified, has the exclusive jurisdiction of a suit for the settlement and partition of his estate, and to that end may sell the property left by the decedent, whether real or personal, and wherever situated in this State. (Sections 428, et seq., Civil Code, and section 66, same.) But this court had expressly held that such jurisdiction does not include the right to try questions of title to such property as between the personal or real representatives of the deceased owner upon the one hand, and an adverse party upon the other (*Citizens' National Bank v. Boswell's Adm'r*, 93 Ky., 92.) particularly when the court would otherwise not have jurisdiction of the parties or subject-matter. In a suit to partition lands among heirs which must be brought in the county where the personal representative of the deceased ancestor qualified (section 66, Civil Code), or in an action under sections 489-491, Civil Code, to sell lands indivisible without materially impairing their value, or for the maintenance of an infant owner, or for re investment for owners under certain disabilities, such jurisdiction does not include the right to bring into those actions adverse claimants to the property and to try the title and right of possession. (*McIntire v. McIntire*, 83 Ky., 502; *Bacon v. Boyd*, 17 Ky. Law Rep., 1876.) Jurisdiction is vested exclusively in the circuit courts of the counties where the land or some part of it lies, of suits involving its title. (Section 62, Civil Code.) The Greenup Circuit Court's jurisdiction was limited by the terms of the act

of 1835 to selling and conveying such title to the lands named as John and George Graham's heirs may have had. Jurisdiction to try disputes as to their title between Graham's heirs and other persons was not touched upon by the act, and consequently is not affected by it.

It is thought, though, that there is something in the doctrine that an entry by a stranger to the suit, *pendente lite*, affects him by the judgment as if he were a party to the record, as controlling the case before us. This doctrine can have no application here. It applies only when the stranger enters under some person who is a party to the suit. In that event he is bound by the record and decree by privity of his relation to him from whom he took title. He is bound in law to take notice of the records affecting his vendor's title, but he is not bound to take notice of, nor is he bound by, a suit over the property between strangers to his chain of title and right of entry. (*Herman Res Adjudicata and Estoppel*, 205, 211, 212; *Morton v. Long*, 3 A. K. Mar., 414; *Henderson v. Pickett's Heirs*, 4 T. B. Monroe, 58; *Stone v. Connelly*, 1 Met., 652; *McIntire v. McIntire*, *supra*.)

Nor can the jurisdiction of the Greenup Court be upheld on the ground that appellees are in contempt in interfering with the subject-matter of a suit pending in the court. The Greenup Court was not in the possession of this land, by its receiver, or otherwise. If appellees owned it, or had bought from one claiming to be the owner and not a party or privy to that suit, they had the right to enter upon it, although it was in litigation between others, so long as there was not a breach of the court's possession. (*Metcalf v. Commonwealth Land and Lumber Co., Receiver*, 24 Ky. Law Rep., 597.) There was no element of contempt shown by the record. Nor is that proceeding an appropriate one to try a disputed title. Jurisdiction can not be obtained under guise of the writ for that purpose. In such case it is confined solely to the trial of whether the court's receiver has been ousted of possession taken under order of court, in an action of which it had jurisdiction.

The judgment of the circuit court dismissing the amended petition because it had not jurisdiction of the suit against appellee, is affirmed.

Whole court sitting.

COMMONWEALTH v. ROSENFELD BROS. & CO.

(Filed May 31, 1904.)

1. **Taxation—Whisky in bond—Interest on taxes—Under Kentucky Statutes**, sections 4109, 4110, 4111 and 4112, regulating the payment of taxes on distilled liquors in bonded warehouses, wherever in either of said sections the payment of taxes is mentioned, it is also provided therein that the payment of interest shall be made, and we do not know how the legislature could have made it plainer than by the language used in these sections, that State taxes on whisky in bond should bear interest.

2. "As other taxes"—Meaning thereof—What was meant by the words "as other taxes," originally used in section 4110 prior to the change made in said section in 1902, was, merely to fix the time at which the interest theretofore provided for, commenced to run and the rate thereof; that is, that interest on taxes on spirits in bond should commence to run on the 1st day of

December in the year following the assessment, and should be at the rate of 6 per cent.

3. Rule of construction—Intention of legislature—The cardinal rule of statutory construction is, that the intention of the legislature shall be effectuated; and we find no difficulty in reaching the conclusion that the legislature manifestly intended that distilled spirits, in bond, should be assessed each year as other taxes, and although not required to be paid until the bonded period is at an end, yet for this privilege of retaining the State's money, the warehouseman should pay interest thereon. This conclusion is reached without reference to the language "as other taxes."

4. Estoppel—Laches—The fact that the auditor has received the principal sum of the taxes without the interest, and that the warehouseman, who was the custodian and not the owner of the whisky, permitted the owner to carry it away, and thus lost his lien through the wrongful act of the State's fiscal officer, does not estop the State from claiming and collecting interest on the taxes; and it is elementary that the State is not estopped by the laches of its officers.

5. Limitation—The rule has been established in this State that actions such as these, are barred by the expiration of five years after the cause of action accrued.

White & Ray for appellant.

Sweeney, Ellis & Sweeney, Gibson, Marshall & Gibson, D. W. Lindsey, C. H. Shield, Chas. H. Stoll and W. H. Mackoy for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker.

The appellees, Rosenfeld Bros. & Co., are the owners and proprietors of a distillery bonded warehouse in this State, wherein was stored, during the fiscal years from 1898 to 1903, inclusive, distilled spirits; and this is a proceeding on the part of the Commonwealth, by the auditor's agent, to collect interest alleged to be due on the taxes assessed for State and county purposes during the bonded period. Without entering into a detailed statement of the pleadings, we can materially abbreviate the opinion by a simple statement of the issues, which are adequately presented in the record.

No question is raised as to the regularity of the assessment of the distilled spirits, or of the payment by appellees of the principal of the taxes due thereon at the proper time; the questions presented are, first, whether or not the taxes due from appellees to the Commonwealth do, or do not bear interest under the statute regulating the taxation of distilled spirits; second, if so, is or not, the Commonwealth estopped from now collecting the interest by reason of the fact that the auditor received the principal sum of the taxes from appellees without interest; and, third, whether the five years' statute of limitation applies to the claim of the Commonwealth under this proceeding.

The law regulating the subject in hand is contained in article 5, chapter 108, Kentucky Statutes, section 4105 to 4114, inclusive. The following sections, relating to the payment of the taxes, are peculiarly applicable to the subject under discussion:

"Section 4103. Any person or corporation having the custody of such spirits of the 15th day of September in the year the assessment is made, shall be

liable for all taxes due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from day of payment.

"Section 4110. Taxes on distilled spirits which may be assessed while in a bonded warehouse, and on which the United States Government tax has not been paid, or will not become due before the 1st day of March after the assessment, shall be due on the 2d day of January, May and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear legal interest until paid.

"Section 4111. Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the 1st day of January, May and September next after said government tax shall have been paid, become due, or be removed from the warehouse, make and transmit the auditor of public accounts, and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement, sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the government tax has been paid or has become due, and what spirits have been removed from the warehouse during the preceding four months; the years in which such spirits were assessed for taxation, and the county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city, or town to the officers entitled to receive the same.

"Section 4112. On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest within five days after the same becomes due, he shall be deemed delinquent, and a penalty of 8 per cent. on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceeding to be instituted for the collection of such taxes, with such interest and penalties as may be provided by law for the collection of other delinquent taxes."

These sections are, substantially, the law as enacted in 1892, except that the following language with which section 4110 closes, "and the taxes on each year's assessment shall bear legal interest until paid," was originally as follows, "and the taxes on each year's assessment shall bear interest as other taxes;" the change having been made in 1902.

The first question for adjudication is, whether or not, under the law as existing from 1892 to 1902, the taxes in question bore interest. It will be observed, that, in each of the foregoing sections, wherever the payment of taxes is mentioned, it is also provided that the payment of interest shall be made; and if it be true, as contended by appellant, that the taxes under consideration do not bear interest during the bonded period, then it must be confessed that the legislature has taken great pains to insert into every section relating to the subject-matter, words which mean nothing. In section 4109, it is provided that the "person or corporation having the custody of such spirits on the 15th day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interest

and penalties which may accrue;" and "when payment shall be made by the warehouseman of the taxes, interest or penalties, he shall have a lien for the amount so paid, with interest from the date of payment." Section 4110 (prior to 1902): "And the taxes on each year's assessment shall bear interest as other taxes." Section 4111 provides how and when the State taxes shall be paid, and that the proprietor of the warehouse "shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city, or town to the officer entitled to receive the same." Section 4112: "On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest within five days after the same becomes due, he shall be deemed delinquent, etc."

We do not know how the legislature could have made it plainer, that State taxes on whisky in bond should bear interest, than by the language used in the sections aforesaid. It is contended, however, that inasmuch as the language of section 4110 is "and the taxes on each year's assessment shall bear interest as other taxes," that because other taxes do not bear interest, therefore, all of the language used by the legislature in providing for interest on the deferred payment of taxes assessed against whisky in bond, is nullified. To this, we can not agree. If there is anything plain in the statute in hand, it is that the taxes shall bear interest, and it can not be consonant with any known or sound principle of statutory construction, that the three words "as other taxes," because they are incorrectly used, shall nullify all of the other parts of the statute which make it perfectly clear that the legislature intended that the taxes should bear interest.

It may be conceded, as urged by counsel for appellees, that taxes do not bear interest without a special requirement therefor. We think that the sections quoted plainly show that the legislature intended to require that the deferred payments of taxes on whisky in bond should bear interest. Let us see, now, what the statutory requirement on the subject of interest on other taxes is. Section 4091 provides, in regard to taxation on the franchises of corporations, that, if they (the corporations) fail to pay the taxes due, after receiving thirty days' notice, they shall be deemed delinquent, and a penalty of 10 per cent. on the amount of the tax shall attach, and thereafter said tax shall bear interest at the rate of 10 per cent. per annum. Section 4103 contains a similar provision as to interest with reference to railroad taxes as that contained in section 4091, and section 4143 provides as follows: "Any person or persons failing to pay their taxes by the 1st day of December in the year following the assessment for such taxes, shall pay 6 per centum additional on the tax so due and unpaid." Now, while it may be admitted, that, technically, this is a penalty, and not interest, we think it clear that it is the provision specifically alluded to in section 4110; and what was meant by the use of the words "as other taxes" was merely to fix the time at which the interest theretofore provided for commenced to run, and the rate thereof; that is, the interest on taxes on spirits in bond should commence to run on the 1st day of December in the year following the assessment, and should be at the rate of 6 per cent. This conclusion is fortified by the fact that the penalty of 6 per centum, inflicted for the nonpayment of other taxes under section 4143, coincides in amount with legal interest, as defined in section 2218 of the statutes. So we find that "other

taxes," after a specified time, either bear interest at a fixed rate, or a penalty coinciding in amount with the legal rate of interest, 6 per cent.

The cardinal rule of statutory construction is that the intention of the legislature shall be effectuated, even at the expense of the letter of the law; and, to accomplish this, the meaning of words may be modified, the structure of sentences changed, or some words rejected altogether, and others interpolated. Endlich, in his work on the Interpretation of Statutes, section 296, thus states the rule: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done, sometimes, by giving an unusual meaning to particular words; sometimes by altering their collocation; or by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction, that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather, the end and object of all construction; and where the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter. And this rule holds good even in the construction of criminal statutes. Of course, if the meaning of the legislature is clear, every technical rule of construction must yield, and though the words used to express that meaning be not apt for the purpose, they will be so construed as to serve the same. And, a fortiori, if there is an express declaration of the intent and meaning of a statute by a provision in the same to carry out that intent, all other parts of the act are controlled in the construction of it. A clause, doubtful upon its grammatical construction, will be controlled by the general intent of the legislature, rather than by the literal meaning of the language."

This principle is upheld in the case of the Commonwealth v. Grinstead & Tinsley, 21 Ky. Law Rep., 1444. In the case of Sams v. Sams, 85 Ky., 400, it is said: "It is a well-settled rule of construction, that the letter of the statute will not be followed when it leads to an absurd conclusion; but on the contrary, the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it." In the case of Bailey v. Commonwealth, 11 Bush, 689, Judge Cofer, speaking for the court, said: "Words in a statute were always to be understood according to the approved use of language. But there are other rules of construction of equal dignity and importance, which must not be overlooked, and which, although not incorporated in our statute, are as binding upon the courts as if embodied in it. One of these rules is that 'every statute ought to be expounded, not according to the letter, but according to the meaning;' and another, that 'every interpretation that leads to an absurdity

ought to be rejected;' and still another, that a law 'ought to be interpreted in such manner as that it may have effect, and not be found vain and illusive.'" To the same effect is *Feemster v. Anderson*, 6 Mon., 537.

We find no difficulty in reaching the conclusion that the legislature manifestly intended that distilled spirits in bond should be assessed each year as other taxes, and, although not required to be paid until the bonded period is at an end, or the United States Government taxes paid, yet, for this privilege of retaining the State's money, the warehouseman should pay interest thereon. This conclusion is reached without reference to the language "as other taxes." What, then, is lacking on the subject in hand before we reach a consideration of these three words? Not that the distiller should pay interest on the deferred taxes, for that is plainly provided for without reference to these words; all that is lacking in the language used by the legislature up to the time that we are forced to apply to the words "as other taxes" to make it intelligible, is the time when the interest shall commence to run, and the rate at which it shall run. It is manifest, therefore, that the use of these words was intended to supply the meaning, or purpose, which was unsupplied by the other language already used. Turning, then, to section 4143, to ascertain the meaning of the words "as other taxes," we find that other taxes bear, not interest, but a penalty of 6 per cent., if not paid on the 1st day of December in the year following the assessment; and we are thus provided with the two lacking constituents necessary to make the meaning of the legislature on the whole subject of interest on whisky in bond, intelligible. Applying the principle enunciated by Mr. Endlich in the section above quoted, and sustained by the utterances of our own court in the cases cited, we ignore the fact that the legislature, in using the words "as other taxes," with reference to interest was technically incorrect, and borrow from the expression all that is essential, the time when the interest commenced to run, and the rate at which it runs, thus making the statute both practicable and intelligible, and saving it from the criticism of being either "absurd" or "vain" or "illusive." And this conclusion we reach in construing the statute as an original proposition.

But, we are not left without authority on the subject; this very question arose in the case of the *Commonwealth v. Taylor*, 101 Ky., 327. The court had originally reached the conclusion that the act relating to the taxing of distilled spirits in bond was unconstitutional, as being special legislation and contrary to the requirements of uniformity in the matter of taxation, as is shown by the first opinion delivered by Judge White. (This opinion was withdrawn and that of Judge Burnam, 19 Ky. L. Rep., 552, rendered in lieu thereof.) Upon a petition for rehearing by the warehouseman, the original opinion was withdrawn, and that contained in volume 101 was delivered by Judge Burnam. In the second opinion of the court, a most elaborate exposition of the unique position which distilled spirits in bond occupies in our fiscal system, is given. It is there shown, that, owing to the fact that the United States Government takes actual possession and control of distilled spirits at the time of its manufacture, and holds it in bond for a period of eight years, it is impossible for the State to enforce its lien for taxes until after the lien of the general government is extinguished, although the property is assessed each year by the State. This results in a great benefit to the warehouse-

man, by enabling him to find purchasers for his goods before he is required to pay cash for taxes, and for this benefit, and in order to preserve uniformity in taxation, the statute requires of him to pay interest. On this subject, the court said: "The assessment and taxes upon the property within the territorial limits of the authority levying them are uniform, and are imposed as fairly, according to value by an assessment made in the mode prescribed by the act under discussion, as they could be by assessment made by a county assessor, and, having been so assessed, are collected under the same general laws regulating the revenues as the taxes imposed on other property, except as to the time of payment, and this delay is necessarily made to depend upon the payment of the taxes due to the United States government, upon the same property; but, to preserve uniformity, distillers are required to pay interest on the deferred taxes."

This language is not the dictum of the writer of the opinion; it was essential to the upholding of the constitutionality of the act as to uniformity of taxation, that the conclusion enunciated should have been reached. This opinion was delivered on May 27, 1897, and since that time, there has been no room for two opinions on the subject in hand. We freely admit the great force of the doctrine of contemporaneous construction, where the meaning of the statute is vague or uncertain; but when the court of last resort construes a statute, the further utility of the doctrine ceases.

But it is urgently insisted that the State is now estopped from collecting the interest involved herein, because the auditor received the principal sum of the taxes due without interest, and the warehouseman, who was only the custodian, and not the owner of the whisky, permitted it to be carried away by the owner, and thus lost his lien through the wrongful act of the State's fiscal officer; and that, if the distiller is now required to pay the interest, he will have no recourse against the owner for the amount of the interest adjudged against him. It may be true, that this will work a hardship upon the distiller, but it was his duty, under the law, to pay the taxes and the accrued interest, and we can not, in his behalf, waive the time honored and conclusive presumption, that he knew the law; and especially is this true since 1897, when the case of the Commonwealth v. Taylor was decided, thus establishing, beyond all question, that taxes on whisky in bond bore interest on the assessments made during the bonded period; waiving this, however, it is elementary, that the State is not estopped by the laches of its officers. Bigelow, in his work on Estoppel, page 341, says: "Clearly, the State can not be estopped by the unauthorized act of its officers." The same rule is laid down in the Am. & Eng. Encycl. of Law, 2d edition, page 397, in this language: "But such estoppels can not arise from the unauthorized act of the agent or officer of the State." (*Commonwealth v. Carter*, 21 Ky. Law Rep., 1509; *Elmendorf v. Carmichael, & c.*, 3 Litt., 481; *Pulaski v. State*, 43 Ark., 118; *Attorney General v. Marr*, 55 Mich, 445, *State v. Brewer*, 64 Ala., 287.)

Since the case of *Commonwealth v. Knute*, 24 Ky. Law Rep., 2138, the rule has been established in this State, that actions such as these are barred by the expiration of five years after the cause of action arose.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

MOBILE & OHIO R. R. CO. v. REEVES.

(Filed April 26, 1904—Not to be reported.)

1. Railroads—Failure to stop train—Rudeness of conductor—Excessive verdict—In an action by appellee for damages for failure of the conductor to stop the train long enough for her to get aboard, and charging that the conductor jerked and abused her, the evidence of the appellee as to any rudeness of the conductor, being unsupported and being contradicted by a dozen witnesses who were present, a verdict allowing her \$400 damages is excessive and flagrantly against the evidence.

2. Instructions—Measure of damages—There being some conflict in the evidence as to whether the train stopped long enough for appellee to get on with safety, the jury was authorized to give her such sum in damages as would fairly compensate her for any time she lost, expenses incurred, inconvenience or discomfort she suffered by reason of appellant's failure to transport her to her place of destination.

3. Punitive damages—Duty of court—Where it is sought to recover both punitive and compensatory damages, the court may refuse to give an instruction allowing punitive damages, if it be shown by the plaintiff's own evidence that only compensatory damages should be awarded; but plaintiff is entitled to an instruction for punitive damages, although there was no other evidence than her own, upon which to base it; but while this is true it is likewise the duty of the court to set the verdict aside if excessive in amount, or flagrantly against the evidence.

Landers & Leek and Corbett & White for appellant.

J. B. Wickliffe and J. H. Tharp for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a verdict and judgment of \$400 recovered against the appellant, Mobile & Ohio R. R. Co., by appellee, Ollie Reeves, in the Ballard Circuit Court.

It was averred in the petition that she and her husband having purchased of appellant tickets which entitled them to ride on its passenger train from Laketon to Wickliffe, Ky., a distance of nine miles, were standing on the depot platform at Laketon awaiting the coming of the train, and that when it arrived at the station, appellant's servants in charge thereof, instead of stopping it, as it was their duty to do in order that appellee, her husband and child might get thereon, only reduced its speed sufficiently to permit the conductor to jump off, which he did, and inquired of appellee if she wished to get on; and upon being answered by her in the affirmative, he maliciously and wrongfully cursed, abused and jerked her about, refused to let her get aboard the train, and caused it to leave without her; that she was at the time enceinte, and by reason of the abuse and maltreatment of the conductor, as well as his negligent failure and that of appellant's other servants in charge of the train to stop it long enough for her to get thereon, she was put to great inconvenience, and subjected to much physical and mental pain, whereby she was damaged in the sum of \$2,000.

The answer of appellant specifically denied the averments of the petition, and in addition averred that the train did stop on the occasion referred to in the petition, and did not start again until a sufficient length of time had

elapsed to enable all persons at the station or near at hand to get upon it, who were desirous of doing so; that the conductor and train porter were on the platform ready to assist appellee or others to get on the car, but she did not attempt to get on the train or signify a desire to do so; that the conductor did not curse, abuse, or use any improper language to appellee, or jerk or throw her about, or take hold of, or otherwise mistreat her.

Upon the trial appellee introduced but two witnesses besides herself. Her own testimony in the main sustained the averments of the petition; that is, she stated that the train did not stop when it reached Laketon, though it did check up enough for the conductor to get on the platform; that he came to her and asked if she were going, and she told him yes, if the train stopped; that he then said he was behind time, and took her by the arm and told her if she was going to get on to do so, to which she replied that she would not until the train stopped; that he then said to her she was a damned crank, and he could not fool with her any more, but would have to go on. She caught hold of the train, but did not get on it, as it was still moving. She further testified that when the conductor took hold of her he shoved her back and pushed her towards the train until she took hold of a post, whereupon he jumped upon the train and left, and that from the pain and excitement of her encounter with him, she was confined to her bed from the time she got to her sister's that day, until 9 o'clock the following morning.

The next witness introduced in her behalf was John Tolliver, who testified that he saw her standing at the place on the platform where passengers usually get on the train; that the train stopped, but not more than a minute, if that long, and appellee tried to get on it, but it pulled out and left her. He did not see her catch hold of the train, nor did he see the conductor take hold of her. On cross-examination the witness further testified that he was close to appellee while the train was there, and a part of the time only five or six steps from her, but did not testify that he saw the conductor mistreat or abuse appellee. The only other witness introduced by appellee was her sister, Mattie Bass, who was not at Laketon when appellee failed to get on the train, but who testified that appellee came to her house that day, and was sick for perhaps a week, that she thought she was threatened with a miscarriage, which did not occur.

Eleven witnesses were introduced by the appellant, all of whom testified that the train did stop on the occasion in question; several of them said it was a very brief stop, some of them that it stopped twice, but each stop was short. At the first stop a man got off the train, at the second stop, appellee's husband with their child succeeded in getting on, but ascertaining immediately after the train left the station that his wife was not aboard, at his request the train was stopped by the conductor two or three hundred yards from the station, and he and the child permitted to get off, after which they rejoined appellee at the station.

The conductor testified that the train was thirty or forty minutes late when it arrived at Laketon, but upon reaching the station that it stopped twice, the first time about a minute, and the second long enough to enable appellee's husband and child to get on; they were, however, let off the train a short distance from the station when the discovery was made by the husband that his wife was not on the train. The conductor also testified that

at the time appellee's husband and child got on the train, he asked her if she wanted to get on, to which she made no reply. About that time the flagman, Collins, put out on the platform a stool used by ladies in getting on the train, but appellee made no attempt in his presence to get on the train, or expressed any desire to do so. The witness also stated that he did not take hold of, or use any profane or abusive language to appellee, and that he was not at any time within more than five or six feet of her.

These statements of the conductor were corroborated by the flagman, Collins, and by other witnesses who were present. One of these witnesses, Isaac Allen, a farmer living near Laketon, testified that the train stopped long enough for him to mail a letter on it. Appellee then came up and took hold of the train, which was moving slowly; he advised her to turn it loose, that she might fall under it, and get killed, but she held on, and the conductor came along and said "you had better get on if you are going to, I can't hold the train all day;" she said, "I can't get on unless it stops," to which he replied, "Its been stopped long enough for you to get on if you wanted to;" he then took hold of her arm as if to help her on, and she turned loose, and so did he, and got on the train. The train then went off a piece and stopped and put her husband off. The witness further testified that when the train stopped, the stool was put off; that he was then in ten feet of the conductor, but when the stool was put on the ground for appellee to get on the train, she, for some cause unknown to the witness, walked away from the conductor, instead of getting on; she seemed to be excited and acted as if she had never been on a train before. Her husband jumped on the train with the child and left her. The witness also testified that he thought he heard every word that passed between appellee and the conductor, that he could have touched either of them with his arm, and the conductor did not use any rough or profane language to her.

Another witness, Mack Ashworth, who had the same opportunity for seeing and hearing what occurred that was afforded Allen, testified to the same effect, and the same is true of several other witnesses, whose testimony need not be mentioned in detail.

An examination of the bill of evidence will show that of the fourteen witnesses introduced in the case, appellee is the only one who testified that the conductor treated her with violence, or with language of abuse. Her own witness, Tolliver, who was near her all the time the train was at Laketon, entirely failed to corroborate her as to the alleged misconduct of the conductor. Upon the other hand, all of the witnesses who saw and heard what passed between appellee and the conductor contradicted her as to what occurred between them. These witnesses constituted half of the entire number introduced by appellant, and several of them were not employes of appellant, and had no connection in any way with its business, and no interest whatever in the result of the trial.

It would seem, therefore, that appellee's version of what occurred between her and the conductor was not only not corroborated, but in direct conflict with all the rest of the evidence. It is equally manifest that appellee's contention that the train did not stop at Laketon, is also untenable. She alone testified that it did not stop at all. Twelve of the other thirteen witnesses say it did stop. The thirteenth witness, Mrs. Bass, was not at Laketon, at

the time, and, therefore, did not testify on that point. But while there can be no doubt that the train stopped, it is by no means certain that it stopped long enough for appellee to get upon it. Upon this point the evidence was conflicting, but much of it conduced to show that the stop was not of sufficient length to enable appellee to get upon the train in safety. It was in proof that the train was thirty or forty minutes late, and that the conductor was in great haste to leave Laketon in order to make up the lost time. In fact, so brief was the stay of the train that appellee's husband, with great difficulty, succeeded in getting upon it with their infant child.

Obviously it was the duty of appellant's servants in charge of the train to have stopped it a reasonable time for appellee to get thereon with safety; and their failure, if any, to do so, entitled her to such damages as she sustained thereby, the measure of which is such a sum as will fairly compensate her for any time she lost, expense she incurred, or personal inconvenience or discomfort she suffered, by reason of appellant's failure to transport her on its train from Laketon to Wickliffe, as it contracted to do, in selling to her husband a ticket for her use between those places. (Southern Ry. Co. v. Marshall, 23 Ky. Law Rep., 813.)

It is insisted for appellant that the trial court erred in giving the instruction as to punitive damages, as appellee alone testified that the conductor was violent or abusive in his treatment of her, in which she was unsupported by her own witnesses, and contradicted by those of appellant. We are unable to concur in this conclusion of appellant's counsel. Where it is sought to recover both compensatory and punitive damages, the court may refuse to give an instruction allowing punitive damages, if it be shown by the plaintiff's own evidence that only compensatory damages should be awarded. But an instruction as to punitive damages was proper in this case, although there was no other testimony than that of appellee upon which to base it, as she was entitled to have the jury instructed upon her theory of the case, if there was any evidence, however slight, to support it. But while this was true, it was likewise the duty of the court to set aside the verdict of the jury, if excessive in amount, or flagrantly against the evidence.

We are of opinion that the verdict was and is excessive, and otherwise flagrantly against the evidence, which is to be attributed in large measure, we think, to the failure of the court to more specifically define the measure of damages. For the instructions, as given, directed the attention of the jury with great particularity to the allowance of punitive damages on account of the alleged misconduct of the conductor, of which there was only slight and unsatisfactory proof, and left them unadvised as to the measure of compensatory damages, when in fact there was some satisfactory evidence conducing to show that appellant's cars, on the occasion complained of, were not stopped long enough to afford appellee a reasonable time to get upon them, which authorized the jury to allow her some amount by way of compensatory damages.

For the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial and for further proceedings consistent with this opinion.

MANCHESTER ASSURANCE CO. v. DOWELL, &c.

(Filed April 26, 1904—Not to be reported.)

1. Insurance—Conduct of agent—In this action to recover upon a policy of fire insurance issued upon personal property, it appearing that it was desired because the applicant had borrowed money from a bank upon the agreement to secure his property by insurance, and the fact that the mortgage was referred to in the application, or rather the statement that it was mortgaged, was contained in the application, the agent by whom the policy was to be issued refusing to issue it because the property was mortgaged, the soliciting agent changed the application so it appeared there was no mortgage, this, it appearing, having been acquiesced in by the agent to whom the application was sent, and it further appearing that there was no fraud on the part of the applicant, but that he acted in accordance with the advice of the soliciting agent, a judgment against the company for the amount of the insurance will not be disturbed.

2. Same—By section 639, Kentucky Statutes, it is provided that all statements in an application for insurance, shall be deemed and held representations and not warranties, and that no representation, unless material or fraudulent, prevents a recovery on the policy, and in this action where the agent knew all the facts with reference to the condition of the property, it can not be said that the applicant was guilty of fraud in making the statements in the application.

C. H. Shield and Wright & McElroy for appellant.

John B. Rodes and Louis McQuown for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal taken from a judgment of the Warren Circuit Court in which the appellee, E. V. Dowell & Co., recovered judgment against the Manchester Assurance Co. on a policy of insurance issued in August, 1902, for \$1,000, \$100 of it being on fixtures, and \$900 being on merchandise. The property insured was situate in the town of Woodburn, a few miles from Bowling Green. In September, 1902, the property was destroyed by fire. In January, 1903, suit was brought on this policy, the appellant having refused to pay. It bases its refusal to pay on the ground that appellee fraudulently concealed from it the existence of a mortgage on the property.

It appears that Dowell & Co. had bought a store from a man by the name of J. J. Herrington. Dowell & Co. were unable to pay the full contract price to Herrington, because it desired to purchase an additional stock from the wholesale houses to increase the entire stock to its desired proportions. Therefore, the parties agreed that appellee would give a mortgage to the Bank of Woodburn to secure the payment to that bank of \$890, and also that Dowell & Co. would assign to the bank, as collateral for this sum, a note for \$650, which was solvent and a lien on land in Allen county, Ky. The officers of the bank agreed to do this, provided appellee would obtain a policy of insurance on its stock, and that it should be assigned to the bank as additional security for its loan of this money. One Pollard, of Bowling Green, Ky., was the agent of appellant, with power to issue policies. One Williams, a resident of Woodburn, was a soliciting agent of appellant under Pollard, with power to solicit insurance, prepare and receive applications for

polices, deliver the policies and receive the premiums from the insured. It appears that Mr. Williams was called in and made acquainted with the above facts, and he prepared an application on one of appellant's blanks, in which was the question as to whether or not there was any mortgage on the property sought to be insured; to which question in that application the answer was written "yes," and the policy was directed to be issued to the Woodburn Bank to the extent to which its interest might appear. This application was forwarded to Pollard at Bowling Green, and on the next day he answered that the appellant would not issue a policy upon such terms, or upon mortgaged property; that same evening appellee, Williams, and J. J. Herrington had a conversation with Pollard by telephone, Herrington doing the talking with Pollard, whereby it was agreed, as proven by Herrington and E. V. Dowell, that the policy was to be issued as a "straight policy," which was explained to mean that the policy was to be paid direct to appellee, the insured, without mentioning the name of the bank. The next morning Williams, in the presence of Dowell and Herrington, changed the former application, directing the policy to be made payable to appellee instead of the bank, and erased the word "yes" in answer to the question as to whether or not there was any mortgage, and wrote, instead, the word "no." Williams at the time explained that that was the proper way to answer that question; that as the mortgage was for only \$890, and as the bank held the land note as collateral, that the mortgage lien was for only a little over \$200, and as the stock was then worth over \$3,000, the company would not regard this mortgage as an incumbrance, within the meaning of that question. Williams then forwarded this application to Pollard, and the policy was issued and returned and handed by Williams to the bank. Williams admitted, at the time of the writing of the first application, that there was to be a mortgage, but denied that he understood that there was to be a mortgage at the time of the writing of the second application. On the contrary, he stated that when the second application was prepared he was informed by the parties that there was not to be any mortgage, that they had agreed upon a different plan to secure the bank. Pollard testified that he did not know anything of the mortgage. The letter of Williams to Pollard and the letter from Pollard to Williams were introduced to corroborate them on this point. The testimony of Dowell, Herrington and Rogers, the banker, corroborate appellee upon the fact that these agents did have knowledge of the fact of the existence of the mortgage at the time of the second application, and Herrington positively corroborates Dowell as to the statement of Williams that the answer "no" was a proper answer to the question in the application as to whether or not there was any lien or incumbrance on the property, because the company would not regard this as an incumbrance within the meaning of the question.

The provision of appellant's policy upon which it relies to defeat the policy reads as follows: "This entire policy, unless otherwise provided by agreement, endorsed hereon or added to, shall be void if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

The appellant says that this mortgage to the bank was concealed from it, that it had no knowledge or notice thereof, and that the appellee intentionally and fraudulently concealed the existence of this mortgage, with a view

to deceive and defraud appellant, and by reason thereof the policy was void from its inception. The appellant claims that under no circumstances would it issue a policy on personal property incumbered by a mortgage, and that appellee knew that fact. Appellee says that it had no personal notice or information of that fact. If appellant's contention be actually true, we are inclined to the opinion that, under the terms of appellant's policy, appellee might be misled into supposing that it might take a risk on mortgaged property where the risk would not be materially affected thereby. In the provision quoted, this language is found: "Unless otherwise provided by agreement endorsed hereon or added to." This language clearly indicates that under certain circumstances the company will, by agreement, insure mortgaged chattels.

There is another provision in this policy which clearly indicates the same thing, viz.: "It, with the consent of this company, an interest under this policy shall exist in favor of the mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached or appended hereto."

We have had a statute in this State since the year 1874 which is now section 639 of the Kentucky Statutes which reads as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."

The only real questions in this case are, whether or not the representation that there was no mortgage on this property was material or fraudulent, and, if material, whether or not the appellant is estopped from making a defense on that account by reason of a knowledge of the facts with reference thereto by its agents who took the application, delivered the policy and received the premium. And also whether or not the mortgage, under the facts of this case, materially affected the risk of appellant.

In the case of *Wright's Adm'r v. Northwestern Mutual Life Insurance Co.*, 91 Ky., 209, the court, in considering a question were the soliciting agent, after the applicant had made a true answer, wrote a different one, informing the applicant at the time that the answer he had written was the proper one, said in substance that where the applicant for insurance makes true answers to questions, and the soliciting agent writes in the application a different answer, which he assures the applicant will meet the requirements of the policy, the company will be liable, although it might have refused the insurance if the answer made by the applicant had been written in the application.

In the case of the *Germania Insurance Co. v. Wingfield*, 22 Ky. Law Rep., 457, in discussing the question as to the knowledge of the facts with reference to the property about to be insured, and the responsibility of the company in such case, the court said: "By the acceptance of the application addressed to the Lancashire Insurance Co. from Clark, and by the issue and delivery to him of the policy of insurance to be delivered to appellee, appellant ratified and adopted the acts of Clark in soliciting the insurance and receiving the application, and in effect constituted him in this transaction its agent, and the law is well settled in this State that knowledge on

the part of the soliciting agent at the time he took the application for insurance, is the knowledge of the company which he represents, and will estop the company from relying upon a provision of the policy which ignores such information of its agent." (Phoenix Insurance Co. v. Phillips, 16 Ky. Law Rep., 162; German Insurance Co. v. Hart, Id., 344; Lancashire Insurance Co. v. Gertisen, 21 Ky. Law Rep., 471, Rogers v. Farmers Mutual Aid Association, 20 Ky. Law Rep., 1925.)

If it be true that appellee, in obtaining this policy, intentionally and fraudulently concealed the fact of the existence of this mortgage, with a view to deceive and defraud the appellant, then the policy would be void and not binding; but this question, as well as the other questions in the case, were submitted to the jury by the court in its instructions, which were very favorable to appellant, and the jury determined that appellee did not obtain this policy with any such purpose or intent. We have read the instructions given by the court with care, and considered them in the light of the criticism of appellant's counsel; without referring to them in detail, it is sufficient to say that while there were more of them than were necessary to present the issues for the determination of the jury, and to some extent possibly calculated to confuse, yet we are unable to see how it was possible for any confusion that might have existed, to have operated to the prejudice of appellant, as the instructions which were calculated to confuse were given at the instance of appellant, and were more favorable to it than the law and facts authorized.

Wherefore, the judgment of the lower court is affirmed, with damages.

LEXINGTON RAILWAY CO. v. FAIN.

(Filed April 26, 1904—Not to be reported.)

1. Street railway—Accident by—Damages—Where one was hurt in a collision with a street car, sustaining injuries requiring the services of physician and treatment in hospital, and was compelled to use crutches for some time, while the testimony is conflicting as to whether the injuries are of a permanent character, the court properly left that question to the determination of the jury.

2. Same—Instructions—Where one, while driving a wagon, which was struck by a street car resulting in injury to him, a peremptory instruction for the defendant in an action against the railway company by him for damages, was not authorized where there was evidence tending to establish negligence on the part of those in charge of the car, although there was conflict of testimony as to how the accident occurred.

3. Same—In an action against a street railway company for damages, where it was averred in the answer that the injury resulted from the mismanagement by the plaintiff of the horse he was driving, there should have been an instruction upon contributory negligence; and an instruction authorizing punitive damages was improper where the record fails to show any elements in the conduct of the servants in charge of the car which justify an infliction of punishment in the form of exemplary damages.

R. C. Stoll and Morton, Webb & Wilson for appellant.

Geo. Denny for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

As the result of a collision between an electric car belonging to appellant and the spring wagon of appellee, the latter was thrown from the wagon and injured, for which he sued and recovered of appellant in the court below \$2,000 in damages, it being averred in the petition that his injuries were caused by the negligence of appellant's servants in charge of the car.

The accident occurred on Limestone street in the city of Lexington, and the injuries received by appellee consisted, as alleged, of the fracture of a small bone of the ankle, a bone of the foot, and a hurt of some sort of the hip and back. For some reason not explained in the record, Dr. Bullock, the surgeon who first attended appellee and bandaged his leg and foot, was not introduced as a witness. Dr. Barrow, another Lexington physician, was called later to see appellee with Dr. Bullock, and testified that he did not look at the leg or foot, as it was not thought advisable to disturb the bandage, but examined the hip, which showed a bruise to the flesh, but neither fracture or dislocation. Dr. Mathews, whose deposition was taken in the case, testified that he attended appellee several weeks after he returned to his home in Jessamine county, but only treated him for fracture of one of the tarsal bones of the left foot. So it appears that appellee alone testified that the ankle bone was broken. It does, however, appear from the evidence that appellee remained in a Lexington hospital for ten days after he was injured, that he was confined to his bed and room at home for six weeks, and had to use crutches for two or three months. While his injuries were both serious and painful, there is considerable doubt under the evidence as to their being of a permanent character, but we think the trial court properly left that question to the decision of the jury.

The evidence as to the manner in which appellee received his injuries is conflicting. It appears that the car in approaching the place of the accident, had to do so upon a descending grade, in fact, down somewhat of a hill, notwithstanding which its rate of speed was not unusual or improper. Appellee's own testimony as to the manner of receiving his injuries is somewhat confusing, and that of his principal witness, Driscoll, hardly less so. Appellee testified that his mare, being frightened at the car, backed the spring wagon to which she was attached as the car approached, and that the hind wheels, or one of them, went upon the railway track in front of the car, which struck it, and thereby threw him out. Driscoll testified that appellee drove from the west to the east side of the track, and that the car struck the hind wheels of the wagon as appellee was crossing the track after the mare and the front wheels had reached the east side. But considered altogether, the evidence introduced by appellee was to the effect that shortly after he entered Limestone street, he saw the approaching car when it was 200 yards or more from him, and when it got in about 300 feet of him his mare became frightened and uncontrollable; that appellee retained his seat in the front of the wagon, the car came on, and he held up his hand and called to the motorman to stop; the mare continued to back until the hind wheels, or one of them, got upon the track just in front of the car, which, striking the wagon, threw it to one side several feet, thereby causing ap-

pellee to be thrown out in front, and that the car was not stopped until after the collision.

Upon cross-examination, appellee stated that the car was "right on" when the mare commenced backing, and declined to state that there was slackening of the speed of the car as it approached him, but said if there was any he did not notice it, which was not unreasonable in view of the fact that his attention was in the main confined to the frightened mare. The appellant introduced five witnesses to the accident, including the conductor and motorman in charge of the car, all of whom testified in substance that when appellee's mare became frightened, the speed of the car was slackened to such a degree as to give the motorman complete control of it, and that it was in fact stopped, after which, and while it was stationary, appellee struck his mare with the lines and she, in her still frightened condition, either backed or ran the wagon against the foot board of the car, causing his fall and injuries.

All of these witnesses agreed as to the fact that appellee struck the mare with the lines, but some of them stated that when struck with the lines by him, the mare backed against the car; others that she plunged forward and ran the wagon against the car, but all but one of them testified that the car was not, at the time, in motion, and he was unwilling to state positively that it was in motion. It is apparent from the foregoing statement of the evidence that a peremptory instruction in behalf of the appellant would have been proper, for there was evidence from appellee's witnesses that tended to establish negligence upon the part of appellant's agents in charge of the car. Upon the other hand, the evidence of appellant's conductors showed that there was not only no negligence upon the part of its agents, but that appellee's injuries were caused by his own negligence.

If the jury believed from the evidence that the appellant's servant in charge of its car saw, or by the exercise of ordinary diligence could have seen, that there was danger of the car striking appellee's horse or wagon unless it should be stopped, and that after they saw, or could so have seen such danger, they could have stopped the car in time to have prevented a collision, but failed to do so, it was their duty to find for the appellant. Upon the other hand, it was their duty to find for appellant, unless it was believed from the evidence that its servants in charge of the car after the collision saw, or by the use of ordinary care could have seen, that there was danger of a collision unless the car should be stopped, failed to stop it in time to prevent the collision. We may also say that the verdict should have been for appellant, if the jury believed from the evidence that the car was stopped and that after it became stationary the wagon of appellant was, by the action of his horse, brought in contact with the appellant's car, and that appellee's injuries were caused by such contact of the wagon and car.

The foregoing views were embodied in the instructions in this case, and we think the lower court should have given an instruction upon contrary negligence, as it is averred in the answer, and there was some evidence tending to show that the collision between the car and appellee's wagon was caused by the latter's mismanagement of the horse while the car was stationary. And it appears from the record that counsel for appellant offered an instruction covering this point, which the court refused to give. We

further of opinion that the court should have given the usual instructions defining negligence and ordinary care, and that it was error to instruct the jury that they might allow punitive damages. Even if it be conceded that appellee's injuries were caused by the negligence of appellant's servants in charge of the car, the evidence found in the record fails to show, in their conduct, the presence of those elements that justify the infliction upon appellant of punishment in the form of exemplary damages. It seems to be well settled that the question of whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages, is for the determination of the court. (Sedgwick on Damages; section 387; McHenry Coal Co. v. Snedden, 98 Ky., 686.)

Under the facts of this case the recovery should have been confined by the court to compensatory damages.

For the reasons indicated the judgment is reversed, with directions to the lower court to grant appellant a new trial, and for further proceedings consistent with the opinion herein.

TARVIN, &c. v. WALKER'S CREEK COAL AND COKE CO.

(Filed April 27, 1904—Not to be reported.)

1. Land—Ancient deeds—Power of attorney—Presumption—Estoppel—In a land controversy between parties claiming under the same vendor, conveyances made by one claiming to be the attorney in fact for the patentee, neither of the litigants is in a position to assail the title of the other, and after the lapse of over sixty years, during all of which time the validity of the title has been recognized by the persons living on and claiming the land, the authority of agent making the conveyance should be presumed.

2. Certain lines established—Finding of chancellor—Conclusion—In the great number of conveyances and divisions of these lands, certain lines, including certain marked corners, have always been recognized as the west line of the G. and E. survey, and in view of the old marks found on this line and the want of adequate marks on the line claimed by the appellant, we conclude that the circuit court properly established the line claimed by the appellee, as the true line between the parties, and we decline to disturb the chancellor's finding.

H. L. Wheeler for appellants.

A. F. Byrd and Gourley & Roberts for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hobson.

On November 17, 1835, pursuant to a sale made on September 27, 1828 Thomas Duckham, as attorney in fact for Samuel Drake, conveyed to Grigsby & Elkins, in consideration of \$250, 10,000 acres of land, being part of Samuel Young's 30,000-acre survey, and bounded as follows: "Beginning on a spruce pine standing on a cliff of Devil's creek near the Hotel cave; thence N. 10 degrees W. passing the said cave 220 poles to a stake; thence N. 65 W. 770 poles to a stake in the lower line of Samuel Young's; thence with line S. 9 degrees E. 638 poles to a stake; thence S. 20 degrees E. 1,000 poles to survey of Crow and Adams; thence with their line to a large tree standing

on the bank of Devil's creek; N. 16 degrees W. 780 poles to the beginning," lying on the north side of the north fork of the Kentucky river.

The deed contains the following words of exception: "With the exception of mines, mineral and saltpeter caves, together with wood or timber to work said caves, etc., as also all the bottom land on the said river fit for cultivation, as also rail timber to enclose said land and keep up the fences."

On June 9, 1837, Thomas Duckham, as guardian for Samuel Duckham, conveyed to Grigsby & Elkins pursuant to the sale made on September 27, 1828, for the same consideration, 10,000 acres bounded as follows: "Beginning at a spruce pine standing on a cliff near the Hotel cave; thence N. 16 degrees W. crossing the Hotel cave in all 220 poles to a stake; thence N. 65 W. 770 poles to a stake in the lower line; thence with that line S. 9 E. 638 poles to a stake; thence S. 30 E. 1,000 poles to a survey of Crow and Adams; thence with their line to a large beech tree standing on the bank of Devil's creek; thence N. 16 W. 700 poles to the beginning." This deed contains only the following restriction: "But the said parties are not to interfere with any land on the Kentucky river that is fit for cultivation."

On June 9, 1843, Thomas Duckham conveyed to Samuel Plummer and Edward Kinkead, among other things the Young 30,000-acre survey "with a deduction (as stated in the deed) of what the said Duckham hath sold and made deeds to prior to this date." On October 4, 1846, Plummer conveyed to Kinkead his one-half interest in the land thus conveyed to them.

Appellants claim under Edward Kinkead. Appellees claim under Grigsby and Elkins. The question in dispute is the location of the west line of the Grigsby and Elkins tract.

The point is made for appellants that no power of attorney is shown, authorizing Duckham to convey the land for Drake, and that as guardian he had no power to convey his ward's land. No title is shown in Duckham from the patentee Young; but both parties claim under Duckham, and neither is in a position to assail his title. After the lapse of so many years, when Drake has not repudiated the act of his assumed agent, and after so many of the public records in this section have been destroyed, as between parties all claiming under Duckham, his authority should at least be presumed; for, for something like sixty years, persons have lived on the land holding it under this title without question. The beginning corner of the Grigsby and Elkins tract is at A. on the following rough plat, on which the west line of the tract, as claimed by appellant, is indicated approximately by the lines B, 2, 3, and as claimed by appellees by the lines F, 10, 11, the land in controversy being indicated by the figure 7, 8, 9, D:

gives way to established objects found on the ground. If we stop at B and run the next line B, 2, according to the calls of the deed, the next line 2, 8, must be greatly extended to reach the Crow and Adams survey and neither of these lines seem to be adequately marked or to have been recognized by any of the parties. If we run on to F the next line must be extended beyond the call of the deed to reach 10 and then the line 10, 11, closes pretty well with the deed. About the year 1859 John D. Spencer settled west of the line 2, 7, claiming under Grigsby and Elkins down to the line F, 10. He sold land to a number of parties around where the town of Zachariah now stands. Edward Kinkad was then living and knew of a survey made by Spencer, but there appears to have been no dispute at any time between him and Spencer. Spencer claimed to a poplar and persimmon corner which was well marked and stood about the point 10. This seems to have been then the recognized corner and the line 10 to 11 was then and is now plainly marked. Previous to 1859, and apparently soon after Grigsby and Elkins bought, Llewellen Bush, claiming under them, settled west of the line B, 2, claiming down to the line of the Young patent. He died there in 1859 and his land was divided among his children, there having been about the year 1848 a division made between him and Elkins. In all these divisions the line F, 10, 11, including the poplar and persimmon corner at 10 was recognized as the west line of the Grigsby and Elkins survey. In view of the old marks found on this line, its long recognition by the parties, and the want of adequate old marks on the line claimed by appellants, we conclude that the circuit court properly established the line as claimed by appellees as the true line between the parties.

It is contended for appellants that if the corner is located where the poplar and persimmon stood, and the line is run from there according to the calls of the deed, it will not include all the land in controversy as shown on the plat, but will run through it. There is evidence to this effect, but it is not from persons who have run the line or seen it run. On the other hand, there is evidence for appellees which locates this corner so as to include all the land in controversy. On this question of fact, which is of minor importance, we decline to disturb the chancellor's finding. The exception in the Duckham deed, of wood or timber to work the mines and caves, and of rail timber to enclose the bottom land on the river, fit for cultivation and keep up the fences, is not material here because it is not shown that any of the timber in controversy is near the river or will ever be needed for the purposes mentioned, and it constitutes no reason why appellants should not be enjoined from destroying the timber on the land to which they have no right.

If we do not apply the rule that where both parties claim under the same title neither can assail the title of their common vendor, the result is the same; for appellees have a deed to the land from the heirs at law of the patentee, Young, while appellants do not connect themselves with the patent at all. It is insisted for them that the deed made by the heirs of Young to appellees is void for champerty; but we do not find in the record sufficient evidence to show that appellants or those they claim under were in actual occupancy of the land at the time these deeds were made, so as to make the deed champertous. (*Krauth v. Hahn*, 28 Ky. Law Rep., 1861.) On the

whole case the judgment of the chancellor seems to be in accord with the rights of the parties, and to meet the ends of substantial justice.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. MENCER.

(Filed May 19, 1904—Not to be reported.)

Railroads—Instructions—Damages—Where appellee, a section hand in the employ of appellant, with a white lantern which appears to be a signal to a railroad engineer that he may proceed without danger, lay on the track and goes to sleep and is injured by a passing train, a peremptory instruction should be given to find for the appellant in an action against it by appellee to recover damages for his injury, as such conduct of appellee under the circumstances was the grossest negligence.

Johnson & Jennings, Wm. H. Yost and L. A. Teague for appellee.

J. M. Dickinson, Pirtle, Trabue, Doolan & Cox and Gordon and Gordon for appellant.

Appeal from Hopkins Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellee, John Mencer against the appellant, the Illinois Central R. R. Co., to recover damages for personal injuries. He testified that on the 1st day of February, 1902, he was in the employ of the defendant as a section hand and track watchman; that a heavy sleet had fallen which covered the defendant's telegraph poles, wires and trees near the track, and rendered them liable to break and fall across the track; that for several days and nights prior to the 1st of February, he had been specially employed to patrol and watch a portion of the track, and especially a large elm tree overhanging the track about one and a half miles south of St. Charles; that by direction of the section boss he had built a large coal fire near this elm tree about six feet from the ends of the cross ties; that having become tired and cold from walking, he sat down on the ends of the cross ties near this fire and cleaned his lanterns, one of which was a white lantern, which was used as a signal of safety, and the other, a red lantern, which indicated danger; that he placed his white lantern, on the side of the railroad between the rails; that he was sitting between the lantern and fire; that after sitting in that position for some time he laid down on the ends of the cross ties and fell asleep; that between 2 and 3 o'clock in the morning, and while asleep, he was struck by a freight train on the side of the head and seriously injured; that the white lantern and fire were plainly visible for one-half mile up the track and that his presence on the end of the cross ties could have been discovered if the engineer in charge of the freight train had been on the lookout and the train stopped in time to have avoided striking him.

The defendant asked the court to give the jury a peremptory instruction at the conclusion of the plaintiff's testimony, which was overruled. Defendant's engineer and fireman testified in substance, that they discovered the lantern sitting on the track while some distance off; and that they whistled to the plaintiff to take it off the track, but that they did not discover the

appellant until they had arrived at within fifty or sixty feet of where he was asleep and too late to avoid striking him. They also testified that the white light stationed on or near the track was a signal to proceed—that the road was free from obstructions.

In lying upon appellant's track and going to sleep, under the circumstances, appellee was guilty of the grossest negligence, and there is no testimony conducing to show any negligence on the part of appellant's servants in charge of the train, or that they discovered appellant's peril in time to have stopped the train. They could not have reasonably anticipated that appellee would assume a position of such danger, and after a careful perusal of this record we have reached the conclusion that the trial court should have given the jury a peremptory instruction at the conclusion of plaintiff's testimony. We are supported in these conclusions by the cases of *Coleman's Adm'r v. P. C. & C. R. Co.*, 28 Ky. Law Rep., 401; *Lyons v. I. C. R. R. Co.*, 22 Ky. Law Rep., 1032.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF N. Y. v.
BAILEY, BY, &c.

(Filed April 27, 1904.)

1. Life insurance—Life tables—Right to change table—Appellant issued to John T. Bailey a policy on his life for \$1,000, on March 16, 1891, in consideration of \$15 paid and to be paid annually thereafter, which provided that after five full years premiums have been paid, a certain per cent. of the premiums should be applied to extend the insurance. Bailey paid the premiums regularly for ten years, but failed to pay the premium falling due March 16, 1901, and died September 24, following. At the time the policy was taken out, appellant was using the American Experience Mortality Table at 4 per cent., but at the time of the death of insured it had, by an act of the New York Legislature, changed to the Actuaries Table. By the former table the insurance was extended until September 26, 1901, and by the latter it expired September 16, 1901. Held—That the appellant had no right to change from the one table to the other so as to affect contracts made prior to the change, and the rights of the insured must be determined by the written contract, unaffected by any subsequent legislation of the State of New York.

Reed & Berry and T. P. Poston for appellant.

W. J. Webb for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson.

Appellant issued to John T. Bailey a policy, of date March 16, 1891, by which, in consideration of \$15, it insured his life in the sum of \$1,000 until March 16, 1892. The policy contained these stipulations: "And the said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment on or before the 16th

day of March in each such year, of the renewal premiums in accordance with the schedule rates, less the dividends awarded hereon.

"After deducting the expense charge, which is limited to \$4 per annum on each \$1,000 insured, the society agrees to divide the residue of each renewal premium received by it upon this policy, as follows: Such amount as shall be required for this policy's share of death losses will be appropriated as a death fund, to be used solely in settlement of death claims. The remainder thereof will be retained as a guaranty fund. The amounts so retained on account of this policy, will be used towards offsetting any increase in the premium on this policy from year to year; or, provided this policy, after five full years' premiums have been paid, be terminated solely by nonpayment of any stipulated premium when due, 80 per cent. of any amounts so retained, but not so used, will be applied to extend this insurance; or if application be made therefor while this policy is in full force and effect, to purchase paid-up insurance."

Bailey paid the premiums on the policy regularly for ten years, but failed to pay the premium falling due on March 16, 1901, and died on September 24, following. The only question to be determined is whether the policy was in force at his death by reason of the clause quoted providing for extended insurance after five annual premiums were paid. The defendant pleaded that after deducting the policy's share of death losses on the 16th of March, 1901, the sum applicable to extended insurance on the policy was \$5.03, which extended it for the period of 184 days from March 16, or until September 16, 1901. The plaintiff replied that the surplus due on the policy was the sum of \$6.27, 80 per cent. of which is \$5.02; that this, calculated according to the American experience tables at 4 per cent., would extend the policy 194 days, and would make it expire on September 26, or two days after the insured died. She also averred that the defendant was using the American experience tables when the policy was issued, and continued to use this as the basis of valuation until November, 1893, when it adopted the actuarial experience tables, according to which the extended insurance on the policy would be 184 days, as alleged in the answer. A copy of the report of the defendant to the insurance commissioner of this State for the year ending December 31, 1891, was filed with the reply, in which, among other things, this question and answer appear:

"Q. Upon what table of mortality and rate of interest were the net premiums of the company computed?"

"A. American Experience at 4 per cent."

The defendant filed a rejoinder in which it denied the conclusions of the reply, but did not controvert the allegation that at the time the policy sued on was issued, it had adopted and was using the American experience tables of mortality. At the conclusion of the evidence on both sides, the court peremptorily instructed the jury to find for the plaintiff. The defendant complains of this, and also complains that the copy of the report made by it to the insurance bureau was allowed to be read in evidence.

We do not see that the defendant is in position to complain of the action of the court in admitting the copy of its report to be read, for it was only admitted to show what tables the defendant was using at the time the policy was issued, and there was no issue in the pleadings on this subject. But

the copy was duly authenticated, and the original being a record of the auditor's office, the copy was admissible for all purposes for which the original would have been competent. (Kentucky Statutes, section 1827.) And as the report was required by law to be made by the defendant, and upon the faith of it, it had been treated by the department as complying with the law, without any repudiation by it of the report, after so many years the presumption of regularity should prevail. It is not presumed that the defendant failed to make a report, or violated the law. The writing purported to have been made by the defendant, was filed with the reply, and was not denied by the rejoinder, or as provided by section 537 of the Civil Code: "A writing purporting to have been made by a party, if referred to in and filed with a pleading of his adversary, may be read as genuine against him, unless he deny its genuineness by affidavit before the trial is begun."

It is conceded that if the extended insurance is computed by the American tables, the policy did not expire until September 26; but that if it is computed by the actuaries tables it expired on September 16. So the only question in the case, is by which tables shall the rights of the parties be determined? It is shown by parol evidence that the company changed from the American to the actuaries tables in November, 1893. It is also shown that by a statute of New York in the laws of 1893, policies were required to be valued by the insurance commissioner according to the actuaries tables; and that by another statute enacted in April, 1901, they were required to be valued according to the American tables. After the death of Bailey, the company wrote appellee's attorney that the policy was entitled to extended insurance for 194 days; but this letter was based on the New York Statute of 1901, the clerk who wrote it not observing that the policy was issued long before that act was passed. The New York Statutes have no extra-territorial effect, nor are they retrospective; therefore, neither the act of 1892 nor the act of 1901 has any effect on the rights of the parties under the policy which was issued in March, 1891. A State can make no law impairing the obligation of a contract. The rights of the parties must be determined by the written contract which they deliberately made, unaffected by any subsequent legislation in the State of New York.

The policy being silent as to the method or tables by which the extended insurance is to be calculated, parol evidence is competent to show what tables were then in use by the company; for it must be presumed that the parties contracted with reference to the tables which had been adopted by the company and were then in use by it. After the policy was issued and the rights of the parties were fixed by it, the company was not at liberty, without the consent of the assured or the beneficiary in the policy, to adopt another table less favorable to the assured and more favorable to the company; for if it could do this, instead of cutting the time down ten days, it might thus cut it down one-half or more; and so deprive the insured of a very substantial part of his contract. It has been held that when a person applies to an insurance company for a policy, he is presumed to apply for the form of policy in use by the company. The same rule must govern the insurance company when it issues a policy calling for extended insurance, and not defining by what tables the extended insurance is to be calculated. The parties must be presumed to contract with reference to the tables then

in use; for else the policy would have no definite meaning; and after the policy is delivered, the company can not change its legal effect by any action of its, without the consent of the other parties to the contract. There being no issue as to what tables the defendant was using when the contract was made, only a question of law was raised, and the court properly instructed the jury peremptorily at the conclusion of the evidence. Besides, we do not find in the evidence any substantial conflict from any one who professes to know the facts. The conflict seems to be only as to matters of opinion on questions of law. The report to the insurance commissioner is nowhere denied or assailed and the report was sworn to by the president and secretary of the company.

Judgment affirmed.

CITIZENS NATIONAL BANK OF LEBANON v. COMMONWEALTH.

(Filed April 27, 1904.)

1. Taxation—National Banks—Fourth class cities—Auditor's agent—County court—Under Kentucky Statutes, sections 3531-3549, inclusive, part of charter of fourth class cities, providing a system for the assessment and collection of municipal taxes on all property liable thereto in fourth class cities, a demurrer was properly sustained to a proceeding in the Marion County Court by the auditor's agent to require the appellant, Citizens National Bank of Lebanon, to list its stockholders shares of stock for the years 1893 to 1902, inclusive, for taxes due the city of Lebanon, a city of the fourth class.

2. County and State taxes—Limitation—In a proceeding in the Marion County Court by the auditor's agent against the Citizens National Bank of Lebanon to require it to list the shares of its stockholders for State and county taxes for the years 1893 to 1902, inclusive, under the provisions of section 4241, Kentucky Statutes, and the act of the Kentucky Legislature of March 21, 1900, entitled "An act relating to the taxation of the shares of stock of national banks," the plea of limitation should have been sustained to all taxes not listed prior to five years next before the filing of said action.

3. Compromise—The appellant bank having paid its county taxes for the years 1898 and 1899, under an illegal compromise with the Marion fiscal court, it should be credited with the sum so paid in whatever is adjudged to be due the county under the principles herein enunciated.

4. Board of equalization—Action conclusive—The Marion County Board of Equalization, after being fully advised as to the number of shares of the stockholders of said bank and the actual value thereof for the years 1900-1901 and 1902, and having listed same at 60 per cent. of its real cash value, the fact that the board fixed its value too low for said years, can not now be remedied in a judicial proceeding, and both the State and county are bound by the action of their fiscal officers.

5. Franchise—Unauthorized procedure—In 1899 the appellant bank having listed the franchise of the bank with the auditor in the same manner as State banks were required to do, and paid to the auditor \$312.75 as a franchise tax, which was an unauthorized procedure, the appellant should be required to list its property for that year and receive credit for the amount paid to the auditor on whatever is found to be due.

6. Discrimination—Federal Statute—The act of March 21, 1900, *supra*, is not in conflict with the Federal Statute, and does not discriminate against

stock in national banks as compared with other moneyed capital in the hands of individual citizens.

T. L. Edelen, W. J. Lisle, John McChord and Thompson & Spalding for appellant.

William W. Spalding, Henry L. Stone and C. S. Hill for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

An auditor's agent instituted this proceeding in the Marion County Court, to require the appellant to list the shares of its stockholders for State, county and municipal taxation for the years 1898-1902, inclusive, under the provisions of section 4241, Kentucky Statutes, and an act approved March 21, 1900, entitled "An act relating to the taxation of the shares of stock of national banks."

A demurrer to so much of the proceeding as sought to list in the county court the property involved herein, for municipal purposes, was sustained by the court, as we think, correctly, Lebanon being a city of the fourth class; and it appearing from an inspection of subdivision 5 of the act for the government of cities of the fourth class (Kentucky Statutes, sections 3531-3549, inclusive), that they are provided with an elaborate system for the purpose of assessment and collection of municipal taxes on all property liable thereto. The bank then pleaded in bar to the proceeding against it the following defenses:

1st. The statute of limitation.

2d. As to the county taxes, two compromises with the fiscal court, by which it paid certain sums in 1898 and 1899 in full settlement of the county's claim for taxes against it.

3d. As to the claim for State taxes, it was admitted that the bank had fully paid all claims against it up to the year 1900, except for the year 1899. As to that year, it appears that the bank paid a franchise tax to the auditor, amounting to \$813.75; this was pleaded in bar to any further taxation for the given year.

4th. For the years 1900, 1901 and 1902, the bank alleges that its property was duly and legally assessed by the county board of equalization, and that it fully paid its taxes for those years.

5th. The invalidity of the act of 1900.

There is no dispute in this case as to the facts; the questions arising are purely of law, and will be considered in the order above named. The county court listed the stock of appellant's shareholders for State and county taxation for all the years, as claimed in the petition of the Commonwealth, overruling all the defenses of appellant. Upon appeal to the circuit court, this judgment was substantially affirmed, of which appellant is now complaining. The plea of the statute of limitation should have been sustained, (*Commonwealth v. Knute*, 24 Ky. Law Rep., 2138; *Chicago, St. Louis & N. O. R'y v. Commonwealth*, 24 Ky. Law Rep., 2124, *Commonwealth v. Citizens National Bank*, ante 2100.) This eliminates all further consideration of any of the years involved in this litigation prior to five years next before the institution of this proceeding (1902).

As to the compromises with the fiscal court of Marion county, it appears

that, at the time they were made, great confusion and uncertainty existed as to the legal status of national bank stock for the purpose of taxation, it being unknown whether or not, under the law as it then existed, it was taxable at all; or, at least, this was the opinion of the parties in interest here. Whereupon the bank and the fiscal court agreed that the former should pay certain sums in lieu of all claims of the latter for taxes against the shares of its stockholders. These compromises, under the provisions of section 52 of the Constitution, as expounded in the case of the city of Louisville v. Louisville Ry. Co., 23 Ky. Law Rep., 390, were ultra vires, and, therefore, void, as the court below correctly decided. The sums paid thereunder are to be credited upon whatever is found due to the county under the principles herein enunciated, upon the return of the case to the lower court.

In 1899, the franchise of the bank appears to have been listed with the auditor in the same manner as State banks are required to do, and \$813.75 paid to that officer as a franchise tax. This was an unauthorized procedure, (*Owensboro National Bank v. Owensboro*, 173 U. S., 664), and, therefore, appellant should be required to list its property for that year, receiving credit for the amount paid the auditor on whatever is found due. For the years 1900, 1901 and 1902, the bank, by its proper officers, went before the county board of equalization, and stated all the facts concerning the shares of its stockholders that was necessary to enable those officials to lawfully assess it for taxation; the number of shares was given, their par value, and the highest price at which any of it had been sold, together with all other data by which an intelligent opinion could be acquired as to its actual cash value; whereupon the board, having all the facts before them, assessed the stock as so much cash, at 60 per cent. of its real value. This was held by the court as a mere assessment pro tanto, and the difference between the assessment and the actual value of the whole stock was considered as omitted property, and listed for taxation for the years named. In this, we think, the court erred. It was the duty of the board of equalization to assess the property for the years involved, at its fair cash value; but the fact that they assessed it too low can not be remedied in a judicial procedure; both the State and the county in this regard are bound by the action of their fiscal officers.

It is urgently insisted by appellant that the act of March 21, 1900, regulating the taxation of national bank stock, is void, because it permits an illegal discrimination against stock in national banks as compared with other moneyed capital in the hands of individual citizens, contrary to the provisions of the Federal statute authorizing its taxation. This question was fully settled in the case of the *Commonwealth v. Citizens National Bank*, cited above. In that case, the court, speaking through Judge Hobson, elaborately discussed the phase of the question now under consideration, and upheld the act by showing that the very purpose of the Legislature was to insure equality of taxation between State and National banks, and holding that, in the assessment of the shares of the stockholders in the latter institutions, no discrimination was to be made as between it and the property of the former; that whatever deductions were authorized and given to the State banks when their property was assessed, was also to be given when

the shares of the stockholders in National banks were assessed, under the provisions of the act.

Appellee prayed a cross appeal from so much of the judgment as credited appellant with over payments under the provisions of the Hewitt bill; this cross appeal was prosecuted because the auditor had already certified to the sheriff of Marion county the amount due from the Commonwealth, and directed that officers to credit it on whatever execution came to his hands against the bank in this proceeding, and, therefore, as the judgment also credits appellant with the same sum, it thereby secures a double credit. The court very properly allowed the credit in the judgment; the officer will, of course, not credit it a second time when the execution comes to his hands.

For the reasons indicated the judgment is affirmed on the cross appeal and reversed on the direct appeal for proceedings consistent with this opinion.

EBELHARR, &c. v. TENNELLY.

(Filed April 27, 1904.)

1. Execution sale—Equity of redemption—A lot sold and conveyed by H. to T. and L. for a recited cash consideration, and at the same time H. taking from the vendees an agreement in writing to reconvey the property to him upon the repayment of the recited consideration within two years, H. has an interest in the lot that may be levied and sold under an execution against him.

2. Levy—Misnaming interest—The sheriff in his return in the writ, after describing the property, denominated it as H.'s equity of redemption therein, and even conceding that he erred in calling it an equity of redemption, the law, which regards the substance rather than the name of things, will hold that he levied on that which he described rather than on that which he misnamed.

George V. Triplett and Miller & Todd for appellants.

Wilfred Carrico for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

R. G. Hill was the owner of a lot and improvements thereon, situated in Owensboro, Ky., which he conveyed by deed, absolute, upon its face, for the recited consideration of \$3,000 cash in hand paid, to J. R. Tennelly and J. R. Lancaster, at the same time taking from the vendees their agreement in writing to reconvey the property to him upon the repayment to them of the recited consideration within two years thereafter.

While the title to the property was in this condition, on the 27th day of August, 1902, an execution issued from the office of the Daviess Circuit Court, from C. G. Thixton against Hill, for the purpose of satisfying a judgment for the sum of \$302, with interest at the rate of 6 per cent. per annum from the 9th day of April, 1896, until paid, and \$10.70 costs; and on the 17th day of September, 1902, another execution issued from the same office, in favor of W. G. Burnett against Hill, for the purpose of enforcing the collection of the sum of \$43.55, with interest at the rate of 6 per cent. per

annum from the 6th day of September, 1896, until paid, and \$10.80 costs. These two writs came duly to the hands of the sheriff of Daviess county, and were by him levied upon the equity of redemption of Hill in the property mentioned, and on the 6th day of October, 1902, in pursuance of the tenor of the writs, the property was sold by the officer at public sale, and purchased by J. R. Tennelly for the sum of \$500, for which he executed bond, as by law and the terms of the sale required. Subsequently Lancaster and Tennelly reconveyed the property mortgaged to them according to the tenor of the contemporaneous writing held by Hill.

On the 1st day of November, 1902, Hill and wife conveyed the property to the appellant, Frank Ebelharr, and on the 14th day of May, 1903, appellee Tennelly instituted this action in equity in the Daviess Circuit Court against Hill and Ebelharr for the enforcement of his lien for the amount of the purchase money paid by him, with interest as by law authorized. Upon trial of the case the chancellor awarded appellee a judgment as prayed for in his petition, to reverse which this appeal is prosecuted.

The question arising upon the face of the record is one purely of law. The levy of the officer, so far as this case is concerned, is as follows: "Levied this execution, No. 1678, book 20, * * * upon equity of redemption in a certain house and lot on the south side of Main street, between Frederica and St. Elizabeth streets, and fronting 40 feet thereon and running back southwardly 42 feet, and bounded on the east by the Deposit Bank; on the south by the property of the Kirk heirs; on the west by an alley, and on the north by Main street. Levied on as the property of R. G. Hill. * * * Above named property, the store or saloon building on Main street, was conveyed to J. R. Lancaster and J. R. Tennelly on the 14th day of February, 1902, at \$3,000, and Hill reserved the right to redeem same within two years. It is this right of redemption that is now levied on. This 27th day of August, 1902."

No question is made as to the regularity of the proceedings leading up to the execution sale except as to the levy, it being contended by appellant that the levy of the officer was void, because he describes the interest of the execution debtor as an equity of redemption, and that an equity of redemption is not subject to execution; that, therefore, the levy was void, and all subsequent proceedings thereunder of no avail. This is the sole objection urged by appellant. This contention is in the very teeth of the statutes.

Section 1684, Kentucky Statutes, provides that if property sold at execution sale does not realize two-thirds of its appraised value, the execution debtor and his representatives shall have one year in which to redeem it, upon the terms therein set forth, and section 1686 is as follows: "The right of redemption herein provided for shall be liable to sale under execution."

"Section 1691. If it appears in the proceedings aforesaid (motion for possession) that the title of the defendant in the execution to the land sold was only equitable, or the land encumbered by mortgage lien, the court shall, if the purchaser require it, subject the land to the payment of the debt of the execution creditor in the same manner it would do if there was a return of 'no property found;' and may cause such pleadings to be filed and the parties brought before the court as may be necessary to a final equitable judgment in respect to the rights of all parties interested.

"Section 1709. When the defendant in an execution owns the legal title to the land encumbered by lien for the purchase money, or who shall own the legal title in any real or personal estate, and shall have created a bona fide encumbrance thereon by mortgage, deed of trust, or otherwise, before an execution has created a lien on the same, the interest of the defendant in such property may be levied on and sold subject to such encumbrance."

It thus appears that equities of redemption, whether they arise under sections 1684 or 1709, may be levied on by execution by express provision of the statute. Evidently the officer in the case at bar was proceeding under section 1709; but appellant urges that, if so, he did not bring himself within the terms of the section, for the reason that he denominated in his levy the interest subjected, an equity of redemption, whereas, it is said that the interest of the debtor which can be subjected under the section in hand is a legal title, and not an equitable one. We think this position is technically unsound. The interest described in section 1709 as subject to execution is the original equity of redemption somewhat modified by our modern procedure. Bouvier in his law dictionary defines equity of redemption to be "a right which the mortgagor of an estate has of redeeming it, after it has been forfeited by law by nonpayment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest and costs." (2 Blackstone, 159.)

We have now two kinds of equities of redemption, one statutory and the other the original right of redemption, which relieved the debtor of the harsh forfeiture of his estate for nonpayment of the mortgage debt within the time stipulated, modified as before stated. In the Am. and Eng. Ency. of Law, 2d edition, volume 11, page 213, it is said: "The statutory right to redeem differs essentially from the equity of redemption proper. It is not an estate in the mortgaged property, but is a mere personal privilege of redeeming the property within a certain time after the mortgage has been foreclosed. But it exists only in such cases and in favor of such persons as are designated in the statute by which it is created."

On page 209 it is said: "An equity of redemption is an estate in the mortgaged property, and is subject to all the incidents of ownership."

Page 211: "At common law an equity of redemption was not subject to levy and sale under execution; but the common-law doctrine as to the equitable nature of the mortgagor's estate has been modified, and the remedy by execution has been extended in many jurisdictions so as to permit an equity of redemption to be sold in execution against the owner. As a general rule, however, the right to sell an equity of redemption under execution does not include the right to sell under an execution on a judgment for the mortgage debt, though in some jurisdictions the rule is otherwise." * * *

In the case of *Crow v. Tinsley, &c.*, 6 Dana, 402, Chief Justice Robertson said: "The statute of this State, subjecting equities of redemption to sale under executions, could furnish no greater right than that which was sold; and it is evident that, in this case, no other interest than the general equity to which Daniel McIlvoy was entitled at the time of the sale was sold or bought under the executions." (*Brace and Wife v. Shaw*, 16 B. Mon., 75; *Bronston v. Robinson*, 4 B. Mon., 142; *Waller v. Tate, &c.*, 4 B. Mon., 529; although in the last two cases it was held that an equity of redemption

could not be sold under an execution issued to enforce payment of a mortgage debt.) These cases are cited for the purpose, and clearly show, that the sheriff properly named the interest levied on an equity of redemption. But, waiving all this, the officer, evidently being in fear of the over-refined casuistry involved in appellant's criticism, did not trust the validity of his levy alone to his accuracy of legal terminology, but described, by apt paraphrase, the identical interest upon which he levied; so that, even conceding that he erred in denominating Hill's interest in the mortgaged land as an equity of redemption, the law, which regards the substance rather than the names of things, will hold that he levied upon that which he described, rather than that which he misnamed.

For the reasons indicated the judgment is affirmed.

PARKERSON, ADM'X v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 27, 1904—Not to be reported.)

1. Railroads—Damages—Evidence—In an action against a railroad company for the death of appellant's intestate, the evidence being conclusive that the horse of deceased became unmanageable and was struck by the side of a passing car after the engine had passed over the crossing where the accident occurred, the judgment in favor of the appellee will be upheld.

2. Same—Instructions—Where the bill of exceptions shows no objection by a plaintiff to instructions offered by a defendant and no exceptions to the action of the court in giving them, there is no ground of complaint against the action of the court in giving them, especially where plaintiff's action was not prejudiced by the instructions.

S. M. Payton for appellant.

Poston & Moorman and Benjamin D. Warfield for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's intestate while passing over a railroad crossing between Lyon's Station and New Haven was struck by a freight train and killed. She filed suit to recover for his death, and at the conclusion of all the evidence the court submitted the case to the jury, who found for the defendant. Lyon's Station is south of New Haven. The freight train was going north. The accident occurred about dusk in November. The deceased was last seen, riding on horseback down the road towards the crossing.

He was then about three hundred yards from the crossing. The person, who saw him went across the field to the railroad and soon after he reached the track the train passed him. There was a pond on the side of the road, near the railroad. Fresh tracks were seen going from the road to the pond, and from the pond up towards the railroad crossing, which was only a few feet away. These tracks were found the next morning and were followed to close to the railroad track and there tracks were seen as if twisting about. The horse was found north of the crossing on the cattle guard and fifteen feet from the center of the road. He seemed to have been struck on the hip. The body of the deceased was found sixty feet north of the crossing. On the iron arm of the rear flat car of the train, which was next to the caboose

some horse hair was found. The train consisted of about thirty cars and was running, according to the testimony of the railroad men, twenty five miles an hour, or, according to the testimony for the plaintiff, forty miles an hour. The conductor and fireman, who testified to being on the outlook, saw nothing of the horse or rider. The conductor, who was in the cupola of the caboose, felt a jar as he passed the crossing. A brakeman, who was on the front end of the caboose, saw the form of a man come against it, but did not see the horse. The deceased was struck on his hip. The claim of the railroad company is that, after the engine passed the crossing, the horse became unmanageable in his effort to get away, being held by the deceased, backed in his struggles against the car next to the caboose. The claim of the plaintiff is that the caboose and rear car had been separated from the front part of the train and that after the train passed the deceased went upon the crossing and was struck by the loose cars which were following on after the train, when he supposed the train had passed. On this question the weight of the evidence is clearly with the defendant. It is a down grade, and if these cars had run down the grade loose there would have been great danger of a collision when the train stopped at New Haven, which was not far off. There was no collision there and nothing unusual occurred. The testimony of persons there, who were about when the train came in, tends to confirm to the testimony of the railroad men that there was no separation of the train. The man who saw the deceased and who went to the railroad track, reaching it only a short distance south of the crossing, testifies to no separation of the train, although introduced as a witness for the plaintiff. Besides, two witnesses, who were introduced also for the plaintiff, who were sitting in a buggy a short distance south of the crossing and saw the train pass, testify to no separation of the cars. Besides all this is the fact that the hair of the horse was found on the side of the car, and that the horse when found was on the same side of the track and next to the pond.

There was some evidence on behalf of the plaintiff that the proper signal were not given to the approach of the train, but on this subject, too, the weight of the evidence is with the appellee. The court gave the jury four instructions, asked by the plaintiff, to which the defendant excepted. He refused two instructions asked by the plaintiff, to which she excepted. It is insisted that these instructions should have been given. The first of these instructions was substantially given in an instruction asked by the defendant. The other was properly refused. By it the court was requested to instruct the jury to find for the plaintiff if the train was running at a negligent and dangerous rate of speed, and by reason of this the deceased was struck and killed. The crossing was out in the country, away from any station or town, and at such places the railroad company is at liberty to run its trains, so far as strangers are concerned, at any rate of speed it sees fit. Were the rule otherwise it would be impracticable for railroad trains to make time as required by the demands of the public service. (*Louisville & Nashville R. R. Co. v. Cummins' Adm'r*, 28 Ky. Law Rep., 681.)

The defendant moved the court to give the jury ten instructions. Of these the court gave seven and refused to give the remainder, to which it excepted; but the bill of exceptions shows no objection by the plaintiff to the instructions offered by the defendant and no exception by her to the action of the

court in giving the seven instructions asked by the defendant. She is not in a position, therefore, to complain of the action of the court in giving the instructions asked by the defendant. And on the whole case we are unable to see that she was prejudiced in any way by these instructions, for on the merits the preponderance of the evidence was with the defendant, and the jury could not well have reached any other conclusion than that the horse became unmanageable and was struck by the side of the passing car after the engine had passed over the crossing before the horse and rider approached it.

Judgment affirmed.

ARMITAGE v. MT. STERLING OIL AND GAS CO.

(Filed April 27, 1904—Not to be reported.)

Oil leases—Contracts—It was proper to sustain a demurrer to a petition in an action seeking the cancellation of a lease to bore for oil and gas where the time expressed in the contract for boring a well had not expired, although operations had not begun in the county as provided in the contract, there being no averment in the petition that that part of the contract relating to the well could not have been performed within the time stipulated.

Osborn, Caudel & Day for appellant.

Robert H. Winn for appellee.

Appeal from Menifee Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 26th of May, 1900, the appellee, the Mt. Sterling Oil and Gas Co., obtained from the appellant, H. B. Armitage, a written lease giving them the exclusive right to drill and operate for petroleum, oil and gas, coal and minerals upon a tract of 470 acres of land owned by him, situated in Menifee county, Kentucky, for a term of ten years, and as much longer as oil, gas, coal and minerals were found thereon. The consideration therefor recited in the lease is that the oil and gas company should give to the appellant one-tenth of the petroleum, oil, gas and minerals obtained on the premises, and deliver the same in pipe lines to his credit. It was further agreed that if gas was found in sufficient quantities to market and be piped from the premises to such market, the lessor was to receive \$100 per annum for each well so long as the gas from this well was marketed. The lessee further agreed to sink a test well on the land within three years, and to commence operations in the county inside of six months. It was expressly stipulated that the lease was to become void if the well was not completed within three years, unless the lessees should pay rentals for the premises at the rate of ten cents per acre during the time the drilling was delayed. On the 18th of February, 1903, the appellant instituted this suit for a cancellation of the lease on the ground that appellee had failed to commence operation in the county of Menifee within six months from the date of the lease, and had also failed to sink a test well on the leased land in accordance with the terms of the contract. The defendant filed a general demurrer to the petition, which was sustained by the trial court and plaintiff's petition dismissed, and he has appealed.

Whilst under the terms of their contract the oil company were to commence operations in the county of Menifee within six months, the only express provision for the forfeiture of the lease recited in the contract is the provision that it was to become void if the well was not completed within three years from the date thereof, and the petition discloses that the suit for the cancellation of the lease was instituted several months before the expiration of the three years given appellee in which to complete the well, and there is no averment that they could not have performed this condition of their contract within the stipulated time. And the general rule appears to be that if the causes for a forfeiture of a lease are distinctly specified and recited therein, that courts will not decree such forfeitures for breaches of other provisions of the contract of lease for which the parties themselves have not prescribed this penalty. ("The Law Relating to Oil and Gas," by Thornton, section 91; *Core v. New York Petroleum Co.*, 48 S. E. Rep., 128; *Harris v. Ohio Oil Co.*, 57 Ohio St., 118; *Pomeroy's Equity Jurisprudence*, section 459.) But such contracts are construed most strongly against the lessee and favorable to the lessor. If the oil company does not, within three years, sink a paying well on the premises, its rights under the contract will not be extended by a mere offer on their part to pay rent for the premises at the rate of ten cents per acre if appellant should decide to treat the lease as at an end. (*Munroe v. Armstrong*, 96 Pa., 307; *Heintz v. Short*, 149 Pa., 286; *Steelsmith v. Gartland*, 44 L. R. A., 107; *Woodland Oil Co. v. Craford*, 34 L. R. A., 62; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 59 L. R. A., 567.)

It was decided by this court in *Shamberg, &c. v. Farmer's Adm'r*, 18 Ky. Law Rep., 514, that leases of this character are not void for want of mutuality.

For reasons indicated the judgment is affirmed.

MAYFIELD WOOLEN MILLS v. FRAZIER, BY, &c.

(Filed April 27, 1904—Not to be reported.)

Damages—Master and servant—The evidence showing that appellee, while in the employ of appellant as bobbin girl, was compelled, against her will, by the weaver to go to a bobbin box which was in an insecure place, and upon going, as she was ordered, was painfully injured. She was not a fellow servant of the weavers, and it was proper for the jury to determine whether she should be regarded as assuming the risk, and they having returned a verdict for her it will not be disturbed.

W. M. Smith for appellant.

Wm. McKee Duncan for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Hobson.

Appellee recovered judgment against appellant for \$200 for personal injuries received by her while in its service. The fact of the case, as stated by her, are as follows: She was fourteen years old, and was bobbin girl;

that it was her duty to collect the bobbins from the weavers; each weaver ran two looms and threw the empty bobbins into a box. It was appellee's duty to take the bobbins out of the box. There was a box at the end of the aisle between the looms in which the bobbins were placed, but appellee stated that there was another box behind one of the looms which could not be reached from the aisle referred to, and that she was directed by the weaver to take the bobbins out of this box. In order to get to this box it was necessary to pass along a narrow aisle and then in behind the looms in the narrow space between some revolving cog wheels, which were unprotected, and the wall. Appellee said she declined to go, thinking it was dangerous, but being peremptorily ordered by the weaver to go, finally went, and while she was stooping down to get the bobbins her hair was caught in the cog wheels mentioned, and much of it was pulled out, inflicting upon her a painful injury. The proof for appellant tended to show that there was no box back of the loom, and it is also insisted for appellant that appellee worked under the floor boss and was only a fellow servant of the weaver.

If there was no box back of the loom for appellee to get the bobbins out of, she had no business there, and should not recover. But appellee testifies positively the box was there; her testimony is straightforward and carries with it an air of sincerity. The witnesses for the defendant do not positively testify the box was not there, and in view of the character of their answers, taken as a whole, we conclude that the jury were warranted in finding for appellee on this question. It is shown by the evidence that it was the duty of the girl to wait on the weavers. The purpose of her position was to keep the empty bobbins out of the way of the weavers, and to do this it was incumbent on her to empty the boxes when called on by them. The floor boss did not direct her in this matter; he only had general charge of the room. She was not, therefore, a fellow servant with the weavers as it was her duty to wait on the weavers in order that their weaving might not be interrupted, and she was not directed in her duties by anybody else.

The instructions of the court aptly and clearly submitted the issue to the jury, and the amount of the verdict is not excessive for the injuries appellee received. The question of contributory negligence was properly left to the jury, as the child was only fourteen years old. The place where she was hurt was an unfit place to assign a child of fourteen years to work in; and if she was specially directed to work at this place, in view of her age, it was a question for the jury whether she should be regarded as assuming the risk. *Kelly v. Barber Asphalt Co.*, 93 Ky., 863; *Baird v. Deering*, 13 Ky. Law Rep., 271; *Cincinnati, &c., R. R. Co. v. Finnell*, 22 Ky. Law Rep., 86, do not apply.

Judgment affirmed.

BROWN v. BROWN'S ADM'R, &c.

(Filed April 28, 1904—Not to be reported.)

Marriage—Antenuptial contracts—Appellant, whose age was twenty-four years, and who was fairly well educated, having entered an antenuptial contract agreeing, in lieu of dower or homestead, to accept at the death of appellee's intestate, a life estate in fifty acres of land and \$500 in person-

alty, and having as the proof shows advised with her uncle about this contract who was a lawyer, and it appearing further took time to consider the matter of entering into the contract, it was properly adjudged by the chancellor that the contract should be upheld.

Bennett, Robbins & Thomas and Robbins & Thomas for appellant.

J. H. Shelton for Lillian Brown.

Bullock & Smith for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal by appellant, Hattie Brown, to test the validity of an antenuptial contract entered into by her with appellee's intestate, W. M. Brown. By her petition she alleged that the contract was procured by fraud and imposition. The contract is in words and figures as follows: "This marriage contract, made and entered into this the 14th day of April, 1900, by and between W. M. Brown, party of the first part, and Hattie Champion, party of the second part, witnesseth: That the party of the second part does hereby agree that she will, if the party of the first part dies before the party of the second part, accept in lieu of dower or homestead, as her interest in the estate of the party of the first part as his widow, a lifetime interest in fifty acres of land in Hickman county, Kentucky, and \$500 worth of personal property and one year's provisions.

"The above amount the party of the second part agrees to accept at the death of the party of the first part as his widow, in lieu of any or all interest she might have, by law or otherwise, in the estate of the above named party of the first part, and party of the first part hereby agrees to give the party of the second part the above-named amount at his death. Witness our hands the day and date above written."

It appears from this writing that this contract was prepared on the 14th of April, 1900, yet it was not signed by the parties until the 2d day of May thereafter. The lower court heard the evidence and adjudged against the appellant, and adjudged that she be allotted fifty acres of land surrounding the home and \$500 in cash and one year's provisions. We have examined the evidence with care and deem it useless to relate it in detail and we are of opinion that it preponderates in favor of the fact that Brown, in the obtaining of this contract, treated appellant fairly and was guilty of no misrepresentations or concealments in the character or effect of the contract or the amount of his estate or otherwise. It shows that the first proposition from Brown to make a marriage contract was by letter written to appellant about a month before the execution of this contract. This letter contained, in substance, the contract as it was made. This letter was presented to her uncle, who was a lawyer, and she advised with him and others with reference thereto; she had time and opportunity to investigate as to the amount and character of his property; she was twenty-four years of age, had a reasonably fair education and a good mind, while he was fifty-two years of age and a reasonably prosperous farmer, had seven children by a former wife, most all of them under age and some of them small, and had an estate at the time of the marriage of about \$12,000 or \$14,000, most of it being in land. The proof shows that she entered into this contract with a proper under-

standing of the situation and surroundings, and that she was not unduly influenced by her husband or overreached by reason of her confidence in or her love for him, for it is shown that she stated that she had no love for Mr. Brown, that it was entirely a business affair with her in entering into the marriage and contract.

It was also shown by many witnesses that during the marital relations and after her husband's death, which occurred in the latter part of 1902, and after she was fully apprised of the full extent of his estate she frequently expressed herself as satisfied with this contract and desired to settle by it and did not want or ask anything more. Under these circumstances the contract will be upheld. (*Forwood v. Forwood*, 86 Ky., 115; *Simpson v. Simpson*, 24 Ky., 586; *Brooks v. Brooks*, 22 Ky. Law Rep., 555.)

It is not apparent from the judgment of the lower court whether or not the property, allowed by section 1403 of the statutes to widows and infant children, was set apart to them. It is true that, under this contract, the widow is not entitled to same, but the infant children are—her child by him as well as his infant children by his first wife. If this has not been done, and if the personal property has been disposed of, then the court should adjudge to them money in lieu of property allowed them by the statute.

Wherefore, the judgment of the lower court is affirmed.

KING v. HUNI, &c.

(Filed June 7, 1904.)

1. Liens on land—Nonresident—Notice—Failure to give bond—Sale of land—Innocent purchaser—Re-opening judgment—Resale—The appellant, King, conveyed a tract of land to John Gallus for \$2,000, \$1,000 of which was paid in hand and three notes given for the deferred payments, with lien retained on the land. Subsequently appellee, Marie Huni, took a mortgage on the land for \$1,000, money loaned by her to Gallus, to pay the first \$1,000 on said land, which mortgage was subject to the \$1,000 purchase money owing to King. At the maturity of King's notes he brought suit to enforce his lien, in which suit appellee was made a party as a nonresident defendant, but had no actual notice of the suit (she then residing in California), and no bond was given by the plaintiff to protect her as such nonresident. Judgment was rendered enforcing plaintiff's lien and for a sale of the land, and adjudging that appellee had no interest in the land. At the sale of the land appellant King bought it and sold and conveyed it to Bertha Gallus, wife of John Gallus, and took her notes for the price, \$1,615.42, secured by lien thereon. After the purchase by King and his sale to Mrs. Gallus, and within the five years allowed by the Code, section 414, appellee filed her suit setting up her mortgage lien, and asking a resale of the land, and the enforcement of her lien thereon subject to the prior lien of King for purchase money due him on the original sale to John Gallus. Held—That all the parties, King, John Gallus and Bertha Gallus, having actual knowledge of appellee's mortgage, the lower court properly re-opened the case, set aside the sale to King, and the sale by King to Mrs. Gallus, and rendered a judgment enforcing appellee's lien for her debt and a resale of the land therefor, subject to the prior lien of appellant King for his original purchase-money notes.

Brown & Vance and R. D. Vance for appellant.

Drury & Drury and R. L. Greene for appellee Huni.

Montgomery Merritt for appellee Gallus.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle

July 24, 1893, the appellant, C. L. King, conveyed to John Gallus seventy-six acres of land in Henderson county for \$2,000. Of this amount Gallus paid \$1,000 in cash, and for the remainder gave his three notes, one of \$400, payable in one year, and two others of \$300 each, payable in two and three years after date, respectively.

In October, 1893, Gallus and wife executed to the appellee, Marie Huni, a mortgage upon the land purchased of King to secure the payment of a note for \$1,000, which they gave her in July previously, the \$1,000 being borrowed money which they got of her and used to make the cash payment to King upon the land at the time of its conveyance to John Gallus. The note and mortgage to the appellee, Huni, only bore interest at the rate of 4½ per cent. In 1897 the appellant, King, brought suit in the lower court to recover of John Gallus the amount of the three notes given him in part payment for the land, and to enforce the lien retained in the deed to secure their payment. By an amended petition and warning order the appellee, Marie Huni, who was and is a resident of California, was made a party.

She did not appear or set up her mortgage lien, and without requiring of the appellant, King, a bond for her protection as a nonresident, the court rendered judgment declaring that appellee had no interest in the land, ordered its sale to pay the notes of the appellant, King. The sale followed, and the appellant became the purchaser at the sum due upon his notes, and the costs of the action. The sale was confirmed and he received a deed from the commissioner conveying him the land.

Not long after his purchase of the land, the appellant, King, conveyed it to Bertha Gallus, wife of John Gallus, for \$1,615.42, and for this sum she gave notes secured by lien on the land. After the sale of the land by the commissioner and its purchase by King, and within the five years allowed by section 414, Civil Code, the appellee, Marie Huni, filed her petition in the lower court, seeking to set aside the judgment under which the land was sold by the commissioner, and setting up her mortgage lien on the land, asked its enforcement, subject to the prior vendor's lien in favor of appellee, King, for the amount of the three notes which had been executed to him by John Gallus. At the time of filing her petition appellee gave the necessary bond required of a nonresident by the section of the Code, *supra*.

The former action of King v. Gallus was redocketed and consolidated with the action brought by appellee, after appellee filed answer, making defense and setting up her mortgage debt and lien. Following the consolidation certain amendments to her petition were made by appellee, and answers were filed thereto by King, Gallus and wife, to which appellee filed replies. Proof was taken by the parties upon the issues presented by the pleadings, and upon a submission of the case the court rendered judgment setting aside the former judgment and ordering a resale of the land, first to satisfy the balance due appellant, King, upon the original three notes executed to

him by John Gallus, and then to satisfy the mortgage debt and lien of the appellee, and giving Bertha Gallus judgment over against the appellant, King, for the sums paid by her on her purchase of the land from him. The appellants, King, and Bertha Gallus, complain of that judgment, and by this appeal seek its reversal.

It is insisted for appellants that Mrs. Gallus, in receiving the conveyance from King, was an innocent purchaser, for which reason her title should not have been disturbed. Section 417, Civil Code, provides that "the title of purchasers in good faith to any property sold under attachment or judgment shall not be affected by the new trial permitted by section 414, except the title of property obtained by the plaintiff and not bought of him in good faith by others."

In *Kellar v. Stanley*, 86 Ky., 246, this court, in defining the meaning of that section of the Code, said: "By 'good faith' as judicially interpreted, is meant a purchase made, not merely for a consideration, but also without notice to the purchaser, of an adverse claim to the property by others. For the taking of an estate after notice of a prior right makes one a *mala fide* purchaser."

Mrs. Gallus united with her husband in the mortgage to appellee, and though it be conceded that she was not presumed to have knowledge of the fact that her husband had not paid the mortgage debt, notwithstanding no release of the mortgage appears to have been made of record, we find that it was directly averred in the amended petition filed by appellee after the consolidation of the two causes, that "C. L. King and Bertha Gallus, defendants herein, had notice of the validity of plaintiff's mortgage and of her debt, and that it was an adverse claim upon the premises when they acquired or attempted to acquire interests therein."

We have been unable to find that this averment was ever denied, either by King or Mrs. Gallus, in the answers or other pleadings filed by them.

Consequently it must be taken as confessed. This seems to dispose of the first contention of appellants. It is, however, further contended by appellant, Bertha Gallus, that she is entitled to be substituted to the lien of King for the amounts which she claims to have paid him. The payments alleged by her to have been paid King on her purchase of the land from him, are denied by appellee. The only witness introduced by appellants to prove the alleged payments, as well as the good faith of the transaction between Mrs. Gallus and King, was the husband of the former, and as he was successfully impeached, and proved to be unworthy of belief upon oath by a number of his neighbors, and no effort was made to sustain his reputation or otherwise support his testimony, it necessarily follows that it is entitled to little, if any, weight.

It is, furthermore, significant that neither King or Mrs. Gallus testified in the case, though the latter might have done so instead of her husband. It does no violence to the rights of the parties to infer that neither King or Mrs. Gallus could have denied, or were willing to deny that the latter at the time of her purchase of the land had full knowledge of the existence of appellee's mortgage, and that the debt which it was given to secure had not been paid. This being true, it would seem to require no great stretch of faith to reach the conclusion contended for by appellee, that the husband of

Mrs. Gallus was the real purchaser of the land from King, and that the deed was made to the wife for the purpose of defeating the mortgage lien of appellee. Under the facts of this case, we do not think the doctrine of subrogation contended for should be made to apply. The cases relied on by counsel for appellants to support this contention can not, we apprehend, be appealed to by any one who, like Mrs. Gallus, is not a purchaser without notice, or in good faith. At most she could have legally asked no more than a judgment against King for the amount she paid him on the land. This relief was given her by the lower court, and as it is not claimed that King is insolvent, such relief is as effectual as if she had been substituted to the lien given him by the judgment appealed from.

We regard the contention of appellants, that the note produced by appellee is not the one secured by the mortgage, as being without support from the evidence. It is admitted that the \$1,000 mentioned in the mortgage was loaned John Gallus by appellee. The mortgage recites that a note was given by Gallus for this amount. There is no averment in the answers that there was any fraud or mistake in the mortgage in that respect.

John Gallus, who is utterly discredited, as already stated, was the only witness introduced to contradict appellee as to the identity of the note. It may be, indeed, there is some evidence tending to show that a renewal note was given for the mortgage dated in 1896, to be used by appellee, together with the mortgage, as collateral security for a loan which she received of a friend, and which loan she afterwards repaid, and by reason thereof received a return of the note and mortgage. The renewal was probably lost, but if so, the special bond of indemnity given by appellee will protect appellants and John Gallus from any future loss upon or by reason of the renewal note. At any rate, we do not think there is any doubt from the evidence that the note filed by appellee is the one for which the mortgage was given, and there is no claim that the amount thereof has ever been paid. It is clear that the obligation secured by the mortgage was not in parol, and, therefore, limitation can not defeat appellee's right to a judgment for her debt and the enforcement of her mortgage lien. So upon the whole case it is apparent that if appellee had set up, on the original trial of this action, the claim finally presented by her, she would have been entitled to judgment for her debt and the enforcement of her mortgage lien subject to the vendor's lien held by the appellant, King. It follows, therefore, that the lower court did not err in re-opening the case or in rendering the judgment appealed from.

Wherefore, the judgment is affirmed.

CENTRAL COAL AND IRON CO. v. PIERCE.

(Filed April 28, 1904—Not to be reported.)

1. Master and servant—Damages—Appellee, a motorman in charge of a train of coal cars, came in contact, while operating his train, with a car that had been dropped, and was injured. It appeared that the lights on the car were insufficient, and while they were known to be by appellee, he claims his superior in charge of them had promised to repair them only a few days before the accident occurred. This question and one as to whether he was

negligent in occupying the front seat with his back to the car at the time of the accident, were questions for the jury and their finding will not be disturbed, the evidence supporting the verdict.

2. Same—It is not negligence per se to operate a dangerous machine in the only way provided to operate it. An act may be dangerous, yet not be at all negligent.

H. P. Taylor for appellant.

Glenn & Ringo for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge O'Rear.

The questions tried in this case were whether appellee, a motorman operating a motor and train or coal cars in appellant's mine, was injured because of the employer's negligence in failing to provide suitable and reasonably sufficient lights upon the motor car, and along the track, so that those in charge of the machine could discover obstacles on the track in due season to stop the car and avoid a collision, that is, whether the master furnished the servant a reasonably safe place and reasonably safe appliances in which, and with which, to do his work, and, whether appellee's contributory negligence was such that but for it the injury would not have occurred.

The contention of appellant is that the lights having been in the same condition for some weeks, the danger from their insufficiency was necessarily an obvious one, apparent alike to the servant and master, and that, therefore, the former assumed the danger as an incident to his employment. It is true that the absence of lights in a coal mine is a thing that the operator knows as well as the employer does; that the lights on the motor car were insufficient, and that its operation in the mine in its then condition was dangerous is admitted by appellee in his testimony. But he claims that his superior, the electrician in charge of the mine, promised only a few days before the accident to replace the weak light by repairing and putting on the machine the stronger one that had been formerly used. Under this promise appellee continued to use the machine. Whether the time that had passed since the promise and before the injury was such an unreasonable one that the servant should have known therefrom that the employer did not intend to fulfill it, was submitted to the jury.

The motor car was so constructed that a seat was provided at each end, so that the motorman could be facing the way the train was moving. The car was not turned, but was operated by a trolley, reversible as the familiar street car trolleys are. A helper also accompanied the motorman, and he also was supposed to ride upon the motor car. On the occasion when appellee was hurt by his train colliding with a stranded car which had been lost from a preceding train, he was riding on the front seat with his back in the direction his train was going, instead of being in the rear seat. But he contends that the seats were only about twenty inches or less wide, and would not accommodate both the operator and helper, and that one of them was compelled to use the front seat. As to the width of the seats the evidence was conflicting, but the weight of it seems to be with appellee's version. Whether his riding upon the front seat was such contributory negligence as that but for it he would not have been injured, was one of the

questions submitted to the jury; that it was a more dangerous place than the rear seat is manifest. But if both could not occupy the rear seat, and if one of them had to sit in front (and such was the custom in operating that machine), it can scarcely be said that the act was negligent, in the legal significance of the term, because it is not negligence per se to operate a dangerous machine in the only way provided to operate it. An act may be dangerous, yet not be at all negligent. Negligent operation is the failure to use the proper means at hand, in a proper and careful way, as persons of ordinary prudence do under like conditions for their own safety. If, however, there was room on the rear seat for both the motorman and helper, and the motorman voluntarily chose the front seat, where it was more difficult for him to keep the track in view, and exposing himself needlessly to increased dangers, then he would have been negligent. But the question of contributory negligence was submitted to the jury. They found the fact in favor of the motorman.

A question is made that the proximate cause of the injury was not proven to be the negligence of the company in failing to provide suitable lights. It is contended that appellee's injury was due to one of several causes, viz.: his own negligence in voluntarily assuming the more dangerous of the two available positions; or, the negligence of his fellow servants in charge of the first train in losing their cars and permitting them to obstruct the track; or, the failure of the master to provide suitable lights upon the motor car and along the track.

It is contended that the rule applies that where the evidence shows that the injury may have resulted from one of several causes, for one of which the master is not liable, there is a failure of evidence. It was upon this idea that the peremptory instruction was moved by appellant. But this case does not belong to that class. In no view of the case can it be said that there is a doubt left by the proof as to the cause of the injury, as where there was not an eye witness, and from the circumstances various theories of equal probability might be rationally deduced. The real difficulty is rather in determining the proximate cause of the accident. When two or more causes culminate in an event, one may be nearer and more immediately connected with the result than the other. It is only when something occurs subsequent to the defendant's act, which makes it result in what would not otherwise have happened, that the latter or intervening cause is said to be the efficient one, and for the result of which the original actor is not responsible in law. So far as the cause of the collision is concerned as affecting appellant's liability, it is not material how the obstruction came upon the track (admitting it was not chargeable to appellants' negligence,) for had appellant done its duty in providing proper lights, the injury could have been prevented by the means at hand. This duty was a continuing one, as positive the instant before the collision as at the first moment it was omitted. The absence of the light made it impossible for the motorman to protect himself in the operation of the train at that point. In the sequence of the occurrences appellant's act came closest to the result, in every way, and the collision was, therefore, the proximate if not the natural result of appellant's negligence. A fair test of the efficient cause, would be to reverse the order of procedure, and say that this was an attempt by appellee to

charge the operators of the first train, who had lost the car. Their answer would have been, we are not liable, notwithstanding our negligence, because but for the intervention of another independent cause, viz., appellant's negligence in failing to provide lights for the second train, our negligence would have been harmless. Appellant's negligence then would have been an intervening agency in the chain of events, between the negligence of those in charge of the first train, and the collision between appellees' motor and the stranded car. But even if this were not true, and the two causes were concurrent, appellant would be liable just the same. We have considered this phase of the case as if the crews of the two so called trains were fellow servants, a fact not necessary to be determined. Whether appellee's own negligence was a controlling feature in the matter has already been disposed of. The instructions were altogether as favorable to appellant as it was entitled to.

Perceiving no error prejudicial to appellant's substantial rights the judgment is affirmed, with damages.

UTTER, ADAMS & ALLEN v. SMITH, & CO.

(Filed April 28, 1904—Not to be reported.)

1. Service of process—Proof—In an action by defendants in a judgment to enjoin its collection on the idea that no service of process was had upon them, it was error in the trial court to sustain the prayer of the petition where the officer, whose return showed the process had been served, was dead and one of the parties testified that if the summons had been served upon him he had no recollection of it, the other testifying that it had not been served upon him, it may be supposed that he is as likely to be mistaken as was the officer in making the return.

2. Same—When a judgment has been rendered upon process duly returned executed, by one authorized to serve summons, the court should not set it aside unless the evidence is clear, positive and convincing that it was obtained by fraud of plaintiffs or mistake of the officer in executing the summons.

W. F. Hall and R. L. Greene for appellants.

J. G. Forrester for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Nunn.

On the 1st day of August, 1892, the appellants, Utter, Adams & Allen, filed a petition against appellees, M. D. Smith & Co., composed of M. D. Smith and W. Z. Gilbert, to recover of them \$291.21, balance due on a store account. On the same day process was issued from the clerk's office to be served upon appellees, the defendants therein. On the 5th day of August, 1892, this process was returned with the following endorsement:

"Executed by handing the both of the defendants a true copy of this summons, this the 5th day of August, 1892.

"A. L. COLDIRON, S. H. C.,

"By WM. H. HALL, D. S."

This action was continued to the February term, 1893, and at that term

this order was made: "Rule against plaintiff to file itemized account and continued to the August term." At that term a judgment was rendered against the defendants, appellees here, by default.

It appears that in that year appellants made an assignment for the benefit of their creditors, and nothing was done in the way of collecting this judgment until the year 1898, when execution was issued thereon, and soon after the issue of the execution, and within that year, the appellees filed this action to enjoin the collection thereof, alleging that they did not owe the appellants anything, and that they had never been served with process in that action, and afterwards, by an amendment, alleged that the judgment referred to was procured by the fraud of appellants, Utter, Adams & Allen; that they unlawfully and fraudulently procured Wm. H. Hall, the deputy sheriff, to enter the return endorsed on the summons, copied above. And also that the deputy sheriff, if he intended to mean by his endorsement on that summons, that he had executed it on the appellees, it was a mistake on his part, as the summons was never served upon them, or either of them, in that action. Appellants controverted these allegations, and on the trial the lower court sustained the prayer of the appellees, and vacated the judgment referred to, and appellants have appealed.

By section 3760 of the Kentucky Statutes it is provided: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

It is alleged in the petition that the endorsement on this summons by the officer was procured by the fraud of appellants, but the record does not show a scintilla of evidence to support this allegation. The proof shows that Hall, the deputy sheriff, is dead, and there is no proof that he made a mistake in making that return. The appellee, Smith, says that no summons was served upon him, and Gilbert says that if it was served upon him, he has no recollection of it. It is just as likely that Smith was mistaken in his recollection about this matter as the deputy sheriff was in endorsing his return. Appellees introduced some little proof to show that the deputy sheriff drank to excess at times. The statements offered in evidence by the attorney for appellees, with reference to a conversation he had with the deputy sheriff in his lifetime concerning his return on this summons, and also his recollection of the testimony of the deputy sheriff in another case, with reference to a return on a summons in that case, were clearly incompetent. But even if competent, they would have no weight upon the question at issue.

When a judgment has been obtained upon process duly returned executed by one who is conceded to be a person authorized to execute it, the court should not set aside such a judgment unless the evidence is clear, positive and convincing that it was obtained by the fraud of the plaintiffs or by the mistake of the officer in executing the summons. Otherwise judgments settling the rights of the parties and giving remedies for the enforcement of these rights could never be regarded as permanent, but would be liable to be set aside and the rights settled thereby be re-opened, when the facts, not only appear-

taining to the service of the summons, but the merits of the controversy, had been forgotten, or rendered unavailing by reason of the death of the parties or their witnesses. We are of the opinion that there is a failure of proof on the part of appellees.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

MOORE v. MAUNEY.

(Filed April 28, 1904—Not to be reported.)

Land—Patents—Conflict in boundary—Where there is a conflict of boundary between two adjoining tracts of land, the owner of each tract claiming title from the Commonwealth, the one having the elder patent is entitled to the conflicting boundary, in the absence of a showing by the one holding the junior patent, of having acquired title to the lap by an adverse possession of fifteen years.

R. S. Crawford for appellant.

Sharp & Siler for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Rhoda A. Moore, brought this action, alleging that she was the owner and in possession of a tract of 110 acres of land, which she described by meets and bounds, lying in the county of Whitley; and that the appellee, Bird Mauney, under a fictitious claim of ownership had trespassed thereon and had illegally and without right cut and removed therefrom certain valuable timber, and asked that he be enjoined from further depredations on her property; and that her title thereto might be quieted by a judgment. The defendant, in his answer, denied the alleged trespass, and averred that the land from which the trees were cut was covered by his title papers and he was the owner and in possession thereof, reciting the boundary of his holdings. Plaintiff replied that the boundary claimed by the defendant, covered a part of her tract of land and alleged that her vendor, G. D. Moore, and plaintiff's grantor, G. G. Mauney, were the owners of the adjacent tracts of land; and that more than fifteen years before the institution of this action, they had agreed upon the division line claimed by her between the two tracts of land; and that she and those under whom she claims had been in the peaceable, adverse, continuous and uninterrupted possession thereof for more than fifteen years before the defendant's forcible and wrongful entry, and plead that the defendant be estopped from questioning her claim or title thereto. A rejoinder put in issue the affirmative allegations of the reply. It appears from the pleadings, exhibits and evidence in the record that a patent was granted to John Edwards, as assignee of William Offield, for a tract of one hundred and fifty acres of land in October, 1824, on Duncan's branch, a fork of Spring creek in Whitley county; and that on the 15th of April, 1845, a patent was granted to Samuel Witt, as assignee of Bailey Freeman, for fifty acres of land adjoining the tract patented to Edwards; and that these two tracts were subsequently conveyed to

G. G. Mauney, the father of the appellant, and were by him sold and conveyed to his son, the defendant, Bird Mauney. It also appears that on the 30th of May, 1887, G. D. Moore patented a tract of one hundred and ten acres of land, which, after his death, was sold under decree of the Whitley Circuit Court, and purchased by the appellant.

It appears from the map and survey made by the surveyor of Whitley county, under an order of the court in this case, that the patent granted to G. D. Moore covers about twenty-five acres of the land included in the older grants to Edwards and Bird now owned by the appellee; and that this is the land in controversy. A small part of this twenty-five acres had been enclosed and in the possession of the appellant and those under whom she claims for about eleven years, but the greater part of it was unfenced and wild land. As the land in controversy had been patented by appellee's vendors many years before the entry, survey or patent of appellant's vendor, it is plain that she acquired no title by virtue of the patent issued to G. D. Moore in 1887, in so far as it conflicts with the older grants. Appellant seeks to escape the force of this fact by alleging that G. G. Mauney, appellee's grantor, orally agreed with G. D. Moore, at the time he was having his land warrants surveyed, upon the division line between the two tracts of land claimed by appellant; and that pursuant to this agreement this line was marked between their respective places, and had ever since been recognized as the true division line between the parties. There is no claim that any writing or memoranda was made of the agreement, or that any consideration was paid to appellee's vendor for the twenty-five acres of land in dispute, which were clearly covered by his title papers. The chief witness to establish this alleged parol agreement entered into more than fifteen years before the institution of this suit, is a brother-in-law of the plaintiff, and his statements on this point are flatly contradicted by the testimony of the only witness who was present at the time and who is now alive. And it seems to us that the circumstances under which the alleged parol agreement is claimed to have been entered into, render such an agreement on the part of Mauney wholly improbable. He held the possession and legal title to the land in controversy. Whilst Moore at that time was simply taking the preliminary steps to acquire title to adjacent vacant land owned by the State. The record contains no suggestion why Mauney should, without consideration, have consented that Moore should patent land which had already been patented nearly sixty years before by his remote grantor.

We, therefore, conclude that appellant has failed to establish the alleged parol agreement by a preponderance of the evidence, and the judgment is affirmed.

McGUIRE, &c. v. WHITT.

(Filed April 23, 1904—Not to be reported.)

1. Lands—Contracts—Title bond—Where a title bond covenanted to convey title upon payment of \$300 to be done "in work as a mechanic on a mill at reasonable rates for a millwright, said work to be performed at any time within five years," where the work of building the mill was abandoned by the vendors, though the vendee was willing and ready at all times within the time fixed in the title bond to perform the work, it was error not to direct

the conveyance of the land upon the payment, within a reasonable time to be fixed by the order of court, of the amount of the consideration, less \$150. the amount of labor and building material furnished, and which it was agreed might go as a credit on the title bond.

2. Title bond—Though a title bond can not take the place of a recorded deed, and is insufficient to pass the legal title, it gives the holder an equitable right superior to a claim of title upon the part of a purchaser or creditor with notice.

W. D. O'Neal, Jr. and H. G. Sullivan for appellants.

Thos. R. Brown for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Settle.

This action, when instituted, was one in ejectment brought by Mary J. Mathers and her husband, William Mathers, against John Whitt and W. G. Whitt to recover the possession of ten acres of land described in the petition, which the Whitts were charged with wrongfully withholding from her and claiming as their own, notwithstanding her sole ownership of the same.

The answer of the Whitts denied her title and averred that John Whitt, was the owner of the land by purchase from N. B. McGuire and Luke McGuire, the father and brother of Mary Mathers, made May 14, 1877, they being at that time the owners of the land, and having the possession thereof; that the McGuires then executed to John Whitt a title bond wherein they covenanted to convey to him by deed of general warranty the land in question upon the discharge by him of the consideration therefor, which was \$800, and was to be paid, as stipulated in the bond, by the vendees "in work as a mechanic on a mill at reasonable rates for a millwright, said work to be performed at any time within five years from this date (May 14, 1877), at the pleasure of Luke McGuire." The title bond was filed with and made a part of the answer.

It was admitted by the answer that no part of the consideration mentioned in the title bond was ever paid by John Whitt in work upon the mill, for the reason that the building thereof was abandoned by his vendors, N. B. and Luke McGuire, though it was averred that he was at all times, within the five years, ready and willing, and that he offered to perform as a millwright, the work which he agreed to do in payment for the land. And further, that though no work was done by him in building a mill, John Whitt did furnish material and perform labor amounting altogether to \$150, in erecting a dwelling house for Luke McGuire on his land, which both N. B. and Luke McGuire agreed might go as a payment and be credited upon the consideration for the land mentioned in the title bond.

It was also averred in the answer that N. B. McGuire and Luke McGuire had never made John Whitt a deed of conveyance as provided by the bond, though he was entitled to the same, and the time within which it was to be made had long since expired; that though no deed had passed from the McGuires to John Whitt, he and W. G. Whitt to whom he conveyed the land after his purchase of it, had continued in the actual possession thereof from the date of the title bond down to the time of the filing of the answer, adversely to all persons, which was alleged to have been known to Mary Mathers, and all other parties to this action, all the while. It was further

averred in the answer that John Whitt, or his vendee, W. G. Whitt, was and is entitled to a deed to the land as stipulated in the bond, without further payment on the land than the \$150 in labor and material furnished Luke McGuire.

The statutes of champerty and limitation were also pleaded and relied on in bar of the action, and the answer made a counterclaim against the Mathers, N. B. McGuire, his wife, Eliza McGuire, and Luke McGuire, to the end that the court might require a conveyance by proper deed of the land in controversy from N. B. and Luke McGuire to John Whitt or his vendee, and their title quieted; or if, in the opinion of the chancellor, that could not be done, that they might recover for certain lasting and valuable improvements which they had in good faith made upon the land, whereby its vendible value had been enhanced at least \$1,500.

Mary and William Mathers, by reply, traversed the averments of the answer, counterclaim and cross petition, and an answer was filed to the cross action by Eliza McGuire, wife of N. B. McGuire, but both N. B. McGuire and Luke McGuire died some time after the filing of the answer of John and W. G. Whitt. It also appears that Mary Mathers, William Mathers, her husband, John Whitt and Eliza McGuire all died during the pendency of the action, but that the Mathers left no children surviving them, their only child having died in infancy. Orders of revivor seem to have been duly entered, and the heirs at law of the deceased persons made parties to the action. Some of the new parties filed necessary pleadings, and additional pleadings by way of rejoinder and amendment were later filed, after which the cause was transferred to the equity docket.

By the separate answer of Eliza McGuire she denied that her husband, N. B. McGuire, or her son, Luke McGuire, owned the land in controversy at the time of its attempted sale by them to John Whitt, or that they ever held the title to same, but averred that it was owned by her under title derived from her brother, John Rogers, Jr. The chancellor rendered judgment dismissing the petition, and also the counterclaim and cross petition, without prejudice, but allowed appellee their costs, and from that judgment all the parties have appealed.

Owing to the confused state of the pleadings and the insufficiency of the evidence we find it hard to pass upon and correctly decide the questions presented by the appeal. It appears, however, that N. B. McGuire and Eliza, his wife, in 1838, moved upon a sixteen hundred acre tract of land in Lawrence county, of which the ten acres in controversy was a part, and that they continued to live upon this land until their death, though much of it was sold in parcels from time to time. The title to the entire sixteen hundred acres, and several other contiguous tracts, seems to have been for years held by one John Rogers, Jr., a bachelor brother of Eliza McGuire. In 1858, Rogers, by proper instrument, which was duly recorded, appointed Henry McGuire, a son of Eliza and N. B. McGuire, his attorney in fact, to take charge of, sell and convey his lands. Much of it was sold by Henry McGuire. In 1858, he, as attorney in fact for Rogers, for a recited consideration of \$8,000, sold and conveyed by deed to J. C. Waller, of Louisville, the sixteen hundred acre tract of land upon which his parents lived, and soon thereafter Waller, by deed, expressing the same consideration, conveyed the

same land to Henry McGuire in his individual right. Henry McGuire died in 1861, unmarried and childless.

Under the Revised Statutes, section 1, chapter 30, then in force, the land to which Henry held title went to his father, N. B. McGuire, alone. By an act of the legislature, adopted February 9, 1874, the law was amended so as to provide that the real estate of a person dying intestate and leaving no children or their descendants, shall descend to his father and mother, if both are living, one moiety each. (Section 1, chapter 31, General Statutes, subsection 2, section 1398, chapter 39, Kentucky Statutes.)

It, therefore, appears from the record that at the time of his death in 1861, Henry McGuire held the legal title to the sixteen hundred acres of land upon which his parents resided, and that by his death his father, N. B. McGuire, became invested with the title to the exclusion of the mother and all others. It is admitted that the ten acres of land sold by him to John Whitt was included in the boundary of the sixteen hundred acre tract. It further appears that after the death of Henry McGuire no sale or conveyance was made of any part of the land left by him, and which went to his father, before the sale of the ten acres to John Whitt; it follows that at the time of the sale to him of the parcel in controversy, which was May 14, 1877, N. B. McGuire held the legal title thereto. It is disclosed by the record that in 1867, N. B. McGuire, by deed of that date, conveyed the sixteen hundred acre tract to Rogers Wright, and the latter on that day, by proper deed, conveyed the same land to Eliza McGuire, wife of N. B. McGuire. The consideration expressed in each of these deeds was \$1.

In 1867, N. B. and Eliza McGuire, by deed, conveyed the same land to their daughter, Mary Mathers, the consideration being also \$1. And in 1892, the latter and her husband instituted this action, as stated, to recover the land in controversy of John Whitt, who in the meantime had conveyed it to his son, the appellee, W. G. Whitt. It is manifest that appellants claim the land in controversy under both N. B. and Eliza McGuire, or through the title which the former received at the death of his son, Henry, and thereafter attempted to pass through Wright to Eliza McGuire, thence to their daughter, Mrs. Mathers, at whose death it descended to the appellants, her heirs at law, subject to appellee's equity. Having thus acquired title, appellants will not be heard to say that N. B. McGuire was not the holder of the legal title to the land in controversy when he sold it to John Whitt and executed to him the title bond.

Though a title bond can not take the place of a recorded deed, and is insufficient to pass the legal title, it gives the holder an equitable right, superior to a claim of title upon the part of a purchaser or creditor with notice. (*Perry, &c. v. Trimble*, 25 Ky. Law Rep., 796; *Baldwin, &c. v. Crow*, 86 Ky., 679; *Low & Whitney v. Blincoe*, 10 Bush, 331; *Lane v. Martin*, 23 Ky. Law Rep., 488.)

All the vendees, immediate or remote, of N. B. McGuire are in the attitude of purchasers from him, and are to be treated as having notice of the previous sale made by him to John Whitt, and of the existence of the title bond. Besides, they are charged with knowledge of Whitt's possession of the land, which has continued ever since May 14, 1877. Furthermore, it appears from the record that they are insisting upon a specific performance of

the contract of sale, by asking judgment against the estate of John Whitt and a lien upon the land for the amount of the consideration expressed in the title bond. The only remaining question is as to the amount yet unpaid of the consideration. The fact that N. B. and Luke McGuire abandoned their purpose of erecting the mill, and thereby prevented John Whitt from paying for the land with his labor, could not relieve him of the payment of the consideration altogether. It has not been shown that he sustained any damage by loss of time or of work. We think, however, that it would be but just to allow as a credit upon the amount of the purchase money yet due upon the land the \$150 earned by John Whitt in carpenter's work upon the building of Luke McGuire. It appears to have been understood between him and his vendors that it should be so applied, and equity requires that it be done. We are of opinion, therefore, that the chancellor erred in dismissing the petition.

The appellee, W. G. Whitt, will be entitled to a conveyance of the land according to the terms of the bond, upon the payment by him into court within a reasonable time, to be fixed by its order, of the consideration named in the bond, with interest from May 14, 1882, subject to a credit of \$150 as of that date. If the appellants fail to execute a deed of proper conveyance upon the payment of the purchase money, the conveyance may be made by the commissioner. Upon the other hand, if appellee fails or refuses to pay the purchase money due upon the land, judgment may be entered therefor and a lien given upon the land to secure its payment, to be enforced by sale of the land for the amount due and costs. The conclusions herein expressed render a decision of the questions of champerty and limitation unnecessary. In our opinion, neither defense was available in this case.

Wherefore, the judgment is reversed on both the original and cross appeal and remanded for further proceedings consistent with this opinion.

O'NEAL v. F. A. NEIDER CO.

(Filed April 28, 1904.)

Corporations — Directors — Removal of treasurer — Liability—Appellant
O'Neal was elected treasurer of the appellee corporation at the first meeting of the board of directors, June 8, 1901. A by-law of the corporation provided that the treasurer "shall be elected at the annual meeting of the board of directors in September in each year, who shall hold his office until the next annual meeting or until his successor was elected." No election was held in September, 1901. He was removed from his office by the directors without cause, January 29, 1902. His salary was \$1,200 per year, for which he sues. Held—That under the by-laws of the company and under section 542, Kentucky Statutes, regulating corporations, the board of directors had the right to remove him at any time without cause and are not liable for damages for so doing.

Geo. Doniphan, W. S. Pryor and J. R. Minor for appellant.

Byron & Hargett for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Settle.

The appellant, C. E. O'Neal, sued the appellee, the F. A. Neider Co., a corporation engaged in the business of manufacturing carriage supplies and trimmings, to recover salary alleged to be due him as its treasurer from January 29, 1902, to September of that year, at the rate of \$1,200 per annum.

It was averred in the petition that appellant was elected to the office in question June 8, 1901, by appellee's board of directors, and that his term of office should have continued until the time fixed by the articles of incorporation for the next annual election, which was required to be held in September of the succeeding year, and that he accepted the office at a salary of \$1,200 per annum, notwithstanding which the board of directors, without cause, removed him from office on January 29, 1902; that he was willing and offered to continue in and do the work of the office until the annual election in September, 1902, but was not permitted to do so, and was thereby thrown out of employment and unable to get work, though he made a diligent effort to do so.

Appellee filed a demurrer to the petition, which was sustained by the lower court and the petition dismissed, and from that judgment this appeal was prosecuted. It appears that the first meeting of the stockholders after the organization of the appellee company was held June 8, 1901, at which time a board of directors was elected and by-laws adopted. At that meeting appellant was elected treasurer, and at once entered upon the discharge of his duties, continuing to serve until January 29, 1902, at which time he was, at a regular meeting and by formal action of the board of directors, removed from office, and another elected to the vacancy.

A by-law of the appellee company provides that: "The board of directors at its annual meeting in September in each year shall elect from their own members a president, vice-president, secretary and treasurer, which officers shall hold their respective offices until the next annual election, or until their successors have been elected and qualified." * * *

No election was held by the board of directors in September, 1901, as should have been done, nor does it appear that the minutes of the meeting of June 8, 1901 indicate that the officers then elected were to continue in office until September, 1902. It would seem therefore, that appellant was elected at that meeting for the time intervening between that date and the date for the succeeding September election, 1901, and as there was no election held in September of that year, and no contract is alleged employing him specially for a longer period, it would further seem that his continuance in office was without any fixed tenure after the time at which an election ought to have been held in September, 1901. If so, we are of opinion that appellant can not complain on account of being discharged at any time subsequent to September, 1901, unless he avers that he had a special contract with appellee to remain in its employment longer, which he has not done.

In Cook on Stock and Stockholders, section 711, it is said: "Sometimes, however, the charter or statutes authorize and empower the stockholders to remove directors at any time."

In Clark and Marshall on Private Corporations, volume 3, section 666, it is said: "In some jurisdictions there are statutes expressly giving the stockholders power to remove directors, or other officers, at any time, or to remove them for cause, and such power may be reserved by a by-law if it is not inconsistent with the charter or general law."

And we may add that such power of removal may be, and often is, conferred in the same way upon the directors, especially where the right to elect or appoint the other officers, such as president, treasurer, etc., is vested in them instead of being reserved to the stockholders.

In second edition, Am. and Eng. Ency. of Law, volume 2, page 816, the authors says: "The removal of the officers of private corporations is generally governed by local statutes or corporate by-laws."

The appellee seems to have adopted no by-law on this subject other than the one already quoted, which provides that the officers elected by the board of directors shall "hold their respective offices until the next annual election, or until their successors have been elected and qualified," and, as we have already indicated, there was no election of officers held by appellee's board of directors in September succeeding the organization of the corporation as provided by its charter. We find, however, that it is provided by section 543, Kentucky Statutes, that "when the articles are filed and recorded as provided, and the license tax imposed is paid to the State, the corporation shall be deemed to be organized for the purpose of transacting, promoting, or carrying on, the business or purpose for which it was created; and shall thereupon become a body corporate, and be known by its corporate name, and as such may adopt and use a corporate seal; and shall have power to * * * appoint, remove and elect officers," etc., etc.

We are of opinion that this statute gave appellee's board of directors the right to discharge appellant at any time without cause and without rendering itself liable in damages, unless in so doing it violated a contract, under which he had the right to continue longer, which we think was not the case here.

Wherefore, the judgment of the lower court is affirmed.

MANN AND MORRIS v. COMMONWEALTH.

(Filed April 29, 1904.)

1. Criminal law—Plea in bar—Two offenses committed on same occasion—Where parties enter a dwelling house in the night time with intent to commit a felony, and the occupant is awakened while the burglars are taking money from his pants pockets, and they shoot and wound him, the fact that they have been indicted and convicted for the shooting and wounding in a separate indictment, does not constitute a bar to an indictment for the burglary committed on the same occasion.

2. Unnecessary averments in indictments—The burglary being completed when the parties entered the house with intent to commit a felony, the fact that the indictment contained allegations as to what they did after they entered the house being surplusage, although competent to show the intent of the parties, do not constitute any part of the offense for shooting and wounding, the two offenses, though committed on the same occasion, being separate and distinct from each other.

J. M. Collins for appellants.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

Appellants, Thomas Mann and Edward Morris, were indicted and convicted of burglary, their punishment being fixed at confinement in the penitentiary for ten years. The proof shows that they, in company with one Charles Sanders, went from Maysville in a buggy about ten miles to the house of John B Farrow, or near it, and there tied their horse and, after entering the house through the window in the night time, proceeded to rob Farrow by taking some money that was in his pants pocket. Some noise they made waked up Mrs. Farrow, who roused her husband, and thereupon the defendants, or one of them, shot Farrow in the arm, and also in the back. The same grand jury that found the indictment for burglary also found an indictment against them for shooting Farrow, and on this last indictment they were tried and convicted. Mann appealed to this court, and that judgment was affirmed. (*Mann v. Commonwealth*, ante, 1964.) When arraigned on the charge of burglary they pleaded the conviction under the indictment for the shooting of Farrow in bar of the proceeding.

While the indictment on the charge of burglary contains some unnecessary averments as to the larceny committed by them after they entered the house, it is a charge only of burglary, the allegations as to the stealing of the money by putting Farrow in fear and shooting him being apparently only added to illustrate the felonious intent with which the defendants entered the house, as charged in the indictment. The burglary was complete when the felonious entry was made, and the defendants might have been indicted and convicted therefor, although they had stolen nothing in the house or committed no other crime after they entered it. The allegations, therefore, of the indictment as to what they did after they entered the house are surplusage; although the facts so alleged might be properly given in evidence before the jury on the trial to show the intent with which the entry was made. These averments are simply statements of evidential matter, which should have been omitted from the indictment.

Burglary is defined as "the breaking and entering in the night of another's dwelling house with intent to commit a felony therein." (1 Bishop on Criminal Law, section 559.) "If a man in the night time breaks into a dwelling house, intending to commit therein some act which in law is felony, he is guilty of burglary whether he succeeds in doing what he meant or not." (1 Bishop on Criminal Law, section 437.)

It is insisted, however, for appellants that the defendants entered the house to steal the money, and that the entry of the house, the stealing of the money and the shooting of Farrow were all one transaction, done in pursuance of one intent, and that out of it the Commonwealth can not carve two offenses. In support of this view we are referred to a number of authorities. Thus in *Fisher v. Commonwealth*, 64 Ky., 211, where the defendant by the same act, and with the same intent, took a horse, wagon and harness, it was held that an acquittal of stealing the horse was a bar to an indictment for the stealing of the wagon and harness, and the rule was applied that, out of one transaction committed with the same intent, two offenses could not be carved. The same rule was applied in *Triplett v. Commonwealth*, 84 Ky., 193, where an acquittal of the offense of burglary was held a bar to a prosecution for a larceny, forming part of the same trans-

action. The court said: "At common law, in an indictment for burglary, a count might be added for the larceny when there had been an actual taking, and it, therefore, resulted that an acquittal of the burglary with intent to steal constituted no bar to a prosecution for the actual theft. Without the intention to commit a felony, the mere fact of breaking would not, at common law, constitute a burglary; and when the intent to steal is charged and the party acquitted, it would seem that a subsequent indictment for grand larceny, with the same facts developed on the trial, would be placing the accused in jeopardy the second time for the same offence. The weight of authority, we are aware, is adverse to such a view of the question, but the whole reason and philosophy of the law, as well as justice to the accused, require a different ruling."

In *Hevera v. State*, 84 S. W., 948, it was held by the Texas court that a conviction for assault with intent to kill was a bar to an indictment for robbery committed in the same transaction. But none of these cases are precisely in point here. It is misleading to say that the shooting of Farrow and the burglarious entry of the house were committed in the same transaction in the sense in which this term is used by the authorities. (Bishop on Criminal Law, volume 1, section 1060.) Thus in the *Fisher* case the one act of the defendant was the taking of the horse, wagon and harness; but here there were two acts of the defendant, the burglarious entry of the house and the shooting of Farrow in the house after this act had terminated. These are no more one transaction than if the defendants had successively shot two different persons in the same difficulty. The shooting of Farrow could not have been set out in a second part of the indictment for burglary, or joined with that charge. The robbery of the person by putting him in fear was not complete before the assault with intent to kill was committed; so therefore, neither the *Triplett* case nor the *Hevera* case apply.

In the case before us the entry into the house was for the purpose of theft. The shooting of Farrow came about because he waked up, and was nothing more than a new offense, which the commission of the offense intended, induced the defendants to commit. It is no more one transaction than it would be if the defendants had set fire to the house after robbing it, to conceal the evidence of their crime, or had shot Farrow's son as they escaped, to prevent his being a witness against them.

In *Teat v. State*, 24 Am. Rep., 708, two men were wounded mortally by two almost simultaneous shots fired by the defendant and another lying in ambush. It was held that a conviction for the killing of one of the men was not a bar to an indictment for the killing of the other. In *State v. Nash*, 41 Am. Rep., 72, the defendant fired twice in quick succession upon a crowd of persons, wounding one at the first shot and another at the second. It was held that a conviction for the wounding of the first was not a bar to an indictment for the wounding of the second. In *Jones v. State*, 14 Am. St. Rep., 570, the defendant wounded two men in the same difficulty. The conviction for one was held no bar for a prosecution for the other. (*McCoy v. State*, 46 Ark., 141; *Augustine v. State*, 52 S. W., 77; *Winn v. State*, 83 Wis., 571; *Greenwood v. State*, 64 Ind., 250; *Ashton v. State*, 31 Tex. Crim., 42; *Samuels v. State*, 25 Tex. C. C., 538.) Other cases are also collected in a note to *State v. Nash*, 41 Am. Rep., 475. Referring to this line of

cases, Mr. Bishop, in the last edition of his work on Criminal Law, section 1061, says: "Obviously there is a difference between one volition and one transaction. And on a view of our combined authorities, there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each."

So in American and English Encyclopædia of Law, volume 17, page 608, it is said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had."

It has been held that if a man burns a dwelling house and thereby takes the life of one of the inmates, he can not, after being convicted of arson, be also convicted of murder; and so it has been held that if a man by the same blow wounds two men or kills two by the same discharge of a gun, a conviction for the wounding or killing of one will bar a prosecution for the wounding or killing of the other; but on this subject the authorities are divided. (Bishop's New Criminal Law, sections 1058-1061.) The ruling in the arson case is put on the ground that the force which the defendant started destroyed the house and killed the person without any further action or new impulse from him. The ruling in the cases where two persons are wounded or killed by the same act, is put in part on the ground that the wounding or killing of both might be charged in one indictment, and in part on the ground that there was no new impulse or act on the part of the defendant. But in the case before us the defendant could not be prosecuted under one indictment for the burglary and the shooting of Farrow. Here there was a new volition on the part of the defendant and a new force set in motion by him, after the burglary was complete. If he can not be prosecuted in separate indictments for the two offenses, it results that although he committed both, one beginning after the other was completed, and being the result of a separate volition as well as a new force, the constitutional provision forbidding his being twice punished for one offense will not operate to shield him from punishment for a separate and independent offense, simply because it was followed in close succession by another offense which he committed.

Judgment affirmed.

Whole court sitting.

ZIMMERMAN v. BROOKS.

CARTER COUNTY v. BROOKS, &c.

(Filed April 29, 1904.)

1. New county—Mistake in boundary—The act of the general assembly approved February 9, 1904, creating the county of Beckham, is not void by reason of the fact that the boundary lines given in the act will not close. The act must be treated like a patent and will not be rejected as void because of a mistake in one of the calls, if from the whole act what was meant can be reasonably determined. The rule is that the court will inspect the whole act, and if the actual intention of the legislature can thus be ascertained, the false description will be rejected, or words substituted in the place of those used by mistake so as to give effect to the law.

2. Constitutional conditions—By the provisions of sections 68 and 64 of the Constitution the following conditions must be complied with before a new county can be formed: first, no county from which any part of the territory is taken, must be reduced to less area than 400 square miles; second, the new county must be of not less area than 400 square miles; third, the boundary line of the new county must not pass within less than ten miles of the county seat of any county from which a portion of its territory is taken; fourth, no county from which any part of its territory is taken shall be reduced to less than 12,000 inhabitants; fifth, the new county must contain not less than 12,000 inhabitants. If any of these conditions are wanting, the act is no violation of the Constitution.

3. Parties who may sue—Allegations—Demurrer—Any county whose rights are affected by an act creating a new county, or any taxpayer of such county, may complain and insist upon their constitutional protection against the increased burdens which the formation of the new county may entail, and it was error in the lower court to sustain a demurrer to the petition of Zimmerman, a resident of Carter county, and the petition of Carter county, alleging that by the creation of the new county of Beckham, the area of Carter county would be reduced to less than 400 square miles and its population to less than 12,000, and that the new county would contain less area than 400 square miles and less than 12,000 inhabitants.

4. Legislative determination—Constitutional restrictions—Invasion of private rights—Whilst the legislature has a large discretion in deciding upon all matters of legislation not prohibited by the Constitution, yet where private rights are involved, a statute is void that is in violation of the Constitutional limitations on the power of the legislature, and in such case it is the province of the courts to determine whether these limitations have been violated by the legislature.

R. C. Burns, W. C. Halbert and H. Clay Brown for appellants.

Theobald & Theobald and J. W. Lusby for appellees.

Appeals from Carter Circuit Court.

Opinion of the court by Judge Hobson.

The last general assembly passed an act, which was approved by the governor on February, 9, 1904, entitled "An act creating the county of Beckham." The first section of the act is in these words:

"Section 1. That the county of Beckham be, and the same is hereby created, and the boundary lines thereof are established as follows: Beginning on three black oaks by the county, or old State road, the corner of John Reid's and Wilburn Hall's and Marion Oldfield's land, being ten and one half miles by survey from Grayson, the present county seat of Carter county, Kentucky; thence S. 12 degrees 6 minutes E. 36,740 feet to a small locust; thence S. 66 degrees W. 2,571 feet to a black oak near the open fork of Big Gimlet, thence N. 4 degrees 30 minutes W. 19,860 feet to a white oak on Mauck Branch, so as to exclude William Binion's house; thence with the act of 1869, approved January 26, 1869, making Elliott county; thence with Mauck Ridge to the corner of Rowan, Elliott and Beckham counties; thence N. 70 degrees 6 minutes W. 14,466 feet; thence N. 23 degrees 16 minutes W. 70,157 to the point near Briery creek; thence due N. 31,480 feet; thence N. 9 degrees 15 minutes E. 65,297 feet; thence due S. 12,238 feet to

a small hickory and oak on top of Three Prong ridge; thence S. 5 degrees 19 minutes W. 52,528 to the point of beginning."

The second section makes Olive Hill the county seat. The third section divides the county into five magisterial districts and gives the boundary of each. The fourth, fifth, sixth and seventh sections provide for the organization of the county and makes the act take effect from its passage. Appellee Brooks was appointed by the governor county judge of Beckham county pursuant to the act, and appellant Zimmerman, on March 4, 1904, filed this suit to test its validity. He alleged that the county of Beckham was created out of parts of the counties of Carter, Elliott and Lewis; that the part taken from Carter county leaves it with only about 250 square miles; that the county line between Beckham county and Carter runs within less than ten miles of the county seat of Carter county; that Elliott county, before any territory was taken from it, had a less area than 400 square miles, and was, by the act, reduced to far less than that. He prayed judgment declaring the act void and restraining Brooks from acting as county judge of Beckham county. Brooks demurred to the petition. The county of Carter then appeared in the action, and moved to file its petition, in which it sought the same relief as Zimmerman. It alleged that the matters involved were of general interest to the inhabitants of Carter county, and of importance to it; that it was created in the year 1836; was authorized to sue and be sued, and had, since its creation, been in existence with regular county officers; that at the time the act creating Beckham county was enacted, the area of Carter county was 354 square miles, the area of Lewis county 454 square miles, and Elliott county 274; that the line of Beckham county runs within six miles of Grayson, the county seat of Carter county, and within seven miles of Vanceburg, the county seat of Lewis county; that the area of Beckham county does not exceed 286 square miles and that Lewis county is reduced by the act establishing the county of Beckham to 300 square miles, Elliott county to 234 square miles; that the population of Beckham county is less than 12,000; that the population of Carter and Elliott is reduced by the establishment of Beckham county to less than 12,000 people, Elliott having at the time only in all 10,387 inhabitants; that the act creating Beckham county was unwarranted by the Constitution, and that thereby confusion would be caused in the affairs of Carter county, and it would be prevented from collecting its taxes, and the county officers would be obstructed in the discharge of their duties, thus disturbing the affairs of the county and producing a multiplicity of suits. It prayed that the act be declared unconstitutional, and that the defendant, Brooks, who was a resident of Carter county, Olive Hill being in that county at the passage of the act referred to, be enjoined from acting as county judge. The court sustained a demurrer to Zimmerman's petition, refusing to allow the petition of Carter county to be filed, or to allow it to be made a party to the action. He thereupon dismissed the petition, and the two appeals before us were taken. In the brief filed by the counsel for appellee, it is said: "The appellee does not wish to discuss or raise any points of minor importance as to the sufficiency of appellant's petition, but to proceed at once to the consideration of the all important question to the people most interested, namely, the constitutionality of the act creating the county of Beckham."

We shall proceed, therefore, to settle the case on its merits, as it is of grave importance to all parties concerned to have the validity of the act settled, before liabilities are incurred for county buildings, taxes are levied, or other steps taken in the organization of the proposed county. It is insisted for appellants that the boundary of the county, as given in the first section of the act, will not close, and in fact, takes in part of the State of Ohio. But taking the act as a whole, there seems to be enough in it to show what was meant; for the third section gives minutely the boundary of each of the five magisterial districts by natural objects, and by putting these districts together the mistake in the call of one of the lines, if there is one, can be readily discovered and corrected. The act must be treated like a patent, and will not be rejected as void because of a mistake in one of the calls, if from the whole act what was meant can be reasonably determined. The rule is that the court will inspect the whole act, and if the actual intention of the legislature can thus be ascertained, the false description will be rejected or words substituted in the place of those used by mistake, so as to give effect to the law; thus south may be read for north, or east for west in a call where, from the act as a whole, the mistake is apparent; for it is a matter of common knowledge that mistakes of this character are sometimes made in transcribing. (*Palms v. Shewano County*, 61 Wis., 211; *Rabun County v. Haversham County*, 79 Ga., 248.) In the latter case the word "river" in the enrolled bill was read "ridge," it being manifestly a clerical error. It is not presumed that the legislature intended to include in the county part of the State of Ohio. The calls may be reversed as one line in the survey is of as much dignity as another, and if, on all the facts, a mistake in one of the calls is manifest, the actual intention of the legislature should not for this reason be disregarded. (*Creech v. Johnson*, 25 Ky. Law Rep., 657.)

The constitutional objection to the act is more serious. Section 63 of the Constitution, which is part of its provisions defining the powers of the legislative department, contains the following: "No new county shall be created by the general assembly which will reduce the county or counties, or either of them, from which it shall be taken, to less area than 400 square miles; nor shall any county be formed of less area; nor shall any boundary line thereof pass within less than ten miles of any county seat of the county or counties proposed to be divided."

Section 64 further provides: * * * "Nor shall any new county be established which will reduce any county to less than 12,000 inhabitants, nor shall any county be created containing a less population."

It is earnestly maintained for appellee that the constitutional restrictions as to area and population or location of the county line are for the guidance of the legislature, and that when the legislature has determined these questions by passing the act creating the county, it is incompetent for the courts to inquire into the correctness of the legislative findings. In support of this view we are referred to a number of authorities. Thus in *DeCamp v. Eveland*, 19 Ark., 81, the constitutional provision was that no new county should be thereafter erected unless its population should entitle it to a member in the legislature. It was held that the population of the county at the time the act was passed controlled, and not its population at the last census; that it would be presumed the legislature had enough before it to justify

its conclusion on the facts; the defendant, who had been convicted of a misdemeanor in the new county, did not offer to show that the county did not in fact have, at the time of its creation, the requisite population. This case was approved in *Rumsey v. People*, 19 N. Y., 41, which was similar in its facts, and the act was there sustained; but in the subsequent case of *Lanning v. Carpenter*, 20 N. Y., 447, the act was held invalid because it violated a provision of the Constitution forbidding a change in the assembly districts until after the next enumeration. In *Luscher v. Seltes*, 4 W. Va., 11, the bill was by a taxpayer to restrain the collection of taxes levied by the county of Lincoln to pay debts it had created, on the ground that the act forming the county was in violation of a constitutional provision much the same as ours. The bill was dismissed, although the allegations were substantially the same as in the case before us, the court holding the legal presumption was that when the legislature passed the act all the necessary facts were shown to its satisfaction, and that the court could not go behind the legislative finding. Further on in the opinion the judgment is also rested on the ground that if the plaintiffs' action could be maintained, every other taxpayer had the same right of action, and there might be conflicting judgments, and the debts of the county created in the erection of the public building might be left unpaid. This case was followed in *Farquharson v. Yeargin*, 24 Wash., 549, where the allegation was that the new county had not the requisite population. In *re Short*, 47 Kan., 250, the defendant was convicted of manslaughter and then took out a writ of habeas corpus on the ground that the county in which he was convicted did not have the requisite area under the Constitution and, therefore, the act creating it was void, although the county had been in existence for years. The Constitution required the county should have not less than 432 square miles and it was alleged that the county had only 430 $\frac{1}{4}$ square miles. It was held that the county was at least a de facto public corporation; that its existence could not be collaterally questioned and that the validity of the act creating it could only be assailed in a direct proceeding. To the same effect is *ex parte Renfro*, 112 Mo., 591, and in that opinion other previous cases, holding the same rule, are referred to. On the other hand, in Tennessee, where they have a similar constitutional provision, in a number of cases it has been held that if the act creating a county is in violation of the Constitution, it may be declared void by the court. Thus in *Bradley v. Powell County*, 2 Humph., 425, the fact being disputed, the chancellor had a survey made to show what the truth was. Upholding its power to act in the premises, the court said: "The convention of the State which framed the Constitution, thought proper to place restrictions upon the power of the legislature to establish new counties; and, of consequence, any attempt to do so contrary to the restrictions, is a void exercise of power which can and must be stopped by the judicial department of the State. There is no other place to which an appeal can be made, and, if the court can not interfere, the Constitution, if violated, is a dead letter."

This case was followed in *Gotcher v. Burrows*, 9 Humph., 685; *Maury County v. Lewis County*, 1 Swann., 236; *Bridgenor v. Rogers*, 1 Cold., 259; *Humphreys County v. Houston County*, 4 Baxt., 598. In *Bridgenor v. Rogers*, the court's conclusions of law were as follows:

"1st. A citizen and taxpayer of a county from which a portion of its territory is taken to form a new county, may file a bill to inquire into the validity of the act creating the new county, if he does so before the new county becomes so organized as to become a political organization.

"2d. A county in its corporate character, whose territory has been reduced below 625 square miles, or her qualified voters below 1,000, may come into a court of equity even after a new county has been organized, and have her territory or voters restored to her by decree of the court; and this is so, whether the territory or voters have been reduced by the formation of a new county or by changing the line and attaching a portion of one county to another.

"3d. Before a portion of a new county will be restored to the county from which it was taken, it must clearly appear by an actual measurement of the territory of the old county and an enumeration of its voters, that her constitutional rights have been invaded."

In Wisconsin the same rule is followed under a similar constitutional provision. In *Attorney General v. Merriman*, 6 Wis., 22, the court, in answer to the argument that the legislative finding is conclusive, said: "As a general rule, courts undoubtedly always presume in favor of the constitutionality of an act of the legislature, and in a doubtful case, will sustain it. But how can that presumption be entertained in a clear case, when the act is expressly forbidden by the language of the Constitution? The reasoning, if it proves anything, proves too much. For it is manifest the same presumption would arise in favor of an act of the legislature dividing a county of an area of 400 or 600 square miles. Suppose the legislature should pass an act dividing Waukesha, Walworth or Green county, each of which counties contains sixteen townships, must not the same presumption arise? Must not the court presume that the legislature, in dividing the county, passed upon the question of fact, and hold that the law was valid? This applies a fair test to the soundness of the argument. It places it in a strong light to show more strikingly where it leads. Of course it would practically abrogate a provision of the Constitution."

In *State v. Dorsey County*, 28 Ark., 878, a writ of quo warranto was filed by the attorney general against the county, in answer to which the county pleaded that it was created by an act cutting off portions of Lincoln and other counties. To this the plaintiff replied that by taking off the portion of territory cut from Lincoln county by the act, it was reduced to less than 600 square miles, contrary to the Constitution. The defendants demurred to the replication. The demurrer was overruled and it was held that certain evidence may controvert a statute, but it must be of equal grade and character with the law itself, as for instance, some other official record or official surveys or map of which the court should take official notices.

In *Woods v. Henry*, 55 Mo., 560; *State v. St. John*, 21 Kan., 427; *Garfield v. Brayton*, 33 Iowa, 16, it was held that the court will take judicial notice of the boundaries of counties and their area, and if an act reduces a county below the constitutional limit or creates a county having a less area than allowed by the constitution, it is void, and will be so declared. (*State v. Scott*, 17 Mo. 521; *Perry v. State*, 9 Wis., 19.) In *Board of Commissioners v. Spittler*, 13 Ind., 235; *Board of Commissioners v. State*, 147 Ind., 497, and

Wright v. Hawkins, 28 Tex., 459, it was also held that the courts will take judicial notice of the area of counties.

It will thus be seen that the conclusions reached by the courts are more harmonious than the reasons given for them. The two New York cases reported in 19 Barbour and 19 N. Y., were criminal prosecutions in which the invalidity of the act creating the county was relied on collaterally; and in the Missouri and Kansas cases it was held that this could not be done where the county was organized in fact and was an existing corporation. In the West Virginia and Washington cases the suits were by the taxpayer after the liabilities were created by the county as an existing corporation *de facto*, and it is conceded in Tennessee that in this state of case the taxpayer can not maintain an action assailing the validity of the act creating the county; but the weight of authority is to the effect that when assailed in the proper way and at the proper time, the court will enter upon the inquiry as to the constitutionality of the statute; while the Arkansas case seems to limit the evidence which may be received more narrowly than the other cases.

Lafferty v. Huffman, 99 Ky., 80, and *Taylor v. Beckham*, 118 Ky., 278, are relied on for appellee. It was held in the first of these cases that the enrolled bill, properly authenticated, is conclusive of the regularity of the steps taken in the passage of the statute; and in the other case it was held that the judgment of the legislature in a contest of the office of Governor pursuant to the constitution is conclusive, and that the record made by the legislature and approved by it can not be assailed in the courts. But neither of these cases apply here; for the question is not one of regularity of legislative proceedings, but of unauthorized legislation invading private rights under the Constitution. On the other hand, in *Clerk v. Lester*, 104 Ky., 191, it was held that section 115 of the Constitution allowing the legislature to redistrict the State in appellate districts every ten years, is mandatory, and that an act changing the districts within ten years was void. It is true the court had judicial knowledge that the attempted change was made within less than ten years, but the court must have judicial knowledge also of the counties of the State and their boundaries as fixed by the statutes—of the public surveys made by the State and published by its authority. These are matters of common knowledge within the State, contained in geographies, etc., and if the court does not remember the facts it will resort to the books to refresh its memory. In this way we know approximately the area of the counties of the State, and know that Carter county had, by the geological survey an area of 544 square miles, Elliott county 270, Lewis county 450, total 1,264, as given in the official report of the bureau of agriculture; so that Carter county can properly only contribute 144 square miles to the formation of a new county, Elliott, nothing, and Lewis only fifty square miles. We must, therefore, take judicial notice that only 194 square miles can, on this basis, be cut from these counties without infringing the mandate of the Constitution. We know also judicially that since the geological survey was made of Carter county, part of it has been cut off to other counties. The State Board of Equalization is created by statute and reports of its proceedings are published by the State giving the number of acres of land in each county assessed for taxation. From this we know that the land assessed for taxation in the three counties referred to is as follows:

Carter, 219,686 acres, Elliott, 141,982, and Lewis, 308,503. It thus appears that Carter county is now in fact not as large as Lewis and contains less than 400 square miles, unless, which can not be presumed, a large per cent. of the county is not assessed for taxation. As shown by these figures the actual area of both Carter and Elliott must be less than 400 square miles, and we must, therefore, presume that no part of the territory of either of these counties can be cut off to form a new county without, a violation of the Constitution; for, as 640 acres make a square mile, 400 square miles equal 256,000 acres.

But we do not rest our judgment here, for while the public surveys are presumptively correct, they may be shown to be incorrect. The Constitution recognizes the existing counties of the State. It confers upon them the right to remain in area not less than 400 square miles. They are quasi corporations, and may sue and be sued. They have certain public burdens to bear. When part of their territory is cut off these burdens fall more heavily upon the remaining territory. The rights of these corporations which are guaranteed them by the Constitution are as sacred as any other rights secured by that instrument to other corporations or private persons. The legislature in the creation of new counties is simply an agency with well-defined restrictions upon its powers. If it acts in a case where it has no power to act, its act, like that of any other agent beyond the scope of his power, is void. The county whose rights are affected may complain, and so may any taxpayer who is prejudiced; for the taxpayers have a right to insist upon their constitutional protection against the increased burdens which the formation of the new county will entail. It is the province of the courts to protect private rights under the Constitution. Constitutional guarantees would amount to nothing if there was no way to protect them. The court will not adjudge bad a legislative act on doubtful evidence, but where it is plain that the Constitution has been violated, it is the duty of the court to say what the law is, and protect private rights. Otherwise, the Constitution may be disregarded, and power may be exercised by the legislature in a case where, under the Constitution, it is without power to act at all, and those whose rights are thus destroyed will be left without remedy. This question was fully considered in *Cheaney v. Hooser*, 48 Ky., 330, decided in the year 1848, the court holding that the discretion of deciding on all legislative measures is in the legislature itself, except where the Constitution limits the power of the legislature, but that a statute is void if in violation of the constitutional limitation on the power of the legislature; and in that case parol evidence was received to show that private property was taken for public purposes under an act of the legislature without just compensation. This case was followed in *Covington v. Southgate*, 54 Ky., 492; *Elkton v. Gill*, 94 Ky., 138, and a number of other cases. There can be no sound reason why the same rule should not apply in the cases of violation of any other constitutional restriction on the power of the legislature to the prejudice of private rights. By the terms of the Constitution the following conditions must be complied with before a new county may be formed: First, no county from which any part of the territory is taken must be reduced to less area than 400 square miles; second, the new county must be of not less area than 400 square miles; third, the boundary line of the new county must

not pass within less than ten miles of the county seat of any county from which a portion of its territory is taken; fourth, no county from which any part of the territory is taken shall be reduced to less than 12,000 inhabitants; fifth, the new county must contain not less than 12,000 inhabitants. If any of these conditions are wanting, the act is in violation of the Constitution, and void. The circuit court erred in refusing to allow the petition of Carter county to be filed. He also erred in sustaining the demurrer to the plaintiff's petition.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Whole court sitting.

COVINGTON AND CINCINNATI BRIDGE CO. v. SMITH.

(Filed April 29, 1904.)

1. Petit juries—Jury wheel—Monthly drawings—In courts of continuous sessions, the jury law requires the circuit judge, during the first week of every month that the court is in session, to draw from the jury wheel the names of thirty persons to act as petit jurors for that month. Where the panel of the petit jury had been drawn and served for a month, a motion by a party to an action to be tried by a jury to have the panel discharged and a new panel drawn from the jury wheel was proper, and should have been sustained by the court, and for such error the verdict of the jury should be set aside and a new trial awarded.

S. D. Rouse for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Jennie Smith, on the 21st day of January, 1902, about 6 o'clock p. m., with a companion, was walking over appellant's bridge from Cincinnati to Covington, when near the abutment on the Kentucky side, she slipped in the snow or ice, and fell, breaking her arm, for which she instituted this action to recover damages, alleging that her injury was caused by the negligence of appellant.

The answer placed in issue the material allegations of the petition, with a plea of contributory negligence, which, being controverted, completed the issues. A trial resulted in a verdict in favor of appellee for the sum of \$400, of which appellant now complains. The only error in the record is that of the formation of the jury. Upon calling the case for trial, May 28, 1903, appellant moved the court to discharge the whole panel of the jury, and to summon a new panel, as by law required. This motion was overruled, and, in his opinion refusing a new trial, the court thus states the facts relating to the panel to which appellant had objected: "The jurors drawn and summoned and in attendance in April, 1903, held over, and from them and others drawn and summoned in May to fill vacancies, and one bystander, the jury to try this case was selected. It may be material to state that there was no reason for the failure to draw jurors for May, except that there was set for trial late in that month, an indictment for murder, and it was known that for that trial many extra jurors would have to be drawn, and it ap-

peared more convenient to draw the regular May panel at the same time of drawing the extra jurors; and further, that there were very few other trials set, or to be set, for that month. The April jurors were, in the opinion of the trial judge, exceptionally desirable in point of intelligence and character, and the trial judge was glad to have them remain. It is certain that the defendant was not, in any manner or degree, prejudiced by the failure to draw jurors for May."

Sections 2243 and 2247, Kentucky Statutes, are as follows:

"Section 2243. At each term of the circuit court, within one year after the commencement of that at which said commissioners were appointed, or in case of courts having continuous sessions during the first week of each month that the court is in session, within one year from the first of the month in which said commissioners were appointed, the judge of the court shall draw from said drum or wheel case, a sufficient number of names to procure the names of twenty persons qualified, as hereinafter prescribed, to act as grand jurors, and record the names of the twenty qualified upon paper, and certify and sign it, and shall also, after having locked and re-versed or shaken said drum or wheel case, re-open it and draw therefrom the names of thirty persons to act as petit jurors, record their names on paper, certify and sign it, and he shall place said lists in separate envelopes, of good paper, and seal and endorse them, so as to show that the envelopes contain jury lists, and the month or term and year said jurors are selected for, and date of selection, and sign his name across the seal of each and deliver them to the clerk of his court, at the same time administering to him and his deputies the oath above required of them; from the list of twenty names, the next grand jury shall be drawn, and from the list of thirty names the next petit jury shall be drawn as hereinafter directed. He shall destroy the slips on which are written the names placed on the lists as soon as said names are recorded on said lists, and if, in drawing the twenty grand jurors, the name of a person not having the qualifications of a grand juror be drawn, it shall be forthwith returned to the drum or wheel case, and if at any drawing the name of a person temporarily disqualified is drawn, it shall be replaced in said wheel case or drum; but if the name of any person permanently disqualified is drawn, the slip on which it is written shall be destroyed. Immediately after the judge has drawn said names from said drum or wheel case, he shall lock the same and deliver it and the aforesaid lists to the clerk, as above directed. The judge when he draws the jury, shall not permit any one to see any name, nor shall he divulge the name of any person drawn on any jury, except that the judge may require one of the commissioners to attend and assist him when he draws the jury and makes the list, if he deems it necessary.

"Section 2247. The judge may, at any time during the term, when it is necessary, after the regular panel is for any reason exhausted, draw and select from the drum or wheel other persons to act as grand or petit jurors, or he may, in his discretion, direct that such jurors be supplied from bystanders; and the court may, after the regular grand jury has been discharged during any term of court, impanel a grand jury composed of bystanders, and may, in his discretion, fill vacancies in the grand jury from bystanders or by drawing from the drum or wheel. And the court, after

the petit juries for the term have been selected and impaneled, may, in any action, proceeding or prosecution after said panel has been exhausted, direct the sheriff to supply from bystanders the place of one or more who may be hereafter excused by the court for good cause, or removed by the challenge or either party, or the judge may supply such jurors by drawing names from the drum or wheel as herein provided; and, when the judge draws such names, he shall make a list thereof and deliver the list to the sheriff, who shall forthwith summon them: Provided, that should the court discharge, during the term, the whole of any panel, then their places shall be supplied by the judge drawing from the drum or wheel."

In the case of *Curtis v. Commonwealth*, 23 Ky. Law Rep., 267, the trial judge having drawn more jurors in the month of January, 1901, than were needed for that month, carried over a number of them as a part of the panel for the February term from which the jury in the case cited was selected; upon appeal to this court, it was thus said of this action: "These men so selected may have been, and doubtless were, of the very best citizenship of the county, but they were not drawn impartially from the body of legally qualified jurymen of the county. The mode provided by law for the selection of qualified and impartial jurymen was ignored, and the jury was selected by the judge of the circuit court, himself. This was clearly erroneous. It may have been done with the very best of motives, but it was not the method provided by law, and should not have been done. This action in selecting and impaneling the petit jury being error, the question presents itself, can this court take cognizance of this error?"

It was then held that, under the provisions of section 201 of the Criminal Code, this court had no jurisdiction to reverse the case for the error under consideration. There is no similar provision in the Civil Code.

The error of the circuit judge in the case at bar can not be distinguished from that in the case cited. The statutes quoted provide an elaborate system for the selection, monthly, in courts of continuous session, of impartial jurymen fresh from the body of the people. If these provisions are enforced, each litigant is guaranteed that the best effort possible has been made to secure for the trial of his case an impartial jury. It is not believed that the requirements of the statute in regard to the selection of juries would have been set forth with such minute particularity and detail, if it had been intended that the court might nullify the manifest intention of the legislature by ignoring them.

Wherefore, the judgment is reversed for proceedings consistent herewith.

WATHEN v. POOL, &c.

(Filed April 29, 1904—Not to be reported.)

Conflict of evidence—Question for jury—Where there is a conflict of evidence it is for the jury to determine its weight and effect, and in an action for damages for personal injury the verdict for plaintiff will not be disturbed where it is not palpably against the weight of evidence.

John S. Jackman for appellant.

Edwards & Ogden for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

While the appellee was an infant under four years of age he was crossing Griffith avenue near the intersection of Twenty-Second street in the city of Louisville, and was run over and injured by appellant's mule and wagon which was being driven by his servant. A recovery is sought in this action for the injury thus inflicted. It is claimed that the accident occurred in consequence of the negligence of the appellant's servant in driving the mule at a dangerous and reckless speed along the street. A reversal is urged upon the ground that the verdict is palpably against the weight of the evidence.

Two witnesses were introduced on each side who claim to have witnessed the accident. Prentice testified that he saw the mule coming down the street in a "hard run" and while the child was crossing the street it was struck by the mule and knocked down. His testimony was supported by the evidence of Freeman Vincent. Henry Hopewell testified that the driver stated that he had to drive fast because he was late. The driver and another witness testified to facts which tend to contradict the evidence offered by the plaintiff and to show that the injury was not the result of a negligent act. The conflict in the testimony made it a case for the jury. If the testimony introduced by the plaintiff is true, then it was a case of gross negligence. Owing to the conflict in the testimony we are unable to see how the case of Hoff v. Hahn, 24 Ky. Law Rep., 2267, should prevent the court from reaching the conclusion that it was a case for the jury and that if the verdict of the jury is against the weight of the evidence, it is not so palpable that the court should order a new trial.

The judgment is affirmed.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO. v SULLIVAN.

(Filed April 29, 1904—Not to be reported.)

Right of way—Damages—Instructions—Upon a trial of exceptions to report of commissioners fixing damages for right of way, an instruction which told the jury to find the actual value of the ground taken for the right of way, and in addition thereto damages sustained to remaining part of farm, and that no more than the difference in the actual value of the farm immediately before and after the taking of the right of way should be allowed, properly directed the jury as to how the total damages should be ascertained.

Robbins & Thomas, J. M. Dickinson, Pirtle & Trabue and Jacob Corbett for appellant.

J. B. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

This proceeding was instituted by appellant in the Ballard County Court to condemn a right of way four hundred feet wide over the land of the appellee.

The commissioners appointed by the county court fixed the amount of ap-

pellee's damage at \$1,780. Upon the trial of the exceptions to the report, a jury fixed his damages at \$3,000. An appeal to the circuit court resulted in a verdict and judgment for appellee for \$2,500. On this appeal it is urged that the amount is excessive and the verdict of the jury is palpably against the weight of the evidence. It was the province of the jury under our system of law to pass upon the credibility of witnesses and give such weight to their testimony as it is entitled to receive. An earnest argument is made to show that the judgments of appellee's witnesses as to the value of his land taken and damages to the residue, were of little value and that their statements were untrue.

Two juries have passed upon this question and their verdict in effect deny the correction of appellant's claim. The court declines to hold that the verdict is so palpably against the weight of the evidence that it should interfere. It is urged that the court in its instructions erred in not directing the jury to find in their verdict the different items constituting appellee's damages. The court told the jury to find the actual value of the seventeen and seven-tenth acres taken for the right of way, and in addition thereto the damages which he sustained to the remaining part of his farm of 187 acres. The court also told the jury in fixing the damages, it should not allow more than the difference in the actual value of the farm of appellee immediately before and after taking of the right of way. In our opinion the court properly directed the jury as to how they should ascertain appellee's total damages, and it was not necessary to tell the jury to return a verdict fixing separately the value of the land and the damages.

A reversal is sought because the court gave the appellee the closing argument. It was admitted on the trial that it was necessary for the railroad company to have the land for its right of way and its right to condemn it was conceded. The only question remaining was to ascertain the amount of appellee's damages. Without entering into a discussion of the question as to who had the burden, it is sufficient to say that without objection the appellee assumed it and introduced his testimony. After this had been done it was too late for the appellant to make the question and have the closing argument. We do not think the appellant was prejudiced by any ruling of the court upon the admission or rejection of testimony.

The judgment is affirmed.

ROBERTS v. FARMERS BANK.

(Filed April 29, 1904.)

Bills and notes—Note executed to bank—Assignment of collateral—Delay in suing on collateral—Appellee brought suit on a note for \$220 executed to it by appellant due in sixty days, and as a defense appellant alleged that at the time he executed the note sued on he assigned to appellee as collateral security a note on K. and G. for \$1,000; that when the collateral fell due its makers were solvent and paying their debts, and appellee by the exercise of ordinary diligence could have collected the amount due thereon from the payors; that he demanded of appellee that it turn over to him the collateral, so that he might sue upon it and enforce its payment, but appellee refused to surrender the note or permit him to sue thereon; that more than a year had elapsed since the maturity of the note and that in the meantime its

makers had become insolvent and moved out of the State, and by reason of appellee's negligence the note had become wholly worthless. Held—That the allegations, if true, show that the holder was guilty at least of ordinary negligence in refusing to institute proceedings to enforce the collection of the note, and the demurrer to the answer should have been overruled.

A. C. Moore for appellant.

Champion & Champion for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the Farmers Bank for the purpose of recovering judgment against D. C. Roberts on a note for the sum of \$220, executed and delivered to it by him, and by which he agreed and promised to pay to it the principal, with interest, sixty days after its date. As a defense, appellant alleged, substantially, the following facts as a counterclaim against appellee: That at the time he executed and delivered the note sued on, he assigned to appellee, as collateral security, a note of S. C. Knight and D. C. Griffith for the sum of \$1,000, with interest at 6 per cent. from the 30th day of April, 1902, until paid; that when the collateral fell due, its makers were solvent, and paying their debts, and appellee, by the exercise of ordinary diligence, could have collected the amount due thereon from the payors; that he demanded of appellee that it turn over to him the collateral, so that he might sue upon it, and enforce its payment, but appellee refused to surrender the note, or permit him to sue thereon; that more than a year had elapsed since the maturity of the note, and that, in the meantime, its makers had become insolvent, and moved out of the State; that by the reason of appellee's negligence in the premises, the note had become wholly worthless and uncollectible.

A general demurrer to this answer was sustained by the court, and appellant declining to amend, judgment was rendered against him in accordance with the prayer of the petition; of which he is now complaining. The question for adjudication is the liability of the pledgee of a note assigned as collateral security for failure to enforce its collection at maturity, where the maker has become insolvent, entailing a loss upon the pledgor.

Colebrooke, in his work on Collateral Securities, section 114, thus states the rule: "If upon a pledge of negotiable collateral securities, so as to convey the title thereto, the pledgee, because of his gross negligence, or by his tortious transfer of them or dealings therewith, fails to collect the same of the parties bound thereon, when it might have been done, and the pledgor is injured and the amount of the collateral paper lost, the pledgee is chargeable with the face of such collateral securities as in payment and discharge of the principal debt. Where the opportunity of collecting collateral bills or notes is lost by the insolvency of the parties thereto, by reason of the supine negligence of the pledgee, when with ordinary care the same might have been enforced, the latter is liable to account for the full loss and damage of the pledgor. Such responsibility of the pledgee is limited to the actual loss." Section 115: "The pledgee of negotiable collateral securities, however, is not held to strict responsibility in proceeding at once, upon default, in the enforcement thereof. Mere delay in so doing is not sufficient

to create any liability upon his part to the pledgor. Where there is no suspicion that the maker is embarrassed, and no request on the part of the pledgor that collection should be promptly made, the pledgee is not answerable for a subsequent actual loss."

In the Am. & Eng. Encyl. of Law, 2d edition, volume 22, page 899, it is said: "It is well settled that when a chose in action, such as a bond, or accepted order on a third person, is transferred and delivered to the creditor as collateral security, it is the duty of the pledgee to use reasonable care and diligence to make such collateral available; that he is bound to use proper exertion to render its collection effectual for the purpose for which it was pledged; that if necessary he must bring an action against the maker of the collateral, and that if through his negligence or wrongful act or omission, the collateral is lost, he is accountable and liable to the pledgor, in the same manner as the pledgee of goods and merchandise is liable to the pledgor if they are lost or destroyed through the pledgee's failure to give them the necessary protection and care." On page 908 Id., it is said: "Whether or not the pledgee of collaterals has used due diligence to collect them is a mixed question of law and fact. It is not for the court to determine that due diligence has been used. It is the province of the court to instruct the jury what is due diligence, and for the jury to find whether due diligence has been used."

In the case of *Nolan v. Clark*, 10 B. Mon., 289, the rule is thus stated: "It is said that a person who receives bonds and notes as collateral security for a debt, is bound to use due diligence, and if they are afterwards lost, through his negligence, by the insolvency of the makers, he is charged with the amount."

In the case of *Bonta v. Curry*, 3 Bush, 678, a note had been assigned as collateral security; afterwards, the assignor, becoming insolvent, made a general assignment for the benefit of his creditors; after the maturity of the collateral, the assignee in bankruptcy demanded of the holder of the collateral that it be turned over to him for collection, and warned him that, if he would neither surrender the note, nor forthwith sue on it, he must take the risk, and would be held responsible for any loss which might result from his persistent inaction. The court said: "Now, although *Vanarsdall's* note did not pass to *Harris* by the deed of trust, and the appellant, therefore, was not bound to surrender it on the demand made, yet, as a trustee of ordinary faith and prudence, it was his duty, after that notice and warning by the appellee, to proceed without delay to collect the note by legal process; and it seems probable that, had he thus acted he would have made the whole amount." Thereupon the judgment, holding the assignee liable for laches in regard to the collateral, was affirmed.

In the case of *Sanford v. Lowenthal*, 1 Ky. Law Rep., 357, the rule was stated, that the assignee of a note held as collateral was required to use due diligence in its collection. In the case of *Schindler v. Hayden's Adm'r*, 8 Ky. Law Rep., 859, in a well-considered opinion of Judge Ward, wherein a great number of authorities are reviewed and commented upon, it is said: "Reason and the analogies of the law, therefore, concur in the rule as stated in *Stevens v. Morrow*, 4 Ind., 425, that the holder of collateral paper guilty of laches, whereby the assignor is damaged, makes the paper his own, and

must account to his debtor on the principal debt for the sum which he could have made by pursuing the maker of the collateral paper with ordinary diligence."

We think the allegations of the answer, while not as direct and explicit as they might have been made, were sufficient to have aroused appellee, and put it upon inquiry as to the financial condition of the payors of the collateral it held, and, if true, show that the holder was guilty of, at least, ordinary negligence in refusing to institute proceedings to enforce the collection of the note; and, under the rule established by the authorities herein cited, the demurrer should have been overruled.

Wherefore, the judgment is reversed for proceedings consistent herewith.

FORKED DEER PANTS CO. v. SHIPLEY.

(Filed May 3, 1904—Not to be reported.)

1. Master and servant—In an action by appellee for services under contract with appellant's general manager, the evidence showing it had discharged her and that a written contract had been entered into with her by the general manager, the jury was authorized to find for her under the contract.

2. Same—The rule is that where the employe is discharged before the expiration of the contract, he may recover for the remainder of the term, less what he has earned or might earn, by reasonable diligence. He is not required to wait until the end of the term before bringing the suit on the contract for damages for his discharge.

Puryear & Ray, John W. Ray and J. B. Ray for appellant.

Robt. L. Greene and Thos. E. Moss for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1890 appellee, Bertha Shipley, was in the service of appellant at \$10 a week. She asked an increase of wages in the spring of 1891, and this being refused, left its service and went to St. Louis, and was at work there when, on the 21st of May, appellant's general manager made a contract, in writing, with her, to pay her \$12 a week within a very short time until May 21, 1902, and \$18 a week after that for one year, she to have complete charge of the sewing room. A further advance was contemplated after that year, but no positive promise as to this was made. She returned to Paducah and went to work, remaining in appellant's service until April 12, 1902, when she was discharged. On August 18 she filed this suit to recover damages for the breach of the contract. The defendant denied the authority of the general manager to make the contract, and also denied that she had been discharged, pleading that she left voluntarily. The jury found for the plaintiff \$300.

The evidence warranted the jury in finding that the plaintiff was discharged. There was no question that the written contract was made with her as claimed by her, but by way of showing that the general manager had no authority to make it, the defendant offered in evidence one of its by-laws, as follows: "The board of directors may elect a general manager who shall

have general management of the business of this association, with power to buy and sell."

The court refused to allow the by-law to be read as it was not shown that the plaintiff had notice of it. Of this appellant complains. A principal is bound by the acts of his agent within the apparent scope of his authority, although his private instruction may limit his authority more narrowly. It was manifestly within the apparent authority of the general manager of the business to make contracts for labor. If the by-laws had been read it would not have affected the result, for it conferred on the general manager the authority in question, as it provided that he should have the "general management of the business of this association, with power to buy and sell." If there were limitations upon his authority which were known to the plaintiff or of which she had notice, the association would not be bound beyond his actual authority, and this question was substantially submitted to the jury by the instructions of the court. There was not enough, however, in the evidence to charge her with notice of any limitation upon the authority of the manager, and the instruction was more favorable to the appellant than it should have been. The rule is, where the employe is discharged before the expiration of his contract, he may recover the contract price for the remainder of the term, less what he has earned or might earn by reasonable diligence. He is not required to wait until the end of his term before bringing his suit.

He can recover but once, and in that action must be allowed to recover his entire damages. The trial here took place before the end of the year contracted for, and while it is necessarily somewhat of an approximation what she might earn by diligence during the year, this is permissible and is the most that can be required of her. (*Lewis v. Scott*, 95 Ky., 484.)

The court properly so instructed the jury. While there were some unnecessary allegations in the petition, the allegation as to the loss on the breach of the contract and her inability to get other work, are sufficiently stated to sustain the verdict. The court did not err in refusing to continue the case on account of the absence of one of the attorneys who was sick. A large discretion must necessarily be exercised by the circuit courts in matters of this sort, with which this court will not interfere, unless palpably abused. As one of the members of the firm was present, considering all the facts we do not see that there was an abuse of discretion in refusing to pass the case or continue it on account of the absence of counsel.

Judgment affirmed.

MILLER, &c. v. WIREMAN, &c.

(Filed May 8, 1904—Not to be reported.)

1. Land—Adverse possession—The appellees, John and Florence Wireman, having patented a tract of land, a part of which they subsequently conveyed to their daughter, Rebecca Bailey, in which Mrs. Wireman did not join, and it appearing from the proof that since said conveyance, Wireman and his wife had resided on said land claiming it as their own adversely for more than fifteen years, they were entitled to recover, their title being perfected by possession.

2. Estoppel—Erroneous judgment—No consideration—The appellant,

Rachel Miller, not having paid anything for the land she claims, can not rely upon an estoppel; and while the court erred in adjudging the lower half of the land to her, and not adjudging a lien thereon for \$125 in favor of appellee Wireman, she was not prejudiced thereby, as Wireman was entitled to have the land instead of the lien on it. Had the court so adjudged, Mrs. Miller would have received nothing. She is not personally bound for the debt and may realize something out of the land, and this court should not reverse a judgment which is not prejudicial to the appellant, and as there is no cross appeal Mrs. Wireman is not entitled to a reversal.

D. D. Sublett and John W. Rodman for appellants.

Hazelrigg, Chenault & Hazelrigg and Aug. Arnett for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Paynter.

The appellants, Rachel Miller and her husband, Boyd Miller, instituted this action against John Wireman and his wife, Florence Wireman, in which they alleged that they were the owners of and were in the possession of a certain tract of land in Magoffin county, and that the defendants were committing certain trespasses upon it. They sought to recover damages and to restrain the defendants from committing further alleged acts of trespass. The defendants denied that the plaintiffs were the owners of the land. They claim that they had acquired title to it as follows: First, that the land was patented to John Wireman and his wife, Florence; second, that appellee John Wireman made a deed to his daughter, Rebecca Bailey, in 1884, in which his wife, Florence, refused to join; third, that subsequently John Wireman gave to his daughter, Rebecca, a tract of land in Breathitt county in consideration of the lower half of the tract in controversy; fourth, that Rebecca Bailey conveyed the upper half of the tract by title bond to Morgan Wireman, who assigned it to Florence Wireman; fifth, that they had been in the actual adverse possession of the land for more than fifteen years before the appellants entered upon it.

The uncontradicted testimony shows that the land was originally owned by John and Florence Wireman, and which evidence was given without objection. John Wireman in 1884 made a deed to his daughter, Rebecca, for the land, the consideration being love and affection. Shortly after this was made the evidence tends to show that John Wireman conveyed to his daughter, Rebecca, land in Breathitt county for the lower half of the tract in controversy. This deed was destroyed, and at her instance John Wireman conveyed the Breathitt county land to Jack Wireman, the latter having paid Rebecca for it. She never made her father a deed reconveying the lower half. The evidence tends to show that Rebecca Bailey sold the other half to Morgan Wireman, and it shows clearly that Morgan Wireman paid her therefor. It also shows that Florence Wireman bought from Morgan Wireman his interest in the land. A paper is pleaded which purports to be a title bond for the land from her to Morgan Wireman, but her signature is by mark, without an attesting witness. Rebecca denied in her pleadings that she executed the bond, but did not deny in her testimony that she had done so, although she denied having made the exchange of land heretofore mentioned.

The court below adjudged that Florence Wireman's heirs (she having died

pending the suit) were entitled to the upper half and the appellant, Rachel Miller, the lower half, subject to a lien for \$125. It is claimed by the appellants that the court erred in adjudging the upper half of the land to Florence Wireman's heirs, because the evidence was not sufficient to show that Rebecca Bailey executed the title bond to Morgan Wireman, and in giving John Wireman a lien on the lower half of the land, because the exchange of lands, if at all, was in parol and not enforceable, and that no pleading had been filed authorizing such a judgment. If they were in error as to this, they claim John Wireman was present when the deed was made by Rebecca Bailey to her daughter, and is estopped to deny its validity. We will discuss the questions regardless of the order in which they are stated.

The evidence on behalf of appellees tend to show that John Wireman and his wife occupied and claimed the land in controversy for more than fifteen years after he made the deed to his daughter, and before the appellants got possession of any part of it. If the evidence fails to show that Rebecca did execute the title bond to Morgan Wireman for the land, it does show that he bought and paid her for it, and the transaction amounted to a parol sale of the upper half of the tract. The evidence shows a parol sale of the lower half to John Wireman. So John Wireman and his wife at least held the lands under parol contracts of purchase (though as a matter of fact the wife had never parted with her interest in it,) and having been in the adverse possession for more than fifteen years, claiming it as their own before appellants entered upon it, the statute of limitation made perfect their title to the land. While the Wiremans could not have enforced specific performance of the verbal contracts, that fact did not militate against their right to acquire title to it by an adverse holding. (Thomson v. Thomson, &c., 98 Ky., 435; Lynn v. Cannada, Guardian, 20 Ky. Law Rep., 1488; Hornsby, &c. v. Davidson, &c., 21 Ky. Law Rep., 1582.) The title to the land by adverse holding even if Florence Wireman had joined in the deed to Rebecca Bailey. If we are correct in this conclusion, then John Wireman and his wife, Florence Wireman were entitled to hold the land, unless John Wireman lost his interest in it by reason of the deed which his daughter, Rebecca, made to her daughter, Rachel Miller. John Wireman was a very old man at the time of this transaction. Rachel Miller never paid a cent for the land. It was conveyed to her in consideration of love and affection. If John Wireman did, at the time of the execution of the deed, that which the appellants claim he did, and Rachel had given a valuable consideration for the land, then he would be estopped to assert title to his interest in it. Rachel Miller not having parted with anything as consideration for the land, she is not entitled to rely upon an estoppel; hence the court should have adjudged the lower half of the land to John Wireman, instead of Rachel Miller. While the court erred in adjudging the lower half of the land to appellant, Mrs. Miller, and not adjudging a lien thereon for \$125 in favor of appellee, John Wireman, the question remains, is she prejudiced by such a judgment? Wireman was entitled to have the land adjudged to him, instead of the lien on it. Had the court so adjudged, Mrs. Miller would not have received anything by the judgment. Having been erroneously adjudged the land, can she complain on the appeal that she was adjudged it with a lien debt on it? She is not personally bound for the debt. The land may be worth much

more than the lien debt, hence, as she is not personally bound for it, she may realize something out of it when she was not entitled to any of it. Certainly she can not be prejudiced by the judgment, and the court should not reverse a judgment which is not prejudicial to the appellant. As there is no cross appeal, appellee Wireman is not entitled to have the judgment reversed.

The judgment is affirmed.

BARIES v. LOUISVILLE ELECTRIC LIGHT CO.

(Filed May 8, 1904.)

1. Verdict—Insufficient damages—Failure to plead special damages—Appellant is a painter, and at the time he was injured he was in the employ of one McKelvey, who had the contract for painting a house on which there was one of appellee's wires, not properly insulated, with which he came in contact, by which his arm has withered and become useless. A verdict of one cent damages can not be reversed for the smallness of the damages, for the reason that special damages can not be recovered unless pleaded, which was not done in this case.

2. Incompetent evidence—General custom—On the trial the court admitted evidence to show that it was a general custom for contractors to notify appellee that they were working on a house to which the wires were attached, and when this notice was given it always cut the wires. This evidence was incompetent and prejudicial to appellant. If appellee was negligent in not having its wires insulated, which was the proximate cause of appellant's injury, it can not be excused because some other person might have performed a duty that would have prevented the injury.

Bennett H. Young for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

The arm of appellant has withered and become useless by coming in contact with a live wire of appellee; it occurred while painting on a house to which the wire was attached. Appellant claims that he received the injury by reason of appellee's negligence in not having the wire properly insulated. This was the question of fact at issue on the trial of the case. The jury returned a verdict for the appellant, and fixed his damages at one cent.

He asks a reversal on the grounds: First, that the verdict fixing damages is flagrantly against the weight of the evidence; second, that the court erred to his prejudice in the admission of evidence. It is the contention of appellee that, under section 341 of Civil Code of Practice, the judgment can not be reversed because of the smallness of damages in an action for an injury to the person. The evidence shows that he was earning and could earn at his trade as a painter \$15 a week, and that the time lost in consequence of his injury would equal a sum greater than \$800. The loss of time resulting from a personal injury is a pecuniary loss in contemplation of section 341, and it is a ground for reversal if the verdict is for the plaintiff, and it does not award damages to cover such pecuniary loss. (Taylor v. Howser, 12

Bush, 468; Ray v. Jeffries, 86 Ky., 367; Stroh v. South Covington and Cincinnati Street Ry. Co., ante, 1868.) This court has repeatedly held that special damages must be pleaded. It was not sufficiently done in this case. It is averred in the petition that since the plaintiff received the injury he "has been and is unable to do any kind of work." The averment is not sufficient, hence the appellant is not entitled to a reversal because of the smallness of damages. (Ray v. Jeffries, supra; Stroh v. South Covington & Cincinnati Street Ry. Co., supra; Jesse v. Shuck, 11 Ky. Law Rep., 463.)

While it is stated by the jury that the verdict is for the plaintiff, it was in effect for the defendant. It can not be believed that any jury would so lack in judgment and proper appreciation of the serious loss resulting from a withered arm, as to believe that one cent would compensate the injured party. In determining whether or not appellant was prejudiced by the admission of improper evidence, we will consider its effect the same as if the verdict had been for the appellee. At the time of the injury appellant was in the employ of McKelvey, who had the contract for painting the house. It is contended that the court erred in admitting evidence that McKelvey and some of his employes had notice that appellee desired to cut the wire, when the painting should progress far enough for the men to work on that portion of the building where the wires were situated. Such evidence would be incompetent, as it would be allowing appellee to show the negligence of appellant's employer, to exonerate it from a liability for negligence which was the proximate cause of the injury. The neglect of McKelvey was not a contributory act imputable to the appellant. If appellee was negligent in failing to properly insulate its wire at the place where appellant had the right to be in the discharge of his duties, it certainly could not be relieved of the consequence of its negligence, because some one other than the appellant might have, by performing a duty, prevented the injury. While there is no evidence that such notice was given to McKelvey, evidence was admitted to show that a general custom prevailed which required contractors to notify appellee they were working on a house to which its wires were attached, and when this was done it always cut the wires. This evidence was intended to show that there was a duty upon appellant's employer or himself to give the appellee notice that work was being done on the house. If that custom required the employer or his foreman to give such notice, their failure to do so could not release the appellee from the consequences of its negligence in failing to properly insulate the wires. If such evidence is admissible under any circumstances, it was not in this case; because the appellee introduced evidence showing it had notice the day before the accident that the painters were at work on the house where the accident happened, and Mr. Kinkead, one of its electricians, testified that appellee cut the wires on houses when it had such information. It is the purpose of the notice that men are at work where appellee has its wires to give it an opportunity to cut them. If it had the notice, then the evidence of the general custom (if evidence of it is admissible in any case) was not admissible in this case, for if it had been followed the appellee would have been told a fact of which it was already apprised. Besides, the evidence taken in its entirety did not show that there was any general custom which could impose a duty upon an ordinary employe of a contractor to give such notice. The admission of the evidence

as to the general custom was prejudicial to the rights of the appellant. In giving instructions to the jury the court seems to have followed *Laughlin v. Louisville Electric Light Co.*, 100 Ky., 173, and other cases to the same effect.

The judgment is reversed, with directions for proceedings consistent with this opinion.

HORN v. CARROLL.

(Filed May 3, 1904—Not to be reported.)

1. New trial—Where a judgment was rendered against H. & Co.; instead of H., no motion having been made in the circuit court to correct the judgment on that ground as required by section 763, Civil Code, the Court of Appeals is without power to reverse on that ground.

2. Damages—Instructions—In an action for damages for failure to carry out contract with reference to cutting cross ties, an instruction which authorized the jury to award the full contract price for ties cut by other parties was erroneous, the damages being the real profit that would have been realized over and above the cost in cutting the ties.

3. Burden of proof—In an action upon a contract for cutting timber, where the defendant produced a contract which plaintiff denied was the true contract, the burden was upon the latter that, by reason of fraud or mistake this was not the true contract, and an instruction that placed the burden of proving the contract upon defendant was erroneous.

M. M. Logan and R. L. Greene for appellant.

Wm. Cromwell for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by appellee against the appellant for an alleged violation of a written contract of sale of oak timber to be manufactured into cross ties. The petition alleges in substance that in November, 1899, he sold, by written contract to the appellant, all of the oak timber upon a tract of 200 acres of land owned by him, suitable for cross ties, in consideration of \$200 in cash, and the further consideration that the defendant was to employ him to cut the cross ties and to pay him therefor 10 cents per tie. He also alleges that all of the timber was to be taken off the premises within two years from the date of the contract. He charges that after he had gotten out about one-half of the cross ties that the defendant, Horn, stopped him, and had the work performed by other parties; and that in consequence of this violation of the contract he was damaged \$50. He further alleges that the defendant cut and removed certain board trees, which were reserved from the contract, to his damage; that all of the timber was to be removed in two years; but that the defendant held the forcible possession of the land and removed therefrom a large amount of timber after the expiration of the contract time, to his damage in \$100. The defendant, Horn, for answer, denied that the timber was to be removed in two years from the date of the contract, or that the plaintiff was to have the exclusive privilege of cutting out cross ties; and further filed what purports to be the written contract between the parties, which provides that he was to have until December 9,

1903, or three years from the date thereof, to work the timber; and that the plaintiff was to have the right to manufacture the timber, on a part of the land only, at the same price paid other workmen, and charges that before the expiration of the contract the plaintiff cut and removed a large amount of the timber covered by the contract, to his damage in at least \$325. Plaintiff, in his reply, denied that the written contract produced by the defendant was the true contract between the parties, and claimed that he had been deceived and overreached in its execution. The issues were made up, and a jury trial resulted in a verdict and judgment for \$75 in favor of the plaintiff, and the defendant has appealed.

Several grounds are relied on for reversal; first, because the judgment is against R. W. Horn & Co., instead of R. W. Horn, the real defendant. As no motion to correct the judgment on this ground was made in the circuit court as required by section 763 of the Civil Code, this court is without power to reverse on this ground, even if the alleged error affected the substantial rights of the defendant, which, however, does not appear from the record to be true in this case. Appellant, however, justly complains that the instructions as to the measure of plaintiff's damage growing out of the failure of the appellant to allow him to cut the cross ties, as they authorize the jury to award him the full contract price for the ties cut by other parties. This was erroneous. His damages on this score was the reasonable profit which he would have realized over and above the cost to him, in cutting these ties. The instructions are also erroneous and prejudicial to the appellant in placing upon him the burden of establishing the contract. The plaintiff, both in his pleadings and testimony, admitted that the contract was in writing. The only contract produced upon the trial was that introduced by the defendant, and which was identified as the true contract between the parties by the attesting witness, and the burden was, therefore, properly upon the plaintiff, to show that by reason of fraud and mistake this was not the true contract between them.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent herewith.

LONDON v. CITY OF FRANKLIN, &c.

(Filed May 8, 1904.)

Office and officers—Town marshal—Removal from office—Under Kentucky Statutes, section 8619, providing that "the marshal shall be appointed for a term of two years by the city council, but may be removed at the pleasure of the city council," a marshal of a city of the fifth class may be removed from his office by the city council at any time, without notice or hearing.

Roark & Finn for appellant.

L. B. Finn and G. W. Whitesides for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was appointed marshal of the city of Franklin to fill out an unexpired term. After this, in June, 1903, the grand jury returned an indict-

ment against him for fornication; on the first Monday in July he tendered to the council his resignation as marshal, to take effect upon his conviction of the offense of fornication. The council refused to accept the conditional resignation, and without notice to him or hearing, entered an order removing him as marshal and appointing appellee Williams to his place. He afterwards filed this suit against Williams and the city to recover the emoluments of the office for the remainder of the term, on the ground that the order of the council was void. Section 3619, Kentucky Statutes, provides: "The marshal, assessor, treasurer, clerk and city attorney shall be appointed for a term of two years by the city council, but may be removed at the pleasure of the city council."

Section 3622 also provides: "Any vacancies occurring in any of the offices provided for in this chapter shall be filled by appointment of the city council."

These sections are part of the act regulating cities of the fifth class, to which Franklin belongs. Section 160 of the Constitution contains this clause: "The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices shall be filled."

It is insisted for appellant that under the constitutional provision officers of cities and towns may be only removed for cause, and that section 3619 of the statute above quoted must be construed to refer only to removals for cause, or, if not so construed, is unconstitutional. The language of the statute is that the officers named may be removed at the pleasure of the city council. These words have a well-defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the legislature their ordinary meaning. This can not be done. (Kentucky Statutes, section 460.)

It was held in *Todd v. Dunlap*, 99 Ky., 449, that the constitutional provision quoted, applies to all officers of cities and towns, whether created by the Constitution or by statute; and in that case it was held that the power to remove arbitrarily was not vested in the mayor under sections 2781, 2794, Kentucky Statutes, governing cities of the first class. But the case turned on the construction of the statute, and no opinion was expressed as to the power of the legislature to provide for removals at the pleasure of the city council. In *Lexington v. Rennick*, 105 Ky., 779, it was held that section 161 of the Constitution forbidding a change in the compensation of a municipal officer after his election or appointment and during his term of office, does not apply to officers who hold at the pleasure of the council. By section 160, other officers of towns and cities than those therein named, may be elected by the qualified voters or appointed by the local authorities as the general assembly may, by general law, provide; but when elected by the voters their terms of office shall be four years and until their successors are qualified. The length of the term of officers who are not elected by the people is not fixed by the Constitution. This may be regulated by the general assembly. In creating the office of marshal of cities of the fifth class, the general assembly might, without violating any constitutional provision, enact that the office should be filled by appointment of the council and held subject to its

pleasure; for as to these subordinate officers the whole matter is left to the legislative judgment. If the statute in question had contained nothing about a term of two years there would have been no question of its constitutionality. But what is said on this subject does not conflict with the other words used. Taken as a whole, the sense of the section is plain. Its meaning is that the officers named shall hold at the pleasure of the city council, but not longer than for a term of two years. The council is elected itself for two years, and for this reason their power of appointment is also limited to two years. But their appointees during the term, hold at their pleasure. In other words, their appointments are subject to the pleasure of the council, but expire in any event after two years. The limitation of their appointment to two years does not make them any less at the pleasure of the council than they would have been if this limitation had been omitted. The purpose of the two years' limitation is to make the appointees of one council go out with it, or substantially so, and leave the new council entirely free to make its own appointments for its term. It was not designed to interfere in any way with the appointees holding at the pleasure of the council. To hold that the council can not, under the statute, remove the marshal at pleasure because of the constitutional provision, would be in effect to say that the legislature can not, under the Constitution, create inferior municipal officers to be appointed by the council and to hold their offices at the pleasure of the council.

Judgment affirmed.

GAULT v. GAULT, &c.

(Filed May 4, 1904—Not to be reported.)

1. Life insurance—Policy payable to wife and children of insured—In this State where a life policy is made payable to the wife and children of the insured, as to the beneficiaries it should be regarded in the light of a testamentary provision rather than a contract, and, therefore, the policy in question being made for the benefit of the wife and children of the insured, should be construed as far as possible under the statutes applicable to devises by will; and as a will speaks from the date of the death of the insured, and not from the date of the will, the language in the policy "that the company agrees with the assured well and truly to pay the sum insured to the assured, their executors, administrators, or assigns, within ninety days after proof of death," has reference only to how and when the money should be paid to those who at the death of the insured constitute the assured under the policy, as it could not be known definitely who the assured were until the death of the insured.

2. Devises to a class—Survivors—It must be presumed that when the policy was procured, the contract was made with reference to the law of Kentucky as it then stood, and, therefore, section 2064, Kentucky Statutes, must be read into the contract, which provides "that when a devise is made to several as a class, or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, the share of such as die shall go to his or her descendants, if any; if none, then to the surviving devisees, unless a different disposition is made by the deviser, and under this statute the policy being payable to the wife and children of the insured jointly upon the death of George W. Gault childless before the insured, the said

George being one of the children of the insured, his interest in the policy passed to the survivors.

Forebt & Field for appellant.

Grubbs & Grubbs and Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The appellant, Susan Gault, is the daughter-in-law of Joseph Gault, now deceased, and is the widow of his son, George W. Gault, also deceased. The appellees are the children of Joseph Gault. This controversy grows out of the claim of appellant to an interest in the sum of \$9,448 of life insurance payable on three insurance policies on the life of Joseph Gault. These three policies are identical in language, except as to the amounts. The following agreed facts will, therefore, illustrate the whole case:

On November 1, 1869, the *Ætna Life Insurance Co.* issued and delivered to Joseph Gault its policy No. 67,459, the material parts of which are as follows:

"This policy of insurance witnesseth: That the *Ætna Life Insurance Co.*, in consideration of an annual premium of \$275.70, to be paid or secured to said company by Joseph Gault, for the benefit of Mary A. Gault and his children, the first premium in advance, and each succeeding premium on or before the 1st day of November of each year during the continuance of this policy, do assure the life of Joseph Gault, of Louisville, in the county of Jefferson, State of Kentucky, in the amount of \$5,000, for the term of his life.

"And the said company do hereby promise and agree, to and with the said assured, their executors, administrators, and assigns, well and truly to pay or cause to be paid, the said sum insured to the said assured, their executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Joseph Gault, and all indebtedness of the party to the company shall be deducted from the sum insured."

That at the dates of all of the policies, Joseph Gault had a wife named Mary A. Gault, and four children, namely, two sons, George W. Gault and Joseph K. Gault, who were his children by his former wife, who had died many years before any of said policies were issued, and two daughters, Margaret D. Dickens and Mary E. Gault, who were his daughters by his wife, the said Mary A. Gault, named in the said policies. That at the time said policies were issued Joseph Gault resided in Louisville, Ky., where he continued thereafter to reside until his death; that all said policies were delivered to Joseph Gault in Louisville, Ky., and that he paid all the annual premiums promptly in advance as they matured, and paid same to the insurance company at its office in Louisville, Ky.; that his son, George W. Gault, died intestate on the — day of October, 1892, a resident of Jefferson county, Kentucky, and left surviving him his wife, the said Susan Gault, but never had any child or children; that Joseph Gault, the father of said George W. Gault, was his sole and only heir at law; that Mary A. Gault, wife of Joseph Gault, and named as one of the beneficiaries in his will, died intestate on the 27th day of July, 1902, and left surviving her, her husband, the said Joseph Gault, and only two children, and they were Margaret D. Dickens and Mary E. Gault; that Joseph Gault died testate on March 10,

1908, being a widower at the date of his death, and left surviving him only three children, who are the appellees herein; that by his will, which was duly admitted to probate, Joseph Gault devised all of his estate to his three children, the appellees herein, and nominated his daughter, Mary E. Gault, as executrix thereof.

The question which arises for adjudication on this appeal is the interest, if any, which appellant has in the insurance money in question. Section 2064, Kentucky Statutes, is as follows: "When a devise is made to several as a class or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator, the share or shares of all such as die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser. A devise to children embraces grandchildren when there are no children."

Section 4841: "If a devisee or legatee dies before the testator, or is dead at the making of the will, thus leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will."

In this State, where a life policy is made payable to the wife and children of the insured, as to the beneficiaries, it should be regarded in the light of testamentary provisions, rather than a contract. (*Robinson v. Duvall*, 79 Ky., 83; *Duvall v. Goodson*, Id., 224; *Supreme Council Catholic Knights of America v. Densford, &c.*, 21 Ky. Law Rep., 1574.) It follows, therefore, that, so far as possible, the policy in question should be construed in the light of the statutes above quoted with reference to devises and devisees. It is frankly admitted by counsel for appellant that, if the policy contained only the language enumerating the beneficiaries, the judgment of the chancellor, denying appellant any right to participate in the fund, would be a correct exposition of the law; but they urgently insist that the agreement of the insurance company to pay over the insurance upon the death of the insured to the beneficiaries, "their executors, administrators and assigns," conferred upon the assured vested interests which, upon their death, passed under the statutes of descent and distribution. To this we can not agree. As said in the case of *Robinson v. Duvall*, supra: "A life policy, as between the assured and the insurer, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of other contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, should be regarded in the light of a testamentary provision rather than of a contract. The object of all interpretation of acts or words is to arrive at the intentions of the person whose acts or words are to be interpreted; and the nature of the transaction and the relation of the parties are frequently important, and sometimes controlling factors in the problem. In taking the policy the insured was not providing for himself, but for his wife and children after his death; and it would be unreasonable to suppose that he intended, in case one of these objects of his affection

should die during his life, that the interest of the one so dying should pass to himself, and at his death to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family, wife and children alike, to suppose that his intention was, that in case one or more should die before himself, without leaving children, the share to which those dying would have been entitled had they survived him, should go to the survivors."

The construction for which appellant contends would produce the very effect which, as said in the opinion above quoted, is presumed not to have been the intention of him who procured the insurance, that he was providing in part, at least, for himself; for if, upon the death of one of the beneficiaries, childless, the share of the decedent was vested and became a part of his estate, then the father who procured the insurance, would, necessarily, be entitled under the statute of descent and distribution to the share of the deceased child. It must be presumed that, when the policy was procured, the contract was made with reference to the law of Kentucky as it then stood, and, therefore, section 2064 must be read into the contract under consideration. As this policy, under the decision of this court, must be construed as a will, it speaks from the time of the death of Joseph Gault, and not from its date. The language that the company agrees with the "assured, their executors, administrators and assigns, well and truly to pay or cause to be paid, the said sum insured to the said assured, their executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Joseph Gault," has reference only as to how and when the money should be paid to those who, at the death of Joseph Gault, constitute the assured under the policy. Under section 2064, it could not be known, definitely, who the assured were, until the death of Joseph Gault, and when, by the happening of that event, it was determined who were the beneficiaries, the company agreed to pay the insurance money to them, or, if any of them should die after the death of Joseph Gault, and before the time of payment as fixed by the contract, in that event the company would pay their executors, administrators and assigns. If the language, with reference to the payment by the company, can be construed to have the effect contended for by appellant, then any of the named beneficiaries, prior to the death of Joseph Gault, might have assigned and sold his vested interest; and, if he afterward died, childless and unmarried, his assignee, although a stranger, would take his share to the exclusion of the surviving beneficiaries, who were the natural objects of the affection and bounty of the father.

We do not think the language in the policy, with reference as to how and when the money should be paid by the company, manifests an intention that it should be distributed differently from the provisions of the statute. Taking the instrument as a whole, which includes section 2064, we think it is clear that Joseph Gault intended to make a provision for the benefit of his own family, and that in case of the death of any of the named beneficiaries, without children, before his own demise, the share of the decedent should go to the survivors. As said by Judge Burnam, in the case of the Supreme Council of Catholic Knights of America v. Densford, supra: "If the mother of appellees had died childless, then the fund would have gone to the surviving beneficiaries, but, as she left children surviving her, they stand in

her shoes, and are entitled to one-third of the fund provided for by the certificate." That case, in principle, was in all respects similar to the case at bar. In this case, the son died childless; therefore, under the language of the opinion cited, his share would go to the surviving beneficiaries.

As the judgment of the chancellor is consonant with the conclusion herein reached it is affirmed.

LOUISVILLE, ANCHORAGE AND PEWEE VALLEY ELECTRIC RY.
CO. v. WHIPPS, &c.

(Filed May 4, 1904.)

1. Breach of contract—Failure to erect and maintain depot—Measure of damages—Mrs. Minnie C. Whipps and her husband conveyed the right of way to the appellant through a 45-acre tract of land owned by her in Jefferson county, near to and opposite the Lakeland depot on the L. & N. R. R., in consideration that appellant would erect and maintain a depot or stopping place on her land at a point opposite the L. & N. depot at Lakeland, which the appellant's road parallels. The appellant failed to erect said depot as agreed, but placed it about a quarter of a mile east of the point agreed on, and this suit is to recover damages for the breach of said contract. Held—That the measure of damages which she is entitled to recover is such sum as would represent the difference, if any, as shown by the evidence, in what would have been the fair market value of the residue of her land after the conveyance of the right of way, if the depot or stopping place had been established at the point on her land agreed on by the parties, and the fair market value of such residue of her land without the depot, not to exceed \$3,000, the sum claimed in her petition. And in so estimating the damage the jury should not consider the profits, if any, which she might have made in any business she might have established at or near such depot, but may consider the adaptation, if any, which the location of the depot at the point mentioned, would have given her land for business or other useful purposes and thereby enhanced its market value.

2. Evidence—Price of adjacent land—Evidence as to what price other lands contiguous to that of appellees and situated like it on appellant's roadway, sold for, and as to the advantages of appellee's land for business and suburban purposes, and also as to what value the location of a depot on her land at the point agreed on would give the land, was competent.

3. Conflict of opinion—To the extent that the opinion in this case conflicts with the cases of L. & N. R. R. Co. v. Neafus, 98 Ky., 53, and L. & N. R. R. Co. v. Taylor, 96 Ky., 241, they are overruled.

D. W. Saunders, O'Neal & O'Neal and W. B. Thomas for appellant.

Kohn, Baird & Spindle and R. K. Greene for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle.

This is an action in damages for a breach of contract. The appellant owns and operates an electric railroad from the city of Louisville to Pewee Valley, a distance of about fifteen miles. It appears from the petition that the appellee, Minnie C. Whipps, owns 45 acres of land in Jefferson county opposite the Lakeland depot of the Louisville & Nashville Railroad Co.,

from which she and her husband, the appellee, George L. Whipps, conveyed to appellant in fee simple, something near half a mile of right of way twenty-five feet in width for its roadbed, in consideration, as alleged, that the appellant would erect and maintain at Lakeland a depot or stopping point on the right of way conveyed, at a point opposite the depot of the Louisville & Nashville R. R., which the appellant's road parallels.

By the terms of the conveyance appellant's road was to make a curve at the proposed depot location or stopping place, leaving a strip of ground between its road and the Louisville & Nashville R. R., on which the appellees were to have the right to erect a storehouse and business place, as it was thought such a location between two roads carrying suburban traffic would possess unusual advantages for business purposes. After the execution of this deed it was ascertained by appellant that it would be of detriment to it in the operation of its road to make this curve, and of decided advantage to have its road straightened, as at a point not far distant it had to climb an ascent so as to make an overhead crossing to the north side of the L. & N. R. R. going into Anchorage. So at the request of appellant, appellees consented that the road might be straightened, as by so doing appellant avoided some very heavy cutting through a hill on the appellees' property. It was, however, understood between the parties that this concession did not relieve the appellant of its undertaking to locate the depot or stopping place at a point just opposite the Lakeland depot of the Louisville & Nashville R. R., and about the center of the appellees' land, and its location there was expected to add a value to the property both for business sites and for suburban residences.

Upon the completion of appellant's road and for some days after its cars were in operation, it seems to have regularly stopped them at the point where the station was to be located according to agreement, and lumber and materials were placed there by appellant, apparently with a view of erecting the depot at that point. But it was then concluded by appellant that it would be unable to carry out its contract with the appellees, because the Louisville & Nashville R. R., whose property adjoins, would not grant it the right of a public crossing; for which reason appellant carried away its building material, and erected its depot a quarter of a mile east of the point agreed on, putting it at the corner of adjacent property owned by Shallcross, where it is entered by the county road.

After concluding to thus change the location of the depot, appellant would not suffer its trains to be stopped at the point on appellees' land where it had agreed to locate it, and the agreement as to the depot and stopping place was never performed. Therefore, this action was instituted against appellant by appellees for the breach of the contract resulting from its nonperformance. The answer of appellant denied the material averments of the petition, and in addition, among other matters of defense, alleged that appellees not only donated the land for its right of way through their property, but also agreed to donate further land to it for a depot, and to erect thereon a depot for the use and benefit of appellant, and that appellant only agreed on its part to use the depot thus furnished by the appellees. An amended answer was tendered, but not allowed to be filed, which contained an offer upon the part of appellant to establish a stopping place at the point agreed,

if appellees would erect there a depot for its use, and make the same accessible to the public. We do not think it was an abuse of discretion for the lower court to refuse to permit the amendment to be filed. The matter relied on therein was known to appellant when its original answer was filed, and no reason was shown why the amendment was not offered earlier. The principal issues presented by the pleadings were, as to whether the appellant had agreed to erect the depot at the point claimed by appellees, in consideration of the right of way conveyed, or whether its erection was conditioned upon the appellees donating further land for the location of the depot and themselves building it. These, and other material issues seem to have been submitted to the jury under the proof heard, and under instructions given by the court; and they found in favor of appellees, assessing the damages for the breach of the contract at the sum of \$300.

Conceding that appellant was sincere in its tardy offer to yet make a stopping place at the point contended for by the appellees if the latter would there erect for it a depot and make it accessible to the public, no reason is perceived why such an offer should have authorized the lower court to take the case from the jury as contended by appellant. The court could properly have done no more than to instruct the jury on that point as it did, that if such was the consideration for the conveyance of the right of way, they should find for the appellant. But upon the other hand, if the agreement was that appellant, in consideration of the conveyance of the right of way by appellees, was to erect the depot or establish a stopping place at the point claimed by appellees, they should find for them. But we find that there are two other contentions relied upon by appellant for a reversal that are much more serious than the one indicated, viz.: First, that the trial court erred as to the measure of damages in instructing the jury; second, that the court also erred in the admission of evidence.

The following is the instruction given by the court on the measure of damages: "If the jury find their verdict for the plaintiff, they shall find for the plaintiff in such sum of money as they may believe from the evidence represents the fair and reasonable value of the land conveyed by the plaintiff to the defendant for the right of way at the time said conveyance was made, and in addition thereto such a further sum as they may believe from the evidence would represent the difference, if any, between what would have been the market value of the residue of the plaintiff's land, out of which said right of way was conveyed, if such stopping place had been established at the location mentioned in instruction No. 1, and the market value of said residue of land without said stopping place; the whole award not to exceed the sum of \$3,000, the amount claimed in the petition. In determining the difference in value referred to herein, if there be such difference, the jury will not consider the profits, if any, which might have been made by the plaintiff in any business the plaintiff might have established at or near said stopping place; but the jury may consider the adaptation, if any, which the location of said stopping place, as in instruction No. 1, would have given plaintiff's land for business or other useful purposes, and thereby have enhanced its market value. If the jury find their verdict for the defendant, they shall so state, and no more."

This instruction was evidently patterned after that approved by this court

in the case of *L. & N. R. R. Co. v. Neafus*, 98 Ky., 53. But after a careful examination of the authorities bearing upon the question, we have come to the conclusion that the measure of damages in that case, as well as in the one at bar, was not correctly announced.

In *Sutherland on Damages*, volume 2, section 576, we find what we regard as the correct rule on this subject thus stated: "A covenant by a railroad company, in consideration of the grant of the right of way through land, to erect a flag station convenient to the grantor's house, and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land, and binds the grantee's assignee, who has notice. The measure of damages for its breach is the difference between the value of the lands when suit is brought, and what their value would have been had all the stipulations in the contract been substantially performed; or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and if performed would have increased its market value. This appreciation was within the legal if not the actual contemplation of the parties. Its loss was the natural and proximate result of the breach of the contract."

Continuing the discussion, the learned author refers to a Pennsylvania case in which there was a breach of the contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through the plaintiffs' land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. When the case reached the Supreme Court of the State, that court, in an opinion by Agnew, J., which is approved by *Sutherland*, said: "Instead then of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question would be upon the additional value which would accrue to the plaintiff's land in the event of erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station, would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business can not be added to his damages, for these are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and, therefore, fall within the scope of the contract."

In *Sedgwick on Damages*, volume 2, section 680, it is said: "Where a railroad company breaks an agreement to build a station at any given place, the measure of damages is the enhanced value of the land, had the depot been erected."

The rule announced in these two admirable works on damages is in conflict with that stated in *L. & N. R. R. Co. v. Neafus*, *supra*, yet we think it both just and reasonable.

We think it would be neither reasonable nor just to allow appellees the

value of the land conveyed by them to appellant for its roadbed, in addition to the value which would have accrued to the residue of their land by the building of the depot. The action is not one to recover the value of land which appellant has wrongfully appropriated to its use. In such case the damages recoverable would necessarily include the value of the land taken as well as the injury that resulted to the residue of appellees' lands from such taking, without regard to any advantage that might have accrued thereto by the construction of the railroad. But here it is conceded that the land was conveyed to appellant by the appellee, and the complaint of the latter is, that there has been a failure of consideration. In other words, appellant has failed to erect a depot or establish a stopping place at an agreed point in front of appellees' property, as it undertook to do, as compensation to them for the right of way; which failure constitutes a breach of the contract.

What induced appellees to convey the right of way to appellant? It was because the erection of a depot, and the stopping of its cars in front of their property, would enhance its vendible value. The depot was not built, or the stopping place established as agreed, consequently the expected increase in the value of appellees' land did not result, and by this means they have been damaged. What then is the true criterion of damages? It is such a sum as would represent the difference, if any, as shown by the evidence, in what would have been the fair market value of the residue of Minnie C. Whipp's land after the conveyance of the right of way, if the depot or stopping place had been established at the point on appellees' land agreed upon by the parties, and the fair market value of such residue of land without the depot or stopping place, the whole award not to exceed \$8,000, the sum claimed in the petition. And in so estimating the damages the jury should not consider the profits, if any, which might have been made by the appellee, Minnie C. Whipps, in any business she might have established at or near such depot or stopping place, but may consider the adaptation, if any, which the location of the depot or stopping place at the point mentioned, would have given her land for business or other useful purposes, and thereby have enhanced its market value.

Certain evidence as to what prices other lands contiguous to that of appellees' and situated like it on the appellant's roadway sold for, and as to the advantages of appellees' land for business and suburban purposes, and also as to what value the location of a depot on her land at the point agreed on would give the land, was objected to by appellant, and it now complains of its admission. But such evidence has been declared by this court competent.

In *City of Paducah v. Allen*, 28 Ky. Law Rep., 701, it was said on this subject: "On the trial, appellant offered to prove by various witnesses what adjoining properties of the same class and character had been sold for just before and since the location of the pesthouse, it being thus attempted to prove that the market value of this property had not been impaired to the extent indicated by the opinion of appellees' witnesses. Of course market value is the price at which an article sells in the market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses, for truly here is where money talks. * * *

are of opinion that it was error in the trial court to reject the testimony so mentioned."

Railway v. Clark, 121 Mo., 169, the same character of evidence was held by the Supreme Court of Missouri to be competent. We are of opinion, therefore, that the evidence complained of by appellant was properly admitted by the trial court. We are further of opinion that the only reversible error appearing in the record is that committed by the lower court in the instruction as to the measure of damages. And to the extent that they concur with the views herein expressed, the cases of *L. & N. R. R. Co. v. Nease*, 93 Ky., 53, and *L. & N. R. R. Co. v. Taylor*, 96 Ky., 211, are hereby overruled.

For the error indicated the judgment of the lower court is reversed and the case remanded, with directions to that court to grant appellant a new trial, and for further proceedings consistent with this opinion.
Whole court sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. LOWE.

(Filed May 18, 1904.)

Master and servant—Engine signals—The servants in charge of an engine in a railroad yard owed to a car inspector the duty of giving signals of the approach of the engine and of keeping a lookout for persons on the track.

2. Contributory negligence—Question for jury—Whether the car inspector is guilty of contributory negligence was a question for the jury; and the question was also properly submitted to the jury whether, notwithstanding a negligence, those in charge of the engine after they perceived his danger should have perceived it by the exercise of ordinary care, might have avoided the injury to him.

3. Fellow servants—The car inspector and the men in charge of the engine were not fellow servants, and being in different departments of work, the master is liable for an injury to the car inspector resulting from the ordinary negligence of the men in charge of the engine.

4. Excessive verdict—A verdict of \$13,000 for the loss of an arm by plaintiff, who was thirty-four years of age and earning \$1 a day, is excessive.

W. C. McChord, H. W. Bruce, W. D. Hines, Benjamin D. Warfield and E. J. Hines for appellant.

J. W. S. Clements and J. H. Thurman for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, William S. Lowe, was in the service of appellant, the Louisville & Nashville R. R. Co., as assistant inspector of trains at Lebanon Junction, which is a town of about twelve hundred inhabitants at the junction of the Knoxville branch with the main line of appellant's road. There is maintained at this place a railroad yard, containing an extensive system of sidetracks, used in making up freight trains, going out of the yards. The regular trains too pass over the main tracks and are sometimes switched on the sidetrack, so that cars are moving about the yard pretty much all the time. A switch engine is kept in the yard for the purpose of switching cars and making up trains. Large coal bins are maintained there by the

appellant at which all engines are supplied with coal. Perhaps as many as one hundred and fifty engines, including the different passages of the switch engine, pass across the yard every day. The coal bins are north of the station and in a curve of the track, so that an engine beyond a certain point can not be seen south of the bins. Appellee had been the watchman in the shops for about six weeks before he was made assistant car inspector. On the 12th of September, 1899, which was the first day that he served as car inspector, he went on duty at 6 p. m. and inspected a freight train then ready to go out southward on the Knoxville branch. The train was standing on a sidetrack east of the main track, fronting south. He began at the engine on the west side of the train and inspected the cars going back from one to another until the inspection was finished, when the train pulled out. The tool house to which he was then to go, was on the east side of the tracks and south of the point where he then was. So he walked southward along by the side of the departing train, and when the sidetrack merged in the track next west of it, he got over on that track and then on the main track. While he was walking southward on the main track, an engine and tender backing down on that track ran upon him in the rear, knocking him down, cutting off his right arm, and inflicting severe bruises, for which injuries he recovered damages in the sum of \$18,000.

The evidence introduced by him on the trial tended to show these facts: The track was straight for some distance and appellee walking along with his back to the engine could have been seen by the persons on it for some distance if a proper lookout had been kept. The tender had been loaded with coal at the coal bin; the coal was piled up higher than the engineer's head, so that his line of vision did not reach the track, but rose above the track the further it was prolonged, and he was, therefore, unable to see anything on the track in front of him. A passenger train from the south was just about due on the main track, and appellee supposed that no other train would be on that track, so he kept a lookout in front of him for it, but did not look behind him after he started south. When he turned and started south he looked back and seeing nothing, supposed the way was clear. The engine by which he was hurt was then standing at the coal bin around the curve. After taking coal it came rather rapidly southward in order to get off the main track before the arrival of the passenger train from the south. Appellee's proof tended to show that no signal was given of the movements of this engine and that it was run substantially without any lookout in front of it. The proof is conflicting as to whether signals were given by the ringing of the bell, and as to the speed of the train; but the evidence for appellee shows that the engine was running at something like twelve or fifteen miles an hour. When it stopped, after running over appellee, it was just even with the engine of the outgoing freight train by the side of which he had been walking and had, therefore, run something like a quarter of a mile more than that engine after it started and appellee turned and began to walk south. When it stopped it had only one minute to get in on the sidetrack in time, according to appellant's proof. Appellee could not go directly to the toolhouse because the outgoing freight train was between him and it. He perhaps got on the main track, thinking no other train, except the passenger train from the south could properly be on that track at that

time and this would be in front of him. There is some evidence from which it is argued that the time had already expired when any other train under the rules might properly use the main track. The men in charge of the engine did not see appellee at all, and did not know he was hurt until informed by others.

Appellant complains that the court refused to instruct the jury peremptorily to find for it. It also complains of the instructions given by the court. The court in substance instructed the jury that if they believed from the evidence that appellee, at the time he received the injuries, was upon appellants' track in the usual course of his employment, and that its agents in charge of the engine and tender that injured him negligently failed to ring the bell or give other signal of its approach, or negligently failed to stop it after they saw his peril or after they might have seen it by the use of reasonable care, then they should find for the plaintiff, unless they believed from the evidence that he, by his own negligence, contributed to such an extent to the injury that, but for his negligence, it would not have happened; and that in this event he could not recover, unless appellant's agents in charge of the engine and tender knew or could have known by ordinary attention of the peril in which his negligence had placed him and thereafter failed to observe reasonable care to avoid the injury which followed.

It is earnestly maintained for appellant that the evidence shows no negligence on its part; that as to appellee it was not required to give notice of the movement of its trains or keep a lookout for him in moving them. In support of this view we are referred to a number of decisions in other jurisdictions; but without discussing them we conclude that the rule has been so often held otherwise in this State, it is no longer an open question. Appellant has, at Lebanon Junction, something like two hundred employees. The place at which appellee was injured is used by them and by other persons to a great extent in coming and going. The proof presents a case where the presence of persons on the track should reasonably be anticipated by those in charge of the train. The point was not far from the station, between it and the coal bins and where a great many people passed back and forth, especially during the day. In *Shelby's Adm'r v. Cincinnati & C., R. R.*, 85 Ky., 324, the intestate was in the yard of the railroad at Junction City for the purpose of soliciting employment in watering stock and was run over by a train backed without signal or outlook. The place was not so much traveled as in the case before us, and the intestate was barely a licensee, and yet the court held the company liable. After showing that increased vigilance and precaution are required, the court said: "But it is obvious that neither the duty of giving the warning of the approach of trains, nor of resorting to the proper and necessary means to prevent collision with persons, can be performed unless there be some one in a position to see ahead of the train and to control it."

In *Conley's Adm'r v. Cincinnati, & C., R. R.*, 89 Ky., 402, the intestate was killed in like manner by a backing train as he was crossing the track, and the case is discussed on the idea that he was technically a trespasser. The court held the company liable, and said: "A train of running cars—these were running according to the appellant's proof, at the rate of about fifteen miles per hour—is more dangerous to the life of persons with whom

it comes in contact than that of the most ferocious and powerful wild animal. And certainly it can not be lawfully turned loose to run by itself and expose persons that may be on the track either by accident, mistake or design to its destructiveness. Humanity positively forbids the owner of property that is dangerous to human life and safety, to knowingly turn such property loose even upon his own ground where it will do mischief even to a technical trespasser."

In *L. & N. R. R. v. Potts*, 99 Ky., 80, the deceased was in the employ of the railroad company at Junction City, a town of about four hundred people. It was his duty to enter in a book the numbers of the cars standing on the side tracks and point out to the engineer those he was to take up. While standing on one of the tracks he was run over and killed by some cars detached from the engine moving up behind him without any lookout or signal of their approach. The court said: "The *Shelby* case, 85 Ky., 224, which occurred in the same town and the *Conley* case, 89 Ky., 402, seem conclusive of the question. It was held in those cases that neither a train nor a single car should be permitted to move on a sidetrack in a city or town without some servant in position to give warning of its approach, and to control its movements. * * * It was as essential that the servant should be in a position thus to see and give warning as it was to be in a position to control the cars."

In *Barber v. Cincinnati, &c., R. R.*, 14 Ky. Law Rep., 869, the intestate was in the service of the railroad company getting out ballast near High Bridge, Ky. The quarry was on the west side of the track, and to obtain a suitable place for piling the rock he had to wheel it across the track and along by the side of it a short distance to a point on the east side, and for that purpose was required to place plank across the track on which to run his wheelbarrow. Warning signals by the train to laborers working on the road were required by the rules of the company. But no signal was given of the approach of the train, and when it was very close to the intestate, he ran to the track and tried to move the plank to avoid danger of the train's being derailed. In doing this, he was killed. The men in charge of the train knew of the labor done at this point and the mode of doing it. The trial court gave a peremptory instruction to the jury to find for the defendant, but on appeal this was reversed. In the subsequent case of *Illinois Central R. R. Co. v. Mahan*, 17 Ky. Law Rep., 1200, Mahan was the telegraph operator at Arlington and received orders to stop an extra train. It disregarded his signal to stop, and he, seeing that a collision was inevitable with a passenger train coming in the opposite direction, unless the order to stop was obeyed, seized a lantern and followed the train some thirty yards, waving his light. It stopped, and the conductor came back to him. The extra then backed in off the main track to get out of the way of the approaching passenger train and they also got off the main track to let that train pass. In doing this they got on the sidetrack and while standing there the train, which he had stopped, continued backing down on the sidetrack without any lookout or signal of its approach, and ran over him. Judgment in his favor was affirmed. The court said: "If in the emergency which seemed to confront him, the appellee got on the sidetrack or too close to it when there was space elsewhere within which to stand or walk and give his signals to

the approaching passenger train, he was perhaps guilty of negligence, but for which the injury would not have occurred; yet it is manifest that by the exercise of ordinary care on the part of those controlling the backing train, the danger could have been discovered and the injury averted. By witnesses in the service of the appellant it is shown to have been the duty of those operating the extra, to have had a brakeman on the rear of the backing train, who might give warning of its comparatively noiseless approach; and it is no excuse for the failure to make such provision in this instance to say that the company was using instead of the usual caboose, a box car which did not conveniently admit of this customary precaution. The necessary care was not exercised on this occasion, and the failure to exercise it was gross negligence."

These cases control the one before us, for the danger from the want of signals of the approach of the train or outlook in front of it was greater in this case than in any of them under the evidence. The same rule has been announced elsewhere. Thus in *2 Thompson on Negligence*, section 1839, it is said: "Persons lawfully at work in repairing a railway track or in repairing a highway where it crosses a railway track can not be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive and are not a source of danger to the train; those who are driving the train are active, and are handling and are in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the railway company under these circumstances, therefore, demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late."

In sections 1840-41-43 it is shown that the same rule applies in favor of the servants of a contractor, or persons engaged in loading or unloading cars or receiving mail or express matter. In section 1846 the care required in moving trains through cities and towns is pointed out, and it is laid down to be negligence when a train is moved backwards not to have a person keeping a lookout. (*2 Shearman and Redfield on Negligence*, section 457-458.) The case of *Illinois Central R. R. v. Dick*, 91 Ky., 434, is not inconsistent with the above. In that case Dick was only a licensee to cross the track. For his own convenience he left the usual way of crossing and was walking along the track. He had no right to be where he was, at least, there is nothing in the case to show that his presence there should have been anticipated, or that it was a placet which the servants of the company should have been on the outlook for persons. The appellee was in the discharge of his duties in going from the inspection of the train to the toolhouse, and was at a place at which the presence of persons on the track might be anticipated. While he was not at work on the track he was at work for the defendant and was lawfully on the track in the course of his employment and is as much within the principle of the rule as if laboring on the track. Whether he was guilty of contributory negligence was a question for the jury.

It is earnestly insisted also that the court erred in instructing the jury that appellee could not recover if but for his negligence the injury would not have happened, unless appellant's agents in charge of the engine and

tender knew, or could by ordinary care have known, of the peril in which his negligence had placed him and thereafter failed to observe reasonable care to avoid the injury which ensued. The instruction of the court followed the rule announced in an opinion by Judge Crenshaw in the year 1856 in *L. & N. R. R. Co. v. Yandell*, 17 B. Monroe, 598. It was re affirmed in an opinion by Judge Robertson in *L. & N. R. R. Co. v. Collins*, 2 Duvall, 114, and *L. & N. R. R. Co. v. Robinson*, 4 Bush, 507. These cases have since been followed by the court so often that the question is no longer open. (*L. & N. R. R. Co. v. McCoy*, 81 Ky., 411; *L. & N. R. R. Co. v. Earl*, 94 Ky., 874; *Cahill v. R. R. Co.*, 94 Ky., 845; *L. & N. R. R. Co. v. Schuster*, 10 Ky. Law Rep., 65; *L. & N. R. R. Co. v. Grey*, 16 Ky. Law Rep., 797; *L. & N. R. R. Co. v. Hackman*, 17 Ky. Law Rep., 81; *R. R. Co. v. Lewis*, 18 Ky. Law Rep., 967; *Crawley v. R. R. Co.*, 21 Ky. Law Rep., 1435; *Flynn v. Ry. Co.*, 110 Ky., 662; *Gunn v. Felton*, Recelver, 108 Ky., 665; 1 *Thompson on Negligence*, sections 230-232; *Inland, &c., Co. v. Tolson*, 139 U. S., 551; *Grand Trunk Railway v. Ives*, 144 U. S., 485.)

In towns and cities where the presence of persons on the track of the rail road may be rightfully anticipated, a due regard for human life requires that a lookout should be maintained in the operation of engines and trains. This has been often declared. The place where the injury sued for occurred was in a town and at a place which was used, not only by the numerous employes of appellant, but by other persons in passing from the station to the coal yards and from one portion of the town to another. The presence of persons on or about the track at the point where the injury occurred, should reasonably have been anticipated, and it was incumbent on those operating the engine in question to keep a lookout. Otherwise all the care would be required of those on the track and none would be required of those operating the train. Instructions embodying the view of the law insisted on for appellant, have been held erroneous by this court as to persons rightfully on the track at such places, on the ground that they placed all the care on the person injured. (*L. C. & L. R. R. v. Goetz's Adm'r*, 79 Ky., 442; *L. & N. R. R. Co. v. Clark's Adm'r*, 105 Ky., 571.) In view of the character of the place where the accident occurred and the fact that the deceased was not a trespasser, the court properly qualified the instruction on contributory negligence as indicated.

It is further urged that appellee and the men in charge of the engine were fellow servants, being all engaged in the operations of the yard; and that at any rate appellant is not liable, except for the gross negligence of its man in charge of the engine. The engine was run from the coal bin to the sidetrack by a man employed for that purpose to take charge of the engines in the yard and known as the hostler. There is much conflict in the authorities as to who are fellow servants, but the rule in this State has been steadily maintained from the beginning. In *L. & N. R. R. Co. v. Collins*, 63 Ky., 114, the first case on the subject, where a laborer on an engine in the yard was injured by the negligence of the man in charge of the engine, this court said: "The only consistent or maintainable principle of the corporation's responsibility is that of agency. 'Qui facit per alium facit per se.' It is, therefore, responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running

cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employes associated with the engineer in conducting the cars, the negligence must be gross, but as to employes in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform or equality and power, and engaged in a merely incidental, but independent service, no one of them, as between himself and his co-equals, is the corporation's agent; and, therefore, it is not on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employes would be its agent as to entire strangers to it."

This case and a number of others following it were reviewed and approved in *L. C. & R. R. Co. v. Cavens*, 72 Ky., 559, and still later in *Greer v. L & N. R. R. Co.*, 94 Ky., 169, and *Illinois Central R. R. Co. v. Hilliard*, 99 Ky., 684. In the last case the conductor of a train was injured by the negligence of a car inspector and it was insisted that the jury should have been instructed that they were fellow servants, or that the company was at least liable only for the gross negligence of the car inspector. The court held otherwise, and said: "In the first place the person employed at Mound Station to inspect each car of a train and ascertain if it is in a safe condition was not a fellow servant of plaintiff in the sense of being upon a common footing and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place it would have been improper to require the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars so as to ascertain whether the ladders attached to each were in a safe condition; for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and while a railroad company can not be required to insure the safety of a train, it is bound to make a reasonable, proper and careful examination of each car."

In *L. & N. R. R. Co. v. Davis*, 14 Ky. Law Rep., 716, a switch engine in a railroad yard was held not to be a fellow servant of a switchman and coupler in the yard. In *L. & N. R. R. Co. v. Moore*, 83 Ky., 675, a fireman while acting as engineer, was held to be engineer for the time, and not to be a fellow servant of the brakeman. The same rule has been applied as between the crews of different trains, and it seems to us to be a very unsubstantial distinction between the engineer who runs an engine in the yard and one who runs it at other stations along the road, as the fireman usually does in switching. Appellee had no control of the engineer in charge of this engine. He had nothing to do with the running of the trains or the running operations of the road. He was engaged in a distinct department, his only duty being to inspect cars.

Lastly, it is insisted that the verdict is excessive. Appellee is thirty-four years of age, was earning a dollar a day. He has lost one arm and does not

appear to have received other permanent injury. In no case before this court has it ever sustained so large a verdict for such an injury, and we are all of opinion that the verdict is excessive and that for this reason a new trial should be granted. We see no other error in the record.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Whole court sitting.

Chief Justice Burnam and Judges O'Rear and Barker dissenting, because peremptory instructions were not given.

REED, &c. v. REED, &c.

(Filed April 28, 1904—Not to be reported.)

Coparceners—Partition—Final order—Wife's inchoate right of dower—Sale and distribution of proceeds—In an action by appellees, W. D., S. S. and J. D. Reed against appellant, P. B. Reed, owners in coparcenary of certain lots, for a sale thereof and distribution of proceeds in which the wife of defendant was not a party, a sale was ordered and made and the lots bought by plaintiffs, the sale confirmed, the money paid into court and a deed ordered to be made to the plaintiffs. Before all of the money was distributed, plaintiffs filed a supplemental petition, making defendant's wife a party to the suit, asking that she be compelled to relinquish her inchoate right of dower in the lots, and take the value thereof out of her husband's fourth interest in the price they sold for. P. B. Reed objected and asked to withdraw his fourth interest from the hands of the receiver, which was overruled, and he appealed, but his appeal was dismissed because the order made was not a final judgment. Pending this appeal one of the original plaintiffs, S. S. Reed, a bachelor, filed a petition against all the then married brothers and their wives, under the act of the legislature of March 17, 1902, for a sale of the same land, the real purpose being to divest the married women of their inchoate dower right in the lots. This petition was consolidated with the original action. Ida C., wife of P. B. Reed, filed answer, claiming dower, which was conceded, and a resale ordered, in which order it was recited that "Ida C. has an inchoate right of dower in an undivided one-fourth interest in said lots formerly owned by her husband, P. B. Reed, and that he, P. B. Reed, has no pecuniary interest whatever in said lots." The land was again sold and bought by appellees and judgment rendered distributing the proceeds, adjudging to Ida C. her interest at \$967.52 "as compensation for her contingent right of dower in said lots," and a deed was made to appellees for said lots; the wives of the other brothers having relinquished their inchoate right of dower, and assenting to the proceedings. P. B. Reed was then permitted to withdraw the proceeds of the sale of his one-fourth interest, less the value of his wife's inchoate right of dower above fixed, and she was allowed to withdraw that. On appeal by P. B. Reed and his wife, Ida C., from this judgment, Held—That the proceedings and judgment of the lower court are without error and are affirmed.

Bodley, Baskin & Flexner for appellants.

W. W. Thum for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

Appellant P. B. Reed and his brothers, appellees Wm. D. Reed, S. S. Reed and J. B. Reed, were owners in coparcenary of two certain indivisible lots in Louisville. On December 9, 1899, appellees brought a suit under section 490, Civil Code, against appellant P. B. Reed, for a sale of the lots because they could not be divided without materially impairing their value. The only parties to the suit were the appellees and appellant just named. A decree of sale was entered March 6, 1900, and enforced by a sale of the lots April 9, 1900. One of the lots was sold to appellee S. S. Reed, and the other to appellee Wm. D. Reed. On April 21, 1900, the report of sale was confirmed on motion of the purchasers. By a subsequent order, it was recited that the purchase had been made for the benefit of and it was assigned to the three plaintiffs, appellees, and a deed was ordered to be made to them. The part of the purchase money representing P. B. Reed's one-fourth interest in the lots was not disposed of by the order, but it was recited therein: "The amount left due is for the benefit of P. B. Reed, subject to the question of 1900 State taxes and his proper share of any further cost herein now incurred."

Later, the balance of the purchase money was paid into court. Before all of it had been distributed under order of the court, and on August 7, 1901, appellees filed a supplemental petition in the case. By it for the first time, appellant, Ida C. Reed, wife of P. B. Reed, was made a party to the suit. It was alleged therein that she had an inchoate right of dower in the share of her husband in the lots, and it was asked that she be compelled to relinquish her inchoate dower and take its value in the remainder of that part of the purchase money in court which represented her husband's one-fourth share in the lots. P. B. Reed moved the court to allow him to withdraw the whole of the balance of the purchase money, his one-fourth, from the court's receiver, which was overruled. From that order P. B. Reed appealed to this court, but his appeal was dismissed May 18, 1903, on the ground that the order was not such a final order or judgment as that an appeal would lie from it.

Pending that appeal, and on June 21, 1902, S. S. Reed, one of the plaintiffs in the former suit, filed in the Jefferson Circuit Court, a petition against J. D. Reed and Wm. D. Reed (appellees here), and P. B. Reed (appellant) and their wives, under the act of assembly, approved March 17, 1902 (Acts 1902, chapter 18, page 48), for a sale of the same land which had theretofore been sold under the previous judgment, because of its indivisibility. The real purpose was doubtless to divest the married women of their inchoate rights of dower. Appellant Ida C. Reed filed her answer, setting out the foregoing proceedings, and claiming that as she had not been made a party to the former suit, the sale of her husband's interest in the lots did not affect her inchoate right of dower therein, which indeed was necessarily admitted. Judgment was entered selling the land, in which it was recited: "It is further adjudged that the defendant, Ida C. Reed, wife of the defendant, P. B. Reed, has an inchoate right of dower in an undivided one-fourth interest formerly owned by her husband, the defendant, P. B. Reed and that the defendant, P. B. Reed, has no pecuniary interest whatsoever in either of said two pieces of real estate."

The judgment further proceeded to fix the value of appellant, Ida C.

Reed's inchoate dower interest. The land was again sold, but free from the claims of the wives of the parties, when the same persons (appellees) bought it. On January 8, 1908, judgment was rendered distributing the proceeds of this sale, adjudging to appellant, Mrs. Ida C. Reed, \$967.52, being, "the amount ascertained under the judgment to be the interest, as compensation for her right, of the defendant, Ida C. Reed, in the proceeds of sale of each and both of said tracts of land fully described in, and sold under the judgment herein, and being the amount allowed the said defendant, Ida C. Reed, as compensation for her contingent right of dower in said tracts of land as the wife of said defendant, P. B. Reed."

The commissioner was then directed to make, and made, a deed conveying the whole of the lots to the purchasers, free from the claims of the married women for dower. The wives of J. D. Reed and Wm. D. Reed assented to the proceedings. S. S. Reed was a bachelor.

The two actions, the first to sell the lots for division of the proceeds among the four coparceners, and the second to sell the same lots bought by three of them for partition of its proceeds among the three, and the wife of P. B. Reed, were then consolidated.

P. B. Reed was permitted to then withdraw the proceeds of the sale of his one-fourth interest, less the value of his wife's inchoate right to dower as above fixed, and she was permitted to withdraw that. P. B. Reed appeals because he was not adjudged the whole of one-fourth of the proceeds of the sale; and Mistress Ida C. Reed appeals because she was divested of her inchoate right to dower in the manner stated. We will first dispose of the questions arising on the appeal of P. B. Reed. His first proposition is, that his rights were fixed and finally determined in the first judgment of sale, entered March 8, 1900. Or, if not then, that by the recital in the order of April 24, 1900, directing the deed, it was determined, by the following language: "That plaintiffs W. D. Reed, J. D. Reed and S. S. Reed, purchasers of the property sold herein, be allowed credit on the bonds heretofore executed, to the extent of three-fourths of the principal of each of said bonds, the said W. D., J. D. and S. S. Reed being, with the defendant, P. B. Reed, jointly and equally entitled to one-fourth of the proceeds of the sale had herein."

Courts may, and not infrequently do, indicate their views as to the ultimate rights of a litigant in interlocutory decrees or orders passing upon motions, and taking steps toward the final decree. However manifest the court's opinion may be in such orders, and, however erroneous or correct for that matter, it really decides nothing irrevocably. (*Bondurant v. Apperson*, 4 Met., 80; *Worthington v. Brooks-Waterfield & Co.*, 20 Ky. Law Rep., 1483; *Harris v. Tuttle*, 28 Ky. Law Rep., 220.) The test whether a decree is final is to be found by applying this rule, laid down with care in *Bondurant v. Apperson*, supra: "A judgment, to be final, must not only decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt."

Applying that test to this case, the court had not entered a decree disposing of the fund in court, which, by its own operation and without further order of the court, save process of contempt, could be executed. So far as the

judgment decreed a sale of the land, that was final, because its effect was, when executed by the court's commissioner, as if by sale under an execution on final judgment, to divest the parties of the title, and to admit, possibly, irrevocable rights of others thereto; that the orders regarding the fund in court were not final, was necessarily held by this court when it dismissed the appeal in May, 1903.

His next proposition is, that the suit contemplated selling only the undivided interest of the coparceners, that their wives' interests were not mentioned, and, therefore, could not have been involved in the suit; that the judgment of sale dealt alone with the interest of the four brothers, and their interests only were sold; that the doctrine of caveat emptor applies, and as the purchasers, appellees, got all that was proposed to be sold, and all that was sold, and as that sale was confirmed upon their own motion, they should be compelled to pay for that which they bought. The position is more specious than sound. The proceeding was in the nature of partition of land among coparceners. Owing to the indivisibility of the land without material impairment of its value, and, therefore, to save to all the owners such loss while giving to each of them his full right to have his share segregated from that of the others, the statute allows a sale of the land, and a partition of the money as if it were the land. The partition of the money is to be made under the same principles, and governed by the same rights, as if it were the land it represents. This is made clear enough by reference to the provision of section 494, Civil Code. Besides, it ought to be so. Under our statutes, the wives had inchoate right of dower in the shares of their husbands in these lots. These dower rights could not, in any contingency, enhance the husband's shares, though. They were rather an incumbrance against them. For example, S. S. Reed was the only one of the four brothers not married. Upon a sale of the lots subject to the potential dower rights of the wives of the three others, purchasers advised of the situation would make a deduction in their bids from the real value of the lots proportioned to the value of the wives' unrelinquished contingent interest. Then if the proceeds of such sale be divided equally among the four joint owners, S. S. Reed would be made to contribute to the other three co-owners one-fourth the value of their wives' potential interests, while the wives would continue to hold them. This is so manifestly unjust as to condemn it. If the wife of a joint tenant of an estate in possession (before the amendment of 1902) refused to join in the proceedings under section 490 of the Civil Code, or to join in the conveyance of her husband in such property, her inchoate right to dower therein was a charge against his interest alone. To the extent of the value of her interest, his title conveyed without her consent in one of the manners pointed out by the statute, failed. When P. B. Reed's wife was, by supplemental petition, made a defendant and called upon to assert her claim as contingent doweress against the purchase money representing the lots, the just effect is the same as if she had been made a party originally; and although she could not have been compelled to relinquish her contingent right to dower in the land, nor at that time as the law then was to take her dower in the money or the property in which it might be invested, yet it brought into the case the question of the value of her right, and asserted it as an equity in behalf of appellees against P. B. Reed's share

of the proceeds of the sale, in the first partition proceedings. Pending the adjudication of that question the statute was amended as hereinafter particularly noticed. By that amendment it was permitted to the holders of the vested estate in possession, to bring into an action brought pursuant to section 490, any woman having a claim to dower in the land, whether her interest was vested or contingent, and to have the land sold free of her interest, it being transferred to the proceeds. Thus by the second suit appellant Ida C. Reed's interest was ascertained and divested while the pending equity and partition of the proceeds of the first sale was yet under the control of the court. By the judgment of the second suit her contingent dower in the land was converted into money, and that money paid into court, and became a part of the fund for partition among all the parties according to their interests. As among coparceners, joint tenants, and tenants in common, when they voluntarily partition their joint possession, the law implies a warranty by each of the title to the parts in severalty taken by the others. This is equally so, where the partition is involuntary, as by proceedings in court. (Freeman Cotenancy and Partition, section 533.) This implied warranty will cover the joint tenant's share of outstanding taxes, his own encumbrances, and, we hold, his wife's inchoate right to dower where she fails to join or be joined in a sufficient manner to convey same. So, that when the parties come in the first action to divide or partition among themselves, the money arising from a sale of the land, in lieu of partitioning the land, equity will attach to these proceeds the same liabilities and rights as the parties had in the real property. Therefore, as P. B. Reed's wife had an un conveyed contingent interest in his part of the land by reason of her inchoate right of dower therein, his part of the purchase money should be abated correspondingly to the other coparceners who had bought the land at the sale. While ordinarily that might not be true, yet in this case the parties thought they were selling, and when appellees bought they believed they were buying, the complete title. They were all laboring under a mutual mistake which ought to be corrected by the chancellor having the parties and the substituted subject matter of the original suit before him. It was not deemed at that time that the wives of such joint tenants had an interest in the land so sold. Such is not generally the case, and until the decision by this court in *Woman's Club v. Reed*, 28 Ky. Law Rep., 1846, based upon the peculiar phraseology of our statute, it was not thought they had in this State. With the same parties before the court, the original coparceners, with no intervening equities of others, and with the fund arising from the sale, undistributed, and not adjudged, it was not improper to have allowed the supplemental petition alleging this new matter, as a reason for a different distribution of the proceeds from that originally contemplated, an equal one.

Appellant Ida C. Reed contends that under the construction placed on section 495, Civil Code, by this court in *Womans' Club v. Reed*, *supra*, as she was not originally a party to the record, when the sale was adjudged, made and confirmed, and of course did not consent to be divested of her dower in the manner pointed out in section 495, that her contingent right to dower remained unaffected by the proceedings in that case. In this, in view of the decision in the *Woman's Club* case, we must concur. The amendment to section 495, approved March 17, 1902, provides:

"1st. If a woman have a vested or contingent right to dower in land ordered to be sold pursuant to the provisions of this chapter, the court with her consent, to be taken upon privy examination if she be married, and of sound mind, or without her consent, if she be of unsound mind, may order a sale of the land free from her right; and shall provide for reasonable compensation to her out of the proceeds of sale, or that she shall have the same right in the property purchased with the proceeds as she had in the property sold.

"2d. If a woman have a vested or contingent right to dower in land sought to be sold, under section 490, she shall be made a party to the action brought to sell such land, and the court may, with or without her consent, order a sale of the land free from her right; and shall provide for a reasonable compensation to her out of the proceeds of sale, or that she shall have the same right in property purchased with the proceeds, as she had in the property sold."

When the second suit to sell these lots was instituted, P. B. Reed had no interest whatever in the lots. He was not then a necessary party to the last suit. Treating his presence in the latter suit as unnecessary, this proceeding amounted to an action by S. S. Reed against W. D. Reed and J. D. Reed, the three having bought the land at the sale in April, 1900, and against their wives for a sale of the indivisible lots. Appellant Ida C. Reed was made a party defendant, too, because she answered the description "a woman with a * * * contingent right to dower in the land sought to be sold under section 490." This language includes all women who have a dower right, vested or contingent, in such land, and without regard to the presence of their husbands in the suit. The purpose of the statute was to enable lands so held to be conveyed free from the claims of all the owners of the class described in the act. Any other construction would leave it in the power of a woman who owned only a dower interest, vested or contingent, to defeat a sale for purposes deemed by the legislature to be, and that are, necessary for the just protection of joint owners. In this manner was appellant Ida C. Reed's contingent dower interest in the lots both ascertained actually, and transferred from the lots and converted into money. Then in the first named action, with which the last had been consolidated, the value of Mrs. Reed's contingent dower was deducted from P. B. Reed's undivided one-fourth interest in the proceeds of the lots under the original sale, and his proportion of that sale was disposed of between him and his wife according to their interest thus found.

The proceedings and judgment of the circuit court are without error, and the judgment is affirmed.

Whole court sitting except Judge Barker.

Chief Justice Burnam dissents.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. v.
GREGG.

(Filed May 4, 1904—Not to be reported.)

Carriers—Interstate commerce—Connecting lines—Liability for damage to live stock—Failing to rest, feed and water—In an action for damages against the appellant, Cincinnati, New Orleans & Texas Pacific R. R. Co, in failing

to properly care for rest, feed and water a car load of mules shipped from Imperial, Pa., to Danville, Ky., by which seven of them died of neglect and starvation by being confined in cars for sixty-eight consecutive hours, without rest, food, or water, the defendant can not be excused as a connecting carrier on the ground that it did not have the stock in its possession for twenty-eight hours, nor can it say it did not know that the preceding and connecting carriers had failed to perform their statutory duty, as, under the provisions of United States Revised Statutes, section 4886, no railroad company within the United States whose road forms any part of a line of road over which live stock is conveyed from one State to another, shall confine the same in cars for a longer period than twenty-eight consecutive hours without unloading them for rest, water and feeding; and the statute further provides that in estimating such confinement, the time during which the animals have been confined without rest on connecting roads from which they are recovered, must be included.

Chas. H. Rodas and John Galvin for appellants.

Chas. C. Fox and Robt. Harding for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Nunn.

On the 14th of May, 1908, the appellee delivered to the Pittsburg & Lake Erie R. R. Co., at Imperial, Pa., one car load of mules to be transported over that road and connecting carriers to Danville, Ky. The mules did not arrive in Danville until about 9 o'clock, a. m., May 18, and were not unloaded until about 11 o'clock, a. m., being in the possession of the various railroad companies ninety-six hours. The mules were loaded at Imperial, Pa., about 11 o'clock, a. m., May 14, arriving in Cincinnati May 17th, and at Danville about the hour above stated. On their arrival, one of the mules was found to be dead on the car, and six others died within less than twenty-four hours; some of them died within a few hours after their arrival. This suit was brought by the appellee against the appellant company for the value of the mules alleged to be worth \$800. A trial was had and the jury found for the plaintiff and fixed the value of the mules at \$580. This appeal is taken from that judgment by the railroad company.

The mules when received by the consignees, Bright & Fox, about 11 o'clock, a. m., May 18, were in an exceedingly weak and bad condition. Dr. T. M. Doran, a veterinary surgeon, was called to examine them, and found their stomachs and intestines entirely empty, no evidence of food of any kind, and gave it as his opinion that they were starved to death. He was corroborated in this by Bright & Cox, and others. In fact, it is conceded by appellant's counsel in his brief that they were starved to death.

Appellee contends that appellant is responsible to him for the value of the mules because it failed to exercise proper care of them in their transportation and in suffering them to starve to death, and that it violated section 4886 of the U. S. Statutes, which provides: "No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine or other animals from one State to another, shall confine the same in cars, boats or vessels of any description, for a longer

period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received, shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

Appellant says that it only had the mules in its possession for about eighteen hours; that there was no delay in their transportation when in its possession, and they were properly handled and cared for by its employees; that the section of the U. S. Statutes referred to has no application to it, as the violation of that section, if violated, was committed by some preceding carrier, and it had no knowledge that the mules had not been watered, rested and fed as required by this statute.

The "bill of lading" shows that the Pittsburg & Lake Erie Railroad Co. received from appellee, May 14, 1902, twenty-four head of mules consigned to Bright & Fox, of Danville, Ky., via. Baltimore & Ohio S. W. R. R. on one of appellant's cars, No. 9060, with this statement in the face of the bill: "To be unloaded, watered and fed at Cincinnati." Endorsed on the bill is the following: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route."

It appears that from some cause, not explained, that this car of mules was delayed in the transportation for more than twenty-four hours between Imperial and Cincinnati, and the mules were without food, water and rest for the space of sixty-eight hours, and that when they arrived at Cincinnati it is only claimed they were fed 200 pounds of hay. A ticket for the price of the hay was attached to the way bill or bill of lading. Appellant's proof shows that this car load of mules was transferred from the stock yards to appellant's road on McLane avenue about 4 o'clock, p. m., on the 17th, and at 12 o'clock at night it was attached to one of appellant's freight trains and reached Danville at 8:30, a. m., on the 18th. The consignees were notified by telephone, and they arrived from the country and unloaded them at the hour of 11 o'clock, a. m.; that in the transportation of these mules after they reached them, due care was exercised for their safety and protection, and they were not injured or damaged by it.

The conductor stated that the mules appeared to be in good condition when he received them in Cincinnati, and again when he passed by this car at Erlanger, nine miles out from Cincinnati, he found them all on their feet. At Lexington, on the next morning, about 5 o'clock, he discovered that one of them was dead.

Appellee claims that appellant's servants did not exercise due or any care for the safety and protection of these mules; that it left them standing on its road in Cincinnati for eight hours before starting, and found one dead early in the morning at Lexington, and did not feed or give them any attention there or elsewhere on its line, and left them in the car at Danville for three or four hours after their arrival there.

It appears that the lower court was of the opinion that the U. S. Statutes above copied did not apply to appellant in the shipment of these mules, be-

cause it did not have them in its possession for the full twenty-eight hours, and that it was in no sense responsible for the dereliction of the preceding carriers for their failure to feed, water and rest the stock. The court gave only one instruction, as follows: "If you believe from the evidence that the mules, alleged to be dead, were in reasonably good condition as to health and strength at the time the defendant received them at Cincinnati, and that when they arrived at Danville, one of them was dead, and six of them in such bad condition that they died, then you will find for the plaintiff the reasonable value of the mules, not exceeding \$800, the amount claimed in the petition; unless you believe from the evidence that the employees of defendant in charge of the train which carried the mules, exercised that degree of care for the safe transportation of the mules which, under all the circumstances, was necessary and proper, and if the employees did exercise that degree of care, then you will find for the defendant."

In our opinion the lower court erred to the prejudice of appellee. It is evident that this stock was not watered, fed and rested, as required by the statute referred to, and that this shipment was interstate, and that there was a violation of this statute in this shipment. Under the language of this statute, and under the construction given it by the courts of other States and the Federal court, the appellant can not excuse itself from the performance of this statutory duty by showing that it did not have the stock in its possession and transportation for the period of twenty-eight hours, nor can it say that it did not know that the preceding and connecting carriers had failed to perform their statutory duties. The statute makes no exception, for it says that in estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included.

In the case of the United States v. Louisville & Nashville R. R. Co., 18 Fed. Rep., 481, the court, in discussing and construing this statute, said: "To my mind it is clear enough, without resorting to any artificial rules of construction."

This was said in answer to appellant's contention that the statute should be construed as implying that before a conviction thereunder, a person must knowingly and willfully violate the provisions of the statute. The court therein continuing said: "The law declares that no railroad company transporting animals, etc., shall confine them in cars longer than twenty-eight hours; that is, the company having possession of them when the twenty-eight hours expires. * * * This would be so, no matter what the particular contract may have been in this case between the shipper and carrier. It could not add to or take from the act of congress." (Chesapeake & Ohio R. R. Co. v. The American Exchange Bank, 44 L. R. A., 451; Nashville, Chattanooga & St. Louis R. R. Co. v. Heggie Bros., 36 Ga., 210; I. C. R. R. Co. v. Eblen, 24 Ky. Law Rep., 1609.)

It is claimed that this statute only fixes a penalty against persons who violate its provisions, and does not authorize an individual to recover damages sustained by reason of the violation of it. Section 66, Kentucky Statutes, says, a person injured by a violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty of forfeiture for such violation be thereby imposed. In the

case of *Hale v. Missouri P. R. Co.*, 36 Neb., 206, and *Chesapeake & Ohio R. R. Co. v. The American Exchange Bank*, *supra*, the court, in discussing section 4386, U. S. Statutes, held the carriers liable in damages to the owner of the stock, as well as for the penalties. In view of these authorities we are of the opinion that the lower court did not commit any error prejudicial to the substantial rights of the appellant.

Wherefore, the judgment is affirmed.

Whole court sitting.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. SANDERS & RUSSELL.

(Filed May 4, 1904.)

1. Carriers—Delay in shipping hogs—Contract with shipper to attend to stock—The fact that the shipper of hogs agrees with the carrier to send a man along with the train to feed and water the hogs, and fails to do so, does not relieve the carrier from its duty to look after them while in its custody, and such carrier is liable for the damage which it could, by ordinary care, have prevented.

2. Unusual delay—The fact that the train was delayed three hours in making a run usually requiring six or seven hours, whilst it increased the risk in carrying the hogs through with safety in hot weather, also increased the carriers' obligation to that extent to give them every attention to avoid loss.

3. Common law liability—Negligence—Under section 196, Constitution, carriers are prohibited from contracting for relief from any liability imposed by the common law, and while at common law carriers could limit their liability for loss to goods for many causes, they were never permitted to contract for exemption from liability attributable to their own negligence.

E. G. Gaither and John Galvin for appellant.

J. B. Wilson and W. C. Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellees, Sanders & Russell, shipped two hundred and sixty-five hogs in four live stock cars over defendant's road from Burgin, Ky., to the Cincinnati Stock Yards. The train of which these cars formed a part left Burgin on the morning of July 2 at 2:45 a. m., and reached the Cincinnati Stock Yards, the point of destination, in the afternoon of that day at 4:14 p. m., having been on the road about thirteen and one-half hours. The hogs were in good condition when they left Burgin. When they arrived at their destination fifteen of them were dead, and the remaining two hundred and fifty had lost in shrinkage, over and above the usual loss of flesh incident to the journey, about 750 pounds whilst in route. On the 18th of September, 1902, Sanders & Russell brought this suit against the railroad company, seeking to recover \$318.95, the pecuniary loss resulting from the shipment to them, which they allege was chargeable to the defendant's negligence in failing to give proper care and attention to the hogs whilst in their custody, and to the unnecessary and usual delay in delivering them at their point of destination. The answer of the defendant is in two paragraphs. In the first

It denied that the plaintiff's loss was attributable to any lack of care or attention on their part to the hogs while in transit, or that the delay in their transportation from Burgin to Cincinnati was unusual or unnecessary. In the second, it alleges that the bill of lading under which the hogs were shipped provided that the plaintiffs should unload, feed, water and attend to the hogs at their own expense and risk whilst in transit; and that the company should not be liable for any injury to them arising from heat, suffocation, or other ill effects of being crowded in the cars; and that the plaintiffs should send a man along on the freight train to look after them; that the company should not be liable for any injury or loss by reason of delay in transportation not resulting from the negligence of the company or from any cause whatever beyond its control, and allege that any loss or damage to the hogs was attributable to the negligence of the plaintiffs in failing to look after them, as required by the bill of lading, and to suffocation on account of the excessive heat of the weather. There is no allegation that the cars were overloaded, or that the suffocation or injury arose from this fact. A general demurrer was sustained to the second paragraph of the answer, and a jury trial upon the issues raised by the first paragraph, resulted in a verdict and judgment for the plaintiff for the amount sued for, and the railway company has appealed.

There is little conflict in the testimony. It was shown that the train reached Lexington at 4:30 a. m., and was delayed at that point one hour and twenty minutes; that it was delayed forty minutes at Williamstown, and one hour at Shearman, reaching Ludlow at 1.39 p. m., and that it took until 4:15 p. m. for it to arrive at the Union Stock Yards, the point of destination. The testimony of the plaintiffs is uncontradicted that the usual time required is only about six or seven hours to make the run on this train from Burgin to the stock yards; and that it generally arrives there somewhere between 8 and 10 o'clock in the morning. There is no denial, either in the pleading or proof, as to the extent of the alleged losses. Nor was there any claim by the railway company that they gave any special attention to the hogs whilst in their possession. It was also shown that neither of the plaintiffs or any representative of theirs was on the train, the hogs being consigned to a firm of brokers at the Union Stock Yards.

Considerations of public policy have imposed extraordinary liabilities upon carriers. They are generally held liable as insurers of the safety of goods committed to their care, with the exception of, first, those arising from what is known as the act of God; second, those caused by the public enemy; third, those arising from the act of the shipper; fourth, those arising from the inherent nature of the goods shipped. Appellant insists that the losses to appellee resulting from the death and loss of weight in his hogs, was attributable to their inherent inability to successfully withstand the hot weather which prevailed during the time of their shipment, and not from any negligence or lack of attention on their part. If this is admitted, yet appellant knew the nature of the stock which they assumed to transport; and that the delays in their trains, however excusable in themselves, increased the risk of carrying the hogs through with safety, and to that extent increased their obligation to give them every attention necessary to avoid loss, and to carry them to their destination without unnecessary or unavoidable delay.

While at common law carriers could limit their liability for loss or injury to goods committed to their care resulting from many causes, they were never permitted to contract for exemptions from liability attributable to their own negligence. In 6 Cyc., 892, the rule is laid down as follows: "Where the express language or evident purpose of the stipulation relieving the carrier from common law liability is to exempt him from liability for his own negligence, or that of his servants, or agent, the stipulation is against public policy, and is, therefore, void and of no effect."

And by section 196 of the Constitution of Kentucky, they are prohibited from contracting for relief from any liability imposed upon them by common law. The provisions of the bill of lading, relied on in the second paragraph of appellant's answer, that appellee should water and attend the stock at their own risk while in transit, and that they should send a man along to look after them, does not relieve the carrier from the duties imposed upon it by law to look after the stock. Their only effect is to shift the burden of proving negligence from the railroad company to the shipper. (Ray's Negligence of Imposed Duties, page 241; L. & N. R. R. Co. v. Hawley, 10 Ky. Law Rep., 117; C., N. O. & T. P. Ry. Co. v. Grover, 11 Ky. Law Rep., 236.)

"And the rule as now established by the great weight of modern authority is, that railroad companies are common carriers of live stock with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities or proper vices of the animals themselves." (4 Elliott on Railroads, 1545; Ray on Negligence of Imposed Duties, 253.)

We, therefore, conclude that the demurrer to the second paragraph of appellant's answer was properly sustained. The extraordinary delay in transporting the hogs is not satisfactorily accounted for, and the court in this case made the liability of the appellant depend upon the question of their negligence, and the jury have found a verdict for the appellee. We perceive no grounds for disturbing it.

Judgment affirmed.

NIPP'S ADM'X v. CHESAPEAKE & OHIO RY. CO.

(Filed May 10, 1904—Not to be reported.)

Removal of actions to Federal court—In this action against appellee for damages it was error to dismiss the action on the ground that a former suit for damages was dismissed upon its removal to the Federal court; this court has held that an action for personal injuries brought in a State court which was removed to the Federal court, within twelve months and dismissed, could be renewed in the State court within twelve months of the accrual of the cause of action.

Armstrong & Woods for appellant.

John T. Shelby for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Burnam.

In October, 1901, the appellant, as administratrix of George Nipp, sued the

Chesapeake & Ohio Ry. Co., Newt Armstrong and John L. Ebberly, who were the engineer and fireman of a train, which killed her husband, to recover \$20,000 in damages. This suit was removed to the United States Circuit Court upon application of the railway company on the ground of diverse citizenship. At the first term of the Federal court, the appellant dismissed her action without prejudice, and on the 28th of May thereafter she brought this suit seeking to recover \$2,000 in damages.

The railway company, in their answer, pleaded the removal to the Federal court, and its subsequent dismissal by the plaintiff as a bar to the prosecution of this action. The plaintiff filed a general demurrer to this plea, which was overruled by the trial court and the action dismissed, and she has appealed. It is the contention of the appellee that the Federal court having acquired jurisdiction of the cause of action upon the former removal, it was exclusive and continuous; and that a suit could not be renewed upon the same cause of action in the State court, and in support of its contention refer to the opinion in *C. & O. Ry. v. Riddle's Adm'r*, 24 Ky. Law Rep., 1687.

The opinion in that case overlooked the decision in *Adams Express Co. v. Scofield*, 23 Ky. Law Rep., 1120, and in the subsequent case of *Stevenson's Adm'r v. Ill. Cen. Ry. Co.*, ante, 2011, this fact was pointed out, and so much of the opinion in the Riddle case as conflicted with the conclusion in *Adams Express Co. v. Scofield*, withdrawn. In both the Scofield and Stevenson cases it was decided that the plaintiff in an action for personal injuries brought in a State court which was removed by petition to the Federal court, could dismiss in the Federal court and within twelve months from the accrual of his cause of action, renew his suit in the State court.

We deem it unnecessary to again discuss that question in this proceeding as it is fully considered in the above cases

For reasons indicated judgment is reversed and cause remanded for proceedings consistent with this opinion.

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Ex. J. E. F.
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